ADVISORY COMMITTEE
ON
APPELLATE RULES

Newark, NJ
April 28-29, 2014

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Advisory Committee on Appellate Rules
April 28 and 29, 2014
Newark, NJ

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ADVISORY COMMITTEE ON APPELLATE RULES

Chair, Advisory Committee on Appellate Rules	**Honorable Steven M. Colloton** United States Court of Appeals U.S. Courthouse Annex, Suite 461 110 East Court Avenue Des Moines, IA 50309-2044
Reporter, Advisory Committee on Appellate Rules	**Professor Catherine T. Struve** University of Pennsylvania Law School 3501 Sansom Street Philadelphia, PA 19104
Members, Advisory Committee on Appellate Rules	**Professor Amy Coney Barrett** University of Notre Dame Law School 3165 Eck Hall of Law Notre Dame, IN 46556 **Honorable Michael A. Chagares** United States Court of Appeals United States Post Office and Courthouse Two Federal Square, Room 357 Newark, NJ 07102-3513 **Honorable Allison H. Eid** Supreme Court Justice Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203 **Honorable Peter T. Fay** United States Court of Appeals James Lawrence King Federal Justice Building 99 Northeast Fourth Street, Room 1255 Miami, FL 33132 **Gregory G. Katsas** Jones Day 51 Louisiana Avenue, N.W. Washington, D.C. 20001-2113 **Neal Katyal, Esq.** Hogan Lovells US LLP Columbia Square 555 Thirteenth Street, N.W. Washington, DC 20004

Members, Advisory Committee on Appellate Rules *(cont'd.)*	**Kevin C. Newsom, Esq.** Bradley Arant Boult Cummings LLP One Federal Place 1819 Fifth Avenue North Birmingham, AL 35203 **Honorable Richard G. Taranto** United States Court of Appeals Howard T. Markey National Courts Building 717 Madison Place, N.W., Suite 802 Washington, DC 20439 **Honorable Donald Verrilli** Solicitor General (ex officio) United States Department of Justice 950 Pennsylvania Avenue, N.W. Washington, DC 20530
Clerk of Court Representative, Advisory Committee on Appellate Rules	**Michael Ellis Gans** United States Court of Appeals Thomas F. Eagleton United States Courthouse 111 South Tenth Street, Room 24.329 St. Louis, MO 6312-1116
Liaison Member, Advisory Committee on Appellate Rules	**Gregory G. Garre, Esq.** ***(Standing)*** Latham & Watkins LLP 555 Eleventh Street, N.W. Washington, DC 20004-1304 **Honorable Adalberto Jordan** ***(Bankruptcy)*** Eleventh Circuit Court of Appeals Wilkie D. Ferguson, Jr. U.S. Courthouse 400 North Miami Avenue, Room 10-4 Miami, FL 33128

Secretary, Standing Committee and Rules Committee Officer	**Jonathan C. Rose** Secretary, Committee on Rules of Practice & Procedure and Rules Committee Officer Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-1820 Fax 202-502-1755 Jonathan_Rose@ao.uscourts.gov
Chief Counsel	**Andrea L. Kuperman** Chief Counsel to the Rules Committees 11535 Bob Casey U.S. Courthouse 515 Rusk Ave. Houston, TX 77002-2600 Phone 713-250-5980 Fax 713-250-5213 Andrea_Kuperman@txs.uscourts.gov
Deputy Rules Committee Officer and Counsel	**Benjamin J. Robinson** Deputy Rules Committee Officer and Counsel to the Rules Committees Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-1516 Fax 202-502-1755 Benjamin_Robinson@ao.uscourts.gov

Advisory Committee on Appellate Rules

Members	Position	District/Circuit	Start Date	End Date
Steven M. Colloton Chair	C	Eighth Circuit	2012	2015
Amy Coney Barrett	ACAD	Indiana	2010	2016
Michael A. Chagares	C	Third Circuit	2011	2014
Allison Eid	JUST	Colorado	2010	2016
Peter T. Fay	C	Eleventh Circuit	2009	2015
Gregory G. Katsas	ESQ	Washington, DC	2013	2016
Neal K. Katyal	ESQ	Washington, DC	2011	2014
Kevin C. Newsom	ESQ	Alabama	2011	2014
Richard G. Taranto	C	Federal Circuit	2009	2015
Donald B. Verrilli, Jr.*	DOJ	Washington, DC	----	Open
Catherine T. Struve Reporter	ACAD	Pennsylvania	2006	Open

Principal Staff: Jonathan C. Rose 202-502-1820

* Ex-officio

LIAISON MEMBERS

Liaison for the Advisory Committee on Appellate Rules	**Gregory G. Garre, Esq.**	***(Standing)***
Liaison for the Advisory Committee on Appellate Rules	**Judge Adalberto Jordan**	***(Bankruptcy)***
Liaison for the Advisory Committee on Bankruptcy Rules	**Roy T. Englert, Jr., Esq.**	***(Standing)***
Liaison for the Advisory Committee on Civil Rules	**Judge Arthur I. Harris**	***(Bankruptcy)***
Liaison for the Advisory Committee on Civil Rules	**Judge Neil M. Gorsuch**	***(Standing)***
Liaison for the Advisory Committee on Criminal Rules	**Judge Amy J. St. Eve**	***(Standing)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Judith H. Wizmur**	***(Bankruptcy)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Paul S. Diamond**	***(Civil)***
Liaison for the Advisory Committee on Evidence Rules	**Judge John F. Keenan**	***(Criminal)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Richard C. Wesley**	***(Standing)***

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

Jonathan C. Rose
Secretary, Committee on Rules of Practice &
Procedure and Rules Committee Officer
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-240
Washington, DC 20544
Phone 202-502-1820
Fax 202-502-1755
Jonathan_Rose@ao.uscourts.gov

Benjamin J. Robinson
Deputy Rules Committee Officer
and Counsel to the Rules Committees
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-240
Washington, DC 20544
Phone 202-502-1516
Fax 202-502-1755
Benjamin_Robinson@ao.uscourts.gov

Julie Wilson
Attorney Advisor
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-240
Washington, DC 20544
Phone 202-502-3678
Fax 202-502-1766
Julie_Wilson@ao.uscourts.gov

Scott Myers
Attorney Advisor
Bankruptcy Judges Division
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 4-250
Washington, DC 20544
Phone 202-502-1900
Fax 202-502-1988
Scott_Myers@ao.uscourts.gov

Bridget M. Healy
Attorney Advisor
Bankruptcy Judges Division
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 4-273
Washington, DC 20544
Phone 202-502-1900
Fax 202-502-1988
Bridget_Healy@ao.uscourts.gov

Frances F. Skillman
Paralegal Specialist
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-240
Washington, DC 20544
Phone 202-502-3945
Fax 202-502-1755
Frances_Skillman@ao.uscourts.gov

FEDERAL JUDICIAL CENTER

Tim Reagan *(Rules of Practice & Procedure)* Senior Research Associate Federal Judicial Center Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 6-436 Washington, DC 20002 Phone 202-502-4097 Fax 202-502-4199	**Marie Leary** *(Appellate Rules Committee)* Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4069 Fax 202-502-4199 mleary@fjc.gov
Molly T. Johnson *(Bankruptcy Rules Committee)* Senior Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 315-824-4945 mjohnson@fjc.gov	**Emery G. Lee** *(Civil Rules Committee)* Senior Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4078 Fax 202-502-4199 elee@fjc.gov
Laural L. Hooper *(Criminal Rules Committee)* Senior Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4093 Fax 202-502-4199 lhooper@fjc.gov	**Catherine Borden** *(Evidence Rules Committee)* Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4090 Fax 202-502-4199 cborden@fjc.gov

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Advisory Committee on Appellate Rules
Table of Agenda Items — April 2014

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
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
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal.	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08
08-AP-C	Abolish FRAP 26(c)'s three-day rule.	Hon. Frank H. Easterbrook	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/13
08-AP-H	Consider issues of "manufactured finality" and appealability	Mark Levy, Esq.	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 10/10 Discussed and retained on agenda 04/11 Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13
08-AP-J	Consider FRAP implications of conflict screening	Committee on Codes of Conduct	Discussed and retained on agenda 11/08

FRAP Item	Proposal	Source	Current Status
08-AP-L	Amend FRAP 6(b)(2)(A)(ii) to remove ambiguity	Reporter	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09 Discussed and retained on agenda 10/10 Discussed jointly with Bankruptcy Rules Committee and retained on agenda 04/11 Discussed and retained on agenda 10/11 Draft approved 04/12 for submission to Standing Committee Approved for publication by Standing Committee 06/12 Published for comment 08/12 Draft approved 04/13 for submission to Standing Committee Approved by Standing Committee 06/13 Approved by Judicial Conference 09/13
08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 04/09
09-AP-A	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	ABA Council of Appellate Lawyers	Discussed and retained on agenda 04/09
09-AP-B	Amend FRAP 1(b) to include federally recognized Indian tribes within the definition of "state"	Daniel I.S.J. Rey-Bear, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed and retained on agenda 10/11 Discussed and retained on agenda 04/12; Committee will revisit in 2017

FRAP Item	Proposal	Source	Current Status
09-AP-C	Consider possible FRAP amendments in the light of project to revise Part VIII of the Bankruptcy Rules	Bankruptcy Rules Committee	Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed jointly with Bankruptcy Rules Committee and retained on agenda 04/11 Discussed and retained on agenda 10/11 Draft approved 04/12 for submission to Standing Committee Approved for publication by Standing Committee 06/12 Published for comment 08/12 Draft approved 04/13 for submission to Standing Committee Approved by Standing Committee 06/13 Approved by Judicial Conference 09/13
09-AP-D	Consider implications of Mohawk Industries, Inc. v. Carpenter	John Kester, Esq.	Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed and retained on agenda 04/13
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
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
11-AP-F	Consider amendment authorizing discretionary interlocutory appeals from attorney-client privilege rulings	Amy M. Smith, Esq.	Discussed and retained on agenda 04/13
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
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
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

FRAP Item	Proposal	Source	Current Status
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
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
13-AP-C	Consider possible rules for expediting proceedings under Hague Convention on the Civil Aspects of International Child Abduction	Hon. Steven M. Colloton	Discussed by Appellate Rules Committee 04/13 Discussed by Standing Committee 06/13
13-AP-D	Revise Rule 6(b)(2)(B)(iii)'s list of contents of record on appeal, and revise Rule 3(d)(1) in light of electronic filing	Hon. S. Martin Teel, Jr.	Awaiting initial discussion
13-AP-E	Consider treatment of audiorecordings of appellate arguments	Appellate Rules Committee	Awaiting initial discussion
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	Awaiting initial discussion
14-AP-A	Reconsider FRAP 29(e)'s choice of filing date as trigger for start of period within which amicus brief may be filed	Dean Alan B. Morrison	Awaiting initial discussion
14-AP-B	Amend Criminal Rule 52 to eliminate plain-error standard of review for certain sentencing errors	Hon. Jon O. Newman	Awaiting initial discussion

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Minutes of Spring 2013 Meeting of
Advisory Committee on Appellate Rules
April 22 and 23, 2013
Washington, D.C.

I. Introductions

Judge Steven M. Colloton called the meeting of the Advisory Committee on Appellate Rules to order on Monday, April 22, 2013, at 9:00 a.m. at the Mecham Conference Center in the Thurgood Marshall Federal Judiciary Building in Washington, D.C. The following Advisory Committee members were present: Judge Michael A. Chagares, Judge Robert Michael Dow, Jr., Justice Allison H. Eid, Judge Peter T. Fay, Judge Richard G. Taranto, Professor Amy Coney Barrett, Professor Neal K. Katyal, and Mr. Kevin C. Newsom. Mr. Douglas Letter, Director of the Appellate Staff of the Civil Division, U.S. Department of Justice ("DOJ"), and Mr. H. Thomas Byron III, also of the Civil Division, were present representing the Solicitor General. Mr. Gregory G. Garre, liaison from the Standing Committee; Mr. Peter G. McCabe, Administrative Office Assistant Director for Judges Programs; Mr. Benjamin Robinson, Deputy Rules Committee Officer and Counsel to the Rules Committees; Ms. Julie Wilson, Attorney Advisor in the Administrative Office ("AO"); Mr. Michael Ellis Gans, liaison from the appellate clerks; and Ms. Marie Leary from the Federal Judicial Center ("FJC") were also present. Professor Daniel R. Coquillette, Reporter for the Standing Committee, participated by telephone. On the second day of the meeting, Professor John E. Lopatka and Professor Brian T. Fitzpatrick participated in the discussion of one agenda item, and Ms. Holly Sellers, Staff Attorney with the Judicial Conference Committee on Federal-State Jurisdiction, was present for the discussion of another item.

Judge Colloton opened the meeting – his first as the Committee's Chair – by noting that he looked forward to working with the Committee. He congratulated Judge Taranto on his recent confirmation as a Judge of the U.S. Court of Appeals for the Federal Circuit. He welcomed Mr. Garre, who was replacing Mr. Colson as the liaison from the Standing Committee. Mr. Garre, Judge Colloton noted, served as the forty-fourth Solicitor General of the United States and now is a partner at Latham & Watkins. Judge Colloton also welcomed Mr. Gans, who first joined the Eighth Circuit Clerk's Office in 1983 and who now replaces Mr. Green as the liaison from the appellate clerks.

At 2:50 p.m. on the first day of the meeting, the Committee joined Professor Coquillette in Boston in observing a moment of silence in honor of the victims of the Boston Marathon bombing.

II. Approval of Minutes of September 2012 Meeting

A motion was made and seconded to approve the minutes of the September 2012 meeting. The motion passed by voice vote without dissent.

III. Report on January 2013 Meeting of Standing Committee

Judge Colloton reported that the Standing Committee, at its January meeting, had paid tribute to the memory of Judge Mark R. Kravitz, who died on September 30, 2012. Judge Kravitz is deeply missed.

IV. Other Information Items

Judge Colloton noted that the Supreme Court has approved the proposed amendments to Appellate Rules 28 and 28.1 (concerning the statement of the case), Appellate Rules 13, 14, and 24 (concerning appeals from the United States Tax Court), and Appellate Form 4 (concerning applications to proceed in forma pauperis). Absent contrary action by Congress, those amendments are on track to take effect on December 1, 2013.

V. For Final Approval: Item Nos. 08-AP-L and 09-AP-C

Judge Colloton invited the Reporter to introduce these items, which concern proposed amendments to Appellate Rule 6. The Reporter reminded the Committee that these amendments were designed to dovetail with the Bankruptcy Rules Committee's package of amendments to Part VIII of the Bankruptcy Rules (concerning bankruptcy appellate practice). The amendments would update Rule 6's cross-references to certain Part VIII Rules; amend Rule 6(b)(2)(A)(ii) to remove an ambiguity that resulted from the restyling of the Appellate Rules; and add a new Rule 6(c) to address permissive direct appeals from the bankruptcy court under 28 U.S.C. § 158(d)(2). The amendments also revise Rule 6 to account for the range of possible methods for handling the record on appeal.

A great many comments were submitted on the proposed amendments to the Part VIII Rules; by contrast, only one comment was submitted on the proposal to amend Rule 6. The Reporter noted that the Appellate Rules Committee's agenda materials included a redline showing possible changes that were proposed to the Bankruptcy Rules Committee in light of the public comments. At its spring 2013 meeting, the Bankruptcy Rules Committee had approved many of those changes, had rejected others, and had made a few additional changes. Thus, the proposed Part VIII package, as finally approved by the Bankruptcy Rules Committee, differed in some respects from the version reproduced in Volume II of the Appellate Rules Committee's agenda materials; the Reporter assured the Committee that none of those differences would affect the operation of Rule 6, and she offered to share the as-approved version with any Committee members who wished to review it.

Among the post-publication changes to the Part VIII package, the most interesting change, from the perspective of practice in the courts of appeals, concerns proposed Bankruptcy Rule 8007 (which addresses stays pending appeal). Under proposed Appellate Rule 6(c)(2)(C), Rule 8007 will apply to direct appeals to the courts of appeals

under Section 158(d)(2). Proposed Rule 8007(a), like Appellate Rule 8(a)(1), requires that a litigant seeking a stay must ordinarily move first in the lower court; Rule 8007(a)(2) states that this "motion may be made either before or after the notice of appeal is filed." As published, Rule 8007(b)(1) provided that "[a] motion for the relief specified in subdivision (a)(1) – or to vacate or modify a bankruptcy court's order granting such relief – may be made in the court where the appeal is pending or where it will be taken." However, a commentator questioned the authority of the appellate court to entertain such a motion prior to the filing of a notice of appeal. In response to this comment, the Bankruptcy Rules Committee decided to delete "or where it will be taken" from Rule 8007(b)(1). The Reporter stated that this change seems to bring the proposed Rule into conformity with Section 158(d)(2)(D), which provides: "An appeal under this paragraph does not stay any proceeding of the bankruptcy court, the district court, or the bankruptcy appellate panel from which the appeal is taken, unless the respective bankruptcy court, district court, or bankruptcy appellate panel, or the court of appeals in which the appeal is pending, issues a stay of such proceeding pending the appeal." In sum, the Reporter suggested, this change seems like an improvement, as do the other post-publication changes that the Bankruptcy Rules Committee made to the proposed Part VIII Rules.

The sole comment on the proposed amendments to Appellate Rule 6 was submitted by Judge S. Martin Teel, Jr., a United States Bankruptcy Judge in the District of Columbia. Judge Teel suggested deleting from Rule 6(b)(2)(B)(iii)'s list of the contents of the record on appeal the phrase "a certified copy of the docket entries prepared by the clerk under Rule 3(d)" and substituting "the docket entries maintained by the clerk of the district court or bankruptcy appellate panel." Judge Teel stated that the reference to certification is unnecessary, that the lower-court clerk maintains rather than prepares the docket entries, and that the cross-reference to Appellate Rule 3(d) is superfluous. Judge Teel also questioned why Appellate Rule 3(d) requires the lower-court clerk to transmit a copy of the docket entries to the court of appeals now that docket entries are available electronically. The Reporter suggested that Judge Teel's comments warrant consideration, but that it would be preferable to add them to the Committee's agenda as a separate item rather than trying to take account of them in the currently-proposed amendments to Rule 6.

A member moved to approve the Rule 6 proposal as published. The motion was seconded, and it passed by voice vote without dissent.

VI. Discussion Items

A. Items Proposed for Removal from Agenda

Judge Colloton explained that, upon becoming Chair of the Committee, he had decided to take a fresh look at the Committee's entire docket. He invited the Reporter to present to the Committee six items that appeared to be ripe for removal from the docket.

1. Item No. 07-AP-H (separate document requirement)

The Reporter reminded the Committee that this item arose from the observation that, where Civil Rule 58(a) requires a judgment to be set out in a separate document, and the district court fails to comply with this requirement, under Civil Rule 58(c)(2) the time limit for making postjudgment motions does not start to run until 150 days after entry of the judgment on the docket. This creates the possibility that a litigant might make a very belated postjudgment motion that – because it was still technically timely – would suspend the effectiveness of any previously-filed notice of appeal pending disposition of the motion.

In 2008, the Committee considered possible ways to address this scenario. Initially, it discussed whether to adopt a time limit within which tolling motions must be filed when a separate document was required but not provided. After consulting with the Civil Rules Committee, however, the Committee decided that it was preferable to raise awareness of Rule 58's requirements in the hopes of improving district court compliance. Since 2008, this item has lain dormant.

By consensus, the Committee decided to remove this item from the docket.

2. Item No. 08-AP-N (FRAP 5 / appendix)

The Reporter noted that this item arose from Peder Batalden's suggestion that the Committee amend Rule 5 to permit litigants to submit an appendix of key record documents along with a petition for permission to appeal (or along with an answer to such a petition). The concern is that courts might count the appendix toward the length limit set by Rule 5(c). (Rule 5(c) excludes the items required by Rule 5(b)(1)(E), but that list of items does not include an appendix.)

When the Committee discussed this proposal in 2009, members observed that when the filings in the district court are electronic, the court of appeals can usually access those documents via the CM/ECF system. Admittedly, as the Committee noted, pro se litigants continue to make paper filings, and some sealed filings are not available in CM/ECF. But, the Reporter suggested, now that all of the courts of appeals have completed the shift to electronic filing, the rationale for this proposal seems weaker than it was in 2009.

Mr. Gans reported that each district court sets its own parameters concerning the access of court of appeals personnel to filings in the district court; some districts, for example, do not permit electronic access to sealed documents.

An appellate judge member asked whether anyone had reported instances in which a court of appeals forbade the filing of an appendix to a petition or an answer. If not, he suggested, it would be a good idea to remove this item from the agenda.

By consensus, the Committee removed this item from the agenda.

3. Item No. 08-AP-P (FRAP 32 / line spacing)

The Reporter stated that this item arose from Mr. Batalden's proposal that the Committee amend the Rules to permit the use of 1.5-spaced, rather than double-spaced, briefs. When the Committee discussed this proposal, members also considered the possibility of amending the Rules to permit double-sided briefs. There was some support for each of these proposals during the Committee's discussion. However, other participants had predicted that judges would oppose such changes. Moreover, it was suggested that the shift to electronic filing would eventually render the question of double-sided printing moot.

An appellate judge member stated that the judges of the Eleventh Circuit prefer double-spaced, single-sided briefs. Another appellate judge member asked whether some units within the DOJ had, in the past, filed double-sided briefs. Mr. Letter responded that the DOJ had periodically raised the possibility of submitting double-sided briefs but that the courts had never acceded to that suggestion. Another appellate judge recalled that Iowa lawyers were known in the Eighth Circuit for attempting to file double-sided briefs – and the explanation was that the Iowa Supreme Court required double-sided briefs.

Mr. Letter said that, in his view, the key question is what judges prefer. However, he also noted that moving to double-sided printing would save a lot of paper and a lot of storage space. Commercially printed briefs, he observed, are printed double-sided, as are books and newspapers. He urged the Committee to consider permitting double-sided printing.

Another appellate judge stated that he preferred the Rules' current approach; he reported that he writes on the blank side of the pages. An attorney participant stated that he had become accustomed to printing documents double-sided for his own use, and that this practice does consume a lot less paper. Mr. Letter added that double-sided briefs are lighter.

An appellate judge asked Mr. Gans whether his office stores appellate briefs. Mr. Gans responded that his office keeps the briefs for a period of time and then recycles them. He observed that sometimes there are copies of briefs that were never used; on the other hand, in other instances his office runs out of copies and has to print more. A member asked whether the Committee could encourage circuits to lower the number of required copies of briefs.

An appellate judge predicted that judges would resist the adoption of double-sided printing. A motion was made to remove this item from the agenda. The motion was seconded and passed by voice vote without dissent.

4. Item No. 08-AP-Q (use of audiorecordings in lieu of transcript)

Judge Colloton introduced this item, which arose from a suggestion by Judge Michael M. Baylson that the Committee consider amending the Appellate Rules to permit the use of audiorecordings in lieu of a transcript for purposes of the record on appeal.

Professor Coquillette observed that any proposal that would affect court reporters would become highly political. An appellate judge member suggested that searching an audio file would be more difficult and time consuming than looking through a written transcript. A motion was made and seconded to remove this item from the agenda. The motion passed by voice vote without dissent.

An attorney participant asked whether the Committee had ever considered drafting a rule concerning the release of audiorecordings of appellate arguments. Some courts, he reported, are very slow to release them – in contrast with recent Supreme Court practice. Mr. Letter stated that he did not recall such a proposal. Professor Coquillette stressed that it would be important for the Committee to confer with the Judicial Conference Committee on Court Administration and Case Management ("CACM") before commencing such a project. Mr. McCabe noted that CACM is in charge of pilot programs concerning audiorecordings and videorecordings of trial-court proceedings. A member stated that he favored approaching CACM to discuss practices concerning the release of appellate argument audiorecordings. He noted that there is a strong public interest in open access, and also that the recordings are very useful to advocates who are preparing for their own arguments. Mr. Gans asked whether the FJC has studied this issue. By consensus, the Committee resolved to investigate this matter further.

5. Item No. 10-AP-D (FRAP 39 / *Snyder v. Phelps*)

Judge Colloton introduced this item, which related to a bill – the "Fair Payment of Court Fees Act of 2010" – 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). At the Committee's request, Ms. Leary prepared a study concerning the circuits' practices with respect to appellate costs. Judge Sutton, as chair of this committee, sent Ms. Leary's report to the Chief Judges of each circuit, and the Fourth Circuit subsequently reduced the ceiling on the permissible reimbursement per page of copies. The bill has not been reintroduced since then.

A motion was made to remove this item from the Committee's agenda. The motion was seconded, and passed by voice vote without dissent.

6. Item No. 10-AP-H (appellate review of remand orders)

The Reporter reminded the Committee that this item relates to an inquiry the Committee received in 2010 from Karen Kremer, an attorney at the AO who works with the Judicial Conference's Committee on Federal-State Jurisdiction. Ms. Kremer had asked whether the Appellate Rules Committee was considering questions relating to appellate review of remand orders. The Committee discussed this inquiry at its fall 2010 meeting and noted that this topic falls within the primary jurisdiction of the Federal-State

Jurisdiction Committee. Committee members expressed willingness to assist with a project in this area if the Federal-State Jurisdiction Committee decided to undertake one. The Committee did not hear anything further on the matter from the Federal-State Jurisdiction Committee.

A motion was made, and seconded, to remove this item from the Committee's agenda. The motion passed by voice vote without dissent.

B. Items for Further Discussion

1. Item No. 05-01 (FRAP 21 & 27(c) / Justice for All Act of 2004)

Judge Colloton and the Reporter introduced this item, which concerned the possibility of amending the Appellate Rules to account for the mandamus procedures set by the Crime Victims' Rights Act ("CVRA") (which was part of the Justice for All Act of 2004). If a district court denies relief sought by a crime victim under the CVRA, the CVRA authorizes the victim to seek a writ of mandamus from the court of appeals. The statute authorizes the issuance of the mandamus writ "on the order of a single judge" and sets a 72-hour deadline for the court of appeals to reach a decision on the application. Then-Professor Schiltz, the Committee's Reporter at the time, identified three problems arising from the CVRA. One is that Rule 27(c) (which provides that a circuit judge acting alone "may not dismiss or otherwise determine an appeal or other proceeding") prevents individual judges from issuing mandamus writs and Rule 47(a)(1) forecloses local rules that are inconsistent with the Appellate Rules. A second is that the 72-hour deadline would be extremely hard to meet. A third was that, as of 2005, the Rules provided no method for computing time periods set in hours. The third of these problems was removed by the adoption, in 2009, of Rule 26(a)(2)'s provision for counting time periods stated in hours. When the committee last considered this matter, it was left that the Department of Justice would monitor practice under the Act and notify the committee of any difficulties. Judge Colloton asked Mr. Letter whether he could report on how the first and second problems identified by Professor Schiltz have played out in practice.

Mr. Letter reported that he had consulted the Solicitor General, the Criminal Appellate Office at DOJ, and various United States Attorney's Offices. Those consultations produced no sense that a rule change is warranted. Mr. Letter surveyed judicial opinions that deal with the CVRA. There are, he reported, some procedural issues that are being litigated in the circuits, but those issues are likely to be resolved through judicial decisionmaking more quickly than they could be resolved by means of a rule change. There has been litigation over whether review of a district court ruling is available via an appeal, or whether mandamus is the only avenue; most courts say the latter. Mr. Letter suggested that this question is probably not appropriate for treatment through rulemaking.

Mr. Letter noted that the 72-hour deadline is not typically observed by courts. Some courts view the issue in terms of waiver; there is some question whether the deadline is waivable by the litigants. In any event, no court has ruled that a failure to

meet this deadline deprives the court of the power to act. Mr. Letter also observed that courts do not all apply the same standard of review when deciding CVRA petitions. However, Mr. Letter's office was unable to identify a case in which the choice (among the different standards of review that are in use in different courts) would have produced a difference in outcome. An appellate judge stated his impression that none of the courts of appeals directs CVRA petitions to a single judge for resolution; rather, all of the circuits use three-judge panels. Mr. Letter agreed.

Judge Colloton asked whether there is any sense that delays in resolving CVRA appeals are causing harm to victims. Mr. Letter responded that he is not aware of any such instances. Mr. Letter noted that although a rule adopted under the Rules Enabling Act will supersede any existing statutory provisions that conflict with it, it would be odd to try to supersede the CVRA's 72-hour deadline through rulemaking. Judge Colloton noted that, during the Committee's prior discussions of this topic, then-Professor Schiltz had raised the possibility of amending the Appellate Rules to permit a single judge to act on CVRA petitions (as a way of expediting them and to conform to the statute's contemplated procedure).

Mr. McCabe pointed out that the statute requires the AO to report to Congress every year on any instances in which a court denied a victim's request for relief under the CVRA. There are, he said, very few such instances per year. Mr. Letter noted that there is a developing circuit split concerning restitution awards against downloaders of child pornography, but that is unrelated to the issues raised by this docket item.

By consensus, the Committee decided to remove this item from its agenda.

2. Item No. 07-AP-E (*Bowles v. Russell*)

Judge Colloton invited the Reporter to introduce this item, which arose from a suggestion that the Committee consider possible responses to the Supreme Court's holding, in *Bowles v. Russell*, 551 U.S. 205 (2007), that Rule 4(a)(6)'s 14-day time limit on reopening the time to take a civil appeal is mandatory and jurisdictional.

Starting in 2007, the Committee discussed a number of possible approaches. It considered the idea of altering the law to specify which appeal-related deadlines were or were not jurisdictional, and the idea of reinstating the "unique circumstances" doctrine (which had provided an avenue for excusing noncompliance with a deadline). After discussing questions of the scope of rulemaking authority, the Committee turned to the possibility of developing proposed legislation that would set a method for determining whether statutory deadlines were jurisdictional. However, after considering the potential scope of that project, the Committee decided to reassess how big a problem *Bowles*-related issues really were in practice. This question proved difficult to assess; the caselaw showed that some litigants were losing the opportunity for appellate review because an appeal deadline was deemed jurisdictional under *Bowles*, but it was hard to tell how frequently this was happening. In addition, some doctrines were available to

mitigate the effect of *Bowles* – for example, the possibility of treating, as the notice of appeal, another document that was the substantial equivalent of such a notice.

After years of comprehensive consideration, it seemed that this item might be ripe for removal from the Committee's agenda. However, there were a couple of loose ends that merited the Committee's attention. Since *Bowles*, the lower courts are treating statutory deadlines for taking an appeal from the district court to the court of appeals as jurisdictional, but they are treating non-statutory appeal deadlines as non-jurisdictional claim-processing rules. This dichotomy gives rise to a difficulty in instances where a basic appeal deadline is set by statute but the Rules fill in statutory gaps; should such a gap-filling rule be viewed as jurisdictional?

In particular, two questions have arisen concerning the treatment under Rule 4(a)(4) of motions that toll the time to take a civil appeal. 28 U.S.C. § 2107 does not mention such motions, but the tolling effect of certain postjudgment motions was recognized even prior to that statute's enactment. Rule 4(a)(4) refers to the tolling effect of specified "timely" motions. A number of circuits have concluded that the Civil Rules' non-extendable deadlines for post-judgment motions are claim-processing rather than jurisdictional rules. In this view, if the district court purports to extend such a deadline, and no party objects, the district court has authority to decide the late-filed motion on its merits. But is such a motion "timely" under Rule 4(a)(4), such that it tolls the time to take an appeal? The majority view in the circuits is that such a motion does not qualify for tolling effect – but the Sixth Circuit has taken the opposite view.

Another question concerns the nature of Rule 4(a)(4)'s requirements themselves: is Rule 4(a)(4)'s requirement of a "timely" motion itself a jurisdictional requirement, or merely a claim-processing rule? Drafting a rule change to address this second question, the Reporter suggested, could be more challenging. An appellate judge member suggested looking at other Rules, if any, that refer to the waivability of a requirement set by Rule. This member wondered whether addressing the waivability of one requirement would give rise to any negative implications for the treatment of other such requirements. The Reporter made a note to look at other rules that refer to timeliness, and also to consider the possible implications (of any proposed change concerning Rule 4(a)(4)) for Rule 4(b)(3)'s tolling provision. The appellate judge member also noted the possible relevance of Rule 4(a)(7)(B) (which states that failure to comply with Civil Rule 58(a)'s separate document requirement "does not affect the validity of an appeal").

Judge Colloton asked Committee members for their views on whether the Committee should propose an amendment to clarify the meaning of "timely" in Rule 4(a)(4). An appellate judge member said that it would be worthwhile to clarify the Rule. Another appellate judge member agreed.

A district judge member noted that it might be useful to gather data on how frequently district courts mistakenly grant a litigant's request to extend one of the non-extendable deadlines for post-judgment motions. He observed that, in criminal cases, the

deadlines for some postjudgment motions *are* extendable and requests for extensions are routinely granted.

By consensus, the Committee decided to keep this item on its agenda. The Reporter undertook to work with Judge Dow, Mr. Letter, and Mr. Byron to draft illustrative alternatives for an amendment to Rule 4(a)(4) – one draft that would implement the majority view concerning the meaning of "timely," and another that would implement the Sixth Circuit's view.

3. Item No. 07-AP-I (FRAP 4(c) / inmate filing)

Judge Colloton invited the Reporter to introduce this item, which concerns the operation of Rule 4(c)(1)'s inmate-filing provision. The first sentence of Rule 4(c)(1) applies the prison-mailbox rule to notices of appeal. The second sentence states that the inmate, to receive the benefit of this rule, must use the "system designed for legal mail" if the institution has one. The third sentence states that timeliness "may be shown" by a declaration or notarized statement setting out the date of deposit and attesting that first-class postage was prepaid. Judge Diane Wood asked the Committee to consider clarifying whether this Rule requires prepayment of postage as a condition of timeliness. Research revealed that there also may be confusion in the law about whether the declaration discussed in the third sentence is required in all instances and, if so, when it must be furnished.

The doctrinal backdrop for this inquiry includes prisoners' constitutional right of access to court under *Bounds v. Smith*, 430 U.S. 817 (1977). The Court has ruled that *Bounds* requires that inmates be provided with the "tools … to attack their sentences, directly or collaterally, and … to challenge the conditions of their confinement." *Lewis v. Casey*, 518 U.S. 343, 355 (1996). Although courts have recognized (or assumed) that there is a federal constitutional right to some amount of free postage for an indigent inmate's legal mail, the constitutionally required amount may be relatively small. The Reporter noted that the Sixth Circuit, in a 2010 decision, found a *Bounds* violation where a defendant's attempt to file a direct appeal of his state-court judgment of conviction was thwarted by prison officials' delay in mailing his appeal papers and by the absence of a prison-mailbox rule under state law.

The Committee's agenda materials set forth some possible drafting alternatives for amendments to Rule 4(c)(1). The Rule could be amended to extend clearly the postage-prepayment requirement to all prison-mailbox filings. An argument in favor of such a change is that it could speed the processing of appeals by preventing delays in the transit of the notice of appeal; counter-arguments would stem from the facts that inmates have fewer opportunities to earn money than non-inmates and that inmates lack the alternative of delivering the notice of appeal to the court by hand. The latter concerns would suggest that if the Committee were to propose an amendment cementing a postage-prepayment requirement, it should also consider including a provision for excusing compliance in appropriate circumstances. The materials also sketched a possible amendment that would restrict the postage-prepayment requirement to instances

when the inmate does not use a legal mail system, but it is unclear why such a choice would be desirable. Another possible type of amendment would make clear whether the declaration or notarized statement is always required, and, if so, whether it must be included with the notice of appeal or whether it can be provided later. Another question is whether it would be possible to clarify what is meant by a "system designed for legal mail"; but a clearer alternative seems difficult to formulate. Finally, another possible type of amendment would clarify whether Rule 4(c)(1) applies to filings by an inmate who has a lawyer.

Judge Colloton observed that the 1993 Committee Note to Rule 4(c) stated that this inmate-filing provision was "similar to that in Supreme Court Rule 29.2." There may have been some ambiguity in the original Rule, he suggested, with respect to the requirement of a declaration. In 1998 the second sentence of Rule 4(c)(1) – referring a "system designed for legal mail" – was added. The 1998 Committee Note to Rule 4(c) explained: "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." Judge Colloton pointed out that "often" is different from "always." He asked whether it is always the case that a piece of mail processed through an institution's legal mail system will have a date stamp, such that it would be unnecessary to have a declaration by the inmate concerning the date of deposit.

Mr. Gans stated that simplicity is key for rules concerning inmate filings. He reported that inmates tend to assume that all of their filings are governed by *Houston v. Lack*, 487 U.S. 266 (1988). Judge Colloton asked whether the Clerk's Office checks inmate mailings for a date stamp. Mr. Gans responded that his office does typically look at the envelope, which is usually scanned in as a PDF file by the District Clerk's Office. The Federal Bureau of Prisons, he noted, does mark the envelopes containing inmate mailings. He reported that his office typically does not see a declaration by the inmate concerning the date of deposit of the mailing; usually the issue does not arise unless the appellee moves to dismiss the appeal. Sometimes the court of appeals remands the case to the district court for the district court to make a finding concerning when the notice of appeal was filed.

An appellate judge member suggested that the provision concerning legal mail systems adds complexity. Another member questioned why the Rule should require payment of postage, and why the institution should not be required to cover the cost of postage for a notice of appeal. Covering the cost of postage, this member suggested, would be cheaper than litigating the question of whether there was good cause to excuse the inmate from paying the postage. Mr. Letter summarized the Federal Bureau of Prisons policy. Under this policy, inmates are generally responsible for paying their own postage costs, but the institution will provide stamps for legal mail (subject to possible limitation by the warden). Mr. Gans noted that, before inmates arrive in a Federal Bureau of Prisons facility, they may be held temporarily in a facility (such as a county jail) where different mail practices apply. An appellate judge agreed that it would be very rare for an inmate to arrive in an institution run by the Federal Bureau of Prisons within the 14-day period for filing a notice of appeal. Mr. Letter observed that federal public defenders file

notices of appeal on behalf of their clients as a matter of course. Mr. Gans responded, though, that retained or appointed counsel might not follow this practice.

An appellate judge member observed that the Committee is not in a position to require an institution to pay the cost of postage for inmates filing a notice of appeal. Another member responded that the Rule could be amended to address the question that does fall within the Committee's purview – namely, whether a notice of appeal that was timely deposited in the institution's mail system is considered timely filed despite subsequent delays caused by nonpayment of postage. If the Rule were amended to provide that such a notice is timely, this member conceded, the effect would likely be that the institution would decide to pay the postage costs itself. This member expressed concern at the possibility that a defendant's appeal might fall through the cracks, and he questioned why the system requires criminal defendants to file a notice of appeal rather than assuming that they will wish to take an appeal. Another participant noted that Rule 4(c)(1) applies to both civil and criminal cases.

An attorney participant stated that he favored making the rules clearer and easier to apply. However, he asked whether the Supreme Court has encountered difficulties in applying its Rule 29.2. A member responded that the filing of certiorari petitions presents different issues because a certiorari petition (unlike a notice of appeal) is not a one-page document.

Mr. Letter questioned whether a Rule could require the government to pay inmates' postage costs; such a requirement, he suggested, could raise questions of sovereign immunity. An appellate judge member responded that a Rule could address the issue by stating that a notice of appeal could be timely even if the lack of postage delayed its arrival at the courthouse. Another appellate judge asked why such a filing should be timely if the inmate had the money to pay for postage and failed to do so. The other appellate judge responded that a bright-line rule providing for timeliness would allow courts to avoid expending judicial efforts on the question of whether the inmate had the resources to pay for postage. Another member added that, under such an approach, the inmate would still need to deposit the notice of appeal in the institution's mail system within the filing deadline.

A district judge member observed that, in civil cases, inmates who lose in the district court are typically litigating pro se. Another member suggested holding this item on the Committee's agenda and conducting research on the origins of the postage-prepayment requirement. An appellate judge suggested that it would also be useful to research whether any similar issues have arisen under the Supreme Court's Rule 29.2. Another appellate judge noted that while the second sentence in Supreme Court Rule 29.2 refers to the statement or declaration noting the date the document was deposited in the mail system and stating that postage has been prepaid, the third sentence provides further steps for the Clerk to take if "[i]f the postmark is missing or not legible." An attorney participant stated that inmates do not have a constitutional right to require the government to pay for postage; he suggested that it would be useful to see whether other Rules discuss prepayment of postage. An appellate judge asked whether there is

information on the frequency with which inmates lose their appeal rights because of the wording of the current Rule 4(c)(1). The Reporter responded that the caselaw provides some examples; for instance, in *United States v. Ceballos-Martinez*, 371 F.3d 713 (10th Cir. 2004), the defendant's notice of appeal was postmarked with a date prior to the deadline for filing the notice of appeal, but the court held his appeal untimely because he had failed to provide a declaration or notarized statement setting forth the notice's date of deposit with prison officials and attesting that first-class postage was pre-paid.

An appellate judge member suggested that it would be useful to revise the Rule to clarify the idea that the declaration *suffices*, but is not required, to show compliance with the Rule. The Reporter suggested that Rule 32(a)(7)(C)(ii) might provide a useful model.

An appellate judge member asked whether amending the Rule to make clear that there is no postage-prepayment requirement would touch off conflicts between inmates and prison authorities. An attorney participant suggested that it would be odd to eliminate the postage-prepayment requirement for notices of appeal but not for briefs. The Reporter noted that the deadline for filing a notice of appeal is jurisdictional in civil cases. Mr. Gans observed, however, that if a litigant fails to meet an appellate briefing deadline, the litigant only receives one opportunity to show cause why the appeal should not be dismissed.

With respect to the effects of amending the Rule to clarify that there is no postage-prepayment requirement, the Reporter suggested that it might be useful to study how practice has developed in the Seventh and Tenth Circuits, where the caselaw provides that prepayment of postage is not required if the inmate uses the legal mail system. An appellate judge member asked why the Rule should *require* an inmate to use an institution's legal mail system in order to get the benefit of the inmate-filing rule. Another appellate judge agreed that this is a good question.

Judge Colloton observed that several possibilities may be on the table. First, the discussion touched upon the possibility of amending Rule 4(c)(1) to eliminate any requirement that postage be prepaid. Second, the discussion raised the question whether the second sentence of Rule 4(c)(1) (requiring use of an institution's legal mail system) makes sense. There was also the question of the declaration referred to in the third sentence of Rule 4(c)(1); participants in the discussion did not seem to think that the declaration should be required if there was another way to tell that the notice was timely deposited in the mail system. Another approach might focus on bringing Rule 4(c)(1) into closer parallel with Supreme Court Rule 29.2.

A district judge member suggested that one approach could be to provide that the notice of appeal is timely whether or not postage is paid by the inmate, and that if institution pays the postage on the inmate's behalf, the institution can debit the postage cost from the inmate's institutional account. To get the benefit of such a provision, this member suggested, the inmate could be required to certify that he or she is indigent. Almost all such litigants, the member stated, are proceeding *in forma pauperis*.

Judge Colloton asked whether any Committee members would be willing to work with the Reporter to draft alternatives in advance of the next meeting. Justice Eid, Professor Barrett, and Mr. Letter volunteered to assist with this task.

4. Item Nos. 08-AP-A, 08-AP-C, 11-AP-C, 11-AP-D (possible amendments relating to electronic filing)

Judge Colloton reported that the Standing Committee was in the process of convening a subcommittee to consider possible amendments to each set of national Rules to take further account of electronic filing issues. Professor Coquillette stated that he would be coordinating the subcommittee's efforts, and that Professor Capra would serve as the subcommittee's reporter. Most of the other Advisory Committees, he noted, were appointing a representative to serve on the subcommittee.

Judge Colloton invited the Reporter to introduce the collection of existing agenda items that relate to electronic filing. The Reporter reminded the Committee that all of the circuits had completed their transition to the CM/ECF system. She observed that the project to revise Part VIII of the Bankruptcy Rules (which the Committee had discussed earlier in the day) provided a model for ways in which the Rules could be amended to take account of electronic filing. With input from the other Circuit Clerks, Mr. Green (who was Mr. Gans's predecessor as the Circuit Clerks' representative on the Committee) had prepared a list of Appellate Rules that could be considered in this connection. Relevant topics included requirements for service by the clerk; filing or service by parties; the treatment of the record; the treatment of the appendix; the format of briefs and other papers; and the number of required copies. One issue that had been raised by a number of commentators concerned the "three-day rule" in Appellate Rule 26(c), 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.

Judge Colloton invited the Committee members to suggest topics that might be ripe for study. The three-day rule might be one such topic. With respect to the appendix, there may be varying views; some judges may prefer an electronic appendix while others will continue to prefer paper.

As to the three-day rule, Mr. Letter pointed out that eliminating this provision in instances where the paper is served electronically could cause problems for lawyers whose opponents electronically serve them at 11:59 p.m. Perhaps, he suggested, the rule could be amended to eliminate the three-day rule for electronically served papers but to provide one extra day for responding to a paper that is electronically served after noon. Mr. Gans responded that such a rule would be difficult for clerks to enforce; moreover, if late-night electronic service causes a problem in a given case the court could grant a one-day extension. In the Eighth Circuit, he noted, the Clerk's Office serves some documents electronically on behalf of inmate litigants; but this practice is not universal among other circuits. Pro se prisoner litigation, Mr. Gans reported, constitutes roughly a third of the Eighth Circuit's docket. Mr. Gans suggested that the three-day rule is no longer

necessary but that if the Rule were amended the change would result in some transition costs.

A member stated that, although lawyers have an ingrained habit of relying on the three-day rule, it does not make sense in the case of electronically served papers. An appellate judge asked how often service is accomplished by U.S. Mail. Mr. Gans reported that, in the Eighth Circuit, over a period of years, only a handful of lawyers had been exempted from using the CM/ECF system. Mr. Letter pointed out that in a number of circuits there will continue to be papers served in paper form by pro se litigants. Those papers are typically delayed in reaching federal-government lawyers because all mail that comes to the DOJ is screened on its way in for security reasons.

An appellate judge member noted two possible ways of amending Rule 26(c) to address the question of electronic service. One option would be to delete the last sentence of the Rule, which currently states that "[f]or purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service." An alternative would be to revise that sentence by deleting the "not." Mr. Gans stated that he preferred the latter approach.

The Reporter observed that, although the application of the three-day rule to electronically-served papers has garnered the most criticism, Chief Judge Easterbrook also has voiced a more general objection to the three-day rule – namely, that it interferes with the Rules' general preference for setting time periods in multiples of seven days. Mr. Gans stated that the continuing prevalence of paper filings by pro se litigants provides a valid argument in favor of maintaining the three-day rule for documents served by mail. An appellate judge asked whether such pro se papers typically require an extensive response by opposing counsel. Mr. Letter predicted that if the three-day rule is eliminated altogether, the change will require the government to file more motions for extension of time.

Mr. Byron pointed out that the Standing Committee's electronic-filing subcommittee would no doubt consider the question of what to do about the three-day rules in the Appellate, Bankruptcy, Civil, and Criminal Rules. Mr. Gans noted that it is important for the three-day rule to function the same way in all of these sets of Rules.

Judge Colloton asked Committee members for their views concerning the treatment of the appendix. The Reporter observed that circuits vary widely in their practices, with some requiring appendices and some requiring "record excerpts" instead. There is a question whether it is possible for the Rules to nudge circuits toward the use of electronic appendices. Mr. Gans observed that court employees do not want to be the ones to print the appendix.

Judge Colloton encouraged Committee members to share any additional thoughts on this topic, and to let him know if they were interested in serving on the newly-formed subcommittee.

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

Judge Colloton introduced this topic, which concerns the efforts of a would-be appellant to "manufacture" appellate jurisdiction over an appeal from the disposition of fewer than all the claims in an action by dismissing the remaining claims. Judge Colloton reminded the Committee that, as of fall 2012, it had appeared possible that the Court would shed light on this topic when deciding *Gabelli v. SEC*, 133 S. Ct. 1216 (2013). As it turned out, however, the Court's decision in *Gabelli* did not speak to the manufactured-finality issue.

Judge Colloton had chaired the Civil / Appellate Subcommittee, which previously considered this topic. He noted that a majority of the Subcommittee members had agreed that it would be desirable to bring clarity to this question of appellate jurisdiction, and had felt that this was an appropriate topic for rulemaking. However, the Subcommittee had failed to reach consensus on how to clarify the law in this area. A majority of the circuits have ruled that a dismissal of the remaining claims without prejudice does not suffice to render the judgment final. And a majority of circuits to consider the question have ruled that a dismissal of the remaining claims with conditional prejudice (i.e., a dismissal that is final as to the remaining claims unless the appellant wins on appeal as to the central claim) does not suffice to render the judgment final. Some circuits look at whether the appellant dismissed the remaining claims with the intent to manipulate appellate jurisdiction – a standard that presents problems of administrability.

Judge Colloton pointed out that the agenda materials included some sketches that Professor Cooper had prepared for the Civil / Appellate Subcommittee's consideration. As a basis for discussion, Judge Colloton suggested considering the possibility of an amendment that would adopt the strict view that a dismissal without prejudice does not achieve finality. Such an approach would help to avoid piecemeal litigation; and avenues for taking an immediate appeal are already provided by Civil Rule 54(b) and by 28 U.S.C. § 1292(b). Judge Colloton drew the Committee's attention to one of Professor Cooper's sketches: "A party asserting a claim for relief can establish a final judgment by voluntary dismissal only by dismissing with prejudice all claims and parties remaining in the action." He asked the Committee members to comment on this possibility.

An appellate judge member stated that he liked the idea of having a clear rule. An attorney member expressed agreement, and stated that some of the existing approaches to manufactured finality felt like methods for gaming the system; an attorney participant concurred in this view. Another member, however, questioned how big a problem the current caselaw is posing in practice; are there many abuses, or are lawyers using existing caselaw to serve the legitimate needs of their clients? Mr. Letter noted that the issue comes up frequently and has generated plenty of caselaw. An appellate judge stated that he did not know how often appellants use the vehicle of manufactured finality in order to take an appeal; he observed that the Second Circuit first recognized conditional prejudice as an avenue for creating finality a decade ago, in *Purdy v. Zeldes*, 337 F.3d 253 (2d Cir. 2003).

Mr. Letter pointed out that some district judges may be unwilling to direct entry of judgment as to fewer than all claims or parties under Civil Rule 54(b). An appellate judge member suggested that it would be worthwhile to understand the reasons why circuits that take a relatively permissive approach to manufactured finality have decided to do so. In complex patent cases, this member noted, there may be an interest in clearing the way for appellate review on the main issue in the case. A district judge member noted that he has directed entry of judgment under Civil Rule 54(b) in cases where the appeal would be taken to the Federal Circuit.

An appellate judge member stated that he favored the sketch pointed out by Judge Colloton. The district judge member agreed.

It was determined that the Chair and the Reporter would contact Judge Campbell and Professor Cooper and ask if the Civil Rules Committee would give consideration to the possibility of adopting a rule amendment along the lines of the sketch.

Later in the meeting, the discussion returned to the topic of manufactured finality. Mr. Letter pointed out that in False Claims Act cases, the government frequently files both a False Claims Act claim (which carries treble damages) and a common-law claim (which does not). If the False Claims Act claim is dismissed, the case may or may not be worth trying on the common-law claim by itself. If an appeal is taken and the court of appeals upholds the dismissal of the False Claims Act claim, sometimes the government might wish to pursue the common-law claim (though in many cases it would instead simply dismiss that claim). Mr. Letter reported that some district judges may be unwilling to direct entry of final judgment as to the False Claims Act claim under Civil Rule 54(b), because they do not wish to try the common-law claim. Mr. Letter stated that he would need to verify the DOJ's position concerning the manufactured-finality issue, but that he suspected that the DOJ would not support a rule change modeled on the sketch.

An appellate judge member expressed skepticism about the value of permitting appeals in the type of scenario described by Mr. Letter. Another appellate judge member asked whether any court has explored an approach that would permit a dismissal without prejudice to result in finality so long as it is clear that the statute of limitations continues to run while the appeal is litigated. The statute of limitations on the voluntarily-dismissed claims, he suggested, could provide some discipline for parties who seek to use manufactured finality to take an appeal.

6. Item No. 12-AP-E (length limits)

Judge Colloton turned the Committee's attention to this item, which concerns the question of how to formulate length limits in the Appellate Rules. Most of the Appellate Rules that set length limits, Judge Colloton observed, set those limits in terms of pages rather than type/volume limits. The Reporter pointed out that the Committee's agenda materials included a chart showing possible ways to reformulate the length limits that are currently set in pages. One column showed a type/volume limit designed to roughly

approximate the current page limit, coupled with the alternative of a shorter page limit. The next column showed a type/volume limit that would provide greater length than the current page limit, coupled with the alternative of the current page limit. And the final column showed a type/volume limit – for papers produced using a computer – that was designed to approximate the current page limit; for papers produced without the aid of a computer, the final column showed the current page limit.

Judge Colloton expressed doubt about the viability of the approaches sketched in the first two columns. Professor Katyal stated that the Supreme Court's switch (in 2007) to using word counts was a great move. Setting length limits in pages invites litigants to game the system and also wastes lawyers' time. Professor Katyal suggested that the approach illustrated in the third column – setting length limits in pages only for typewritten briefs – was an elegant solution. An attorney participant stated a preference for page limits and expressed nostalgia for the prior version of the Supreme Court Rules. Judge Colloton noted that Professor Katyal, in raising this issue, had focused on rehearing petitions; he asked Professor Katyal whether he felt that other page limits, such as those for motion papers, were also problematic. Professor Katyal responded that in his experience it is the rehearing petition page limits that have posed problems, but that it would be best to express all the Rules' length limits in the same units.

Mr. Byron noted that although it is impracticable for a litigant to count the words in a typewritten paper, it is possible to use the alternative type/volume method by counting the number of lines of text in the paper. Mr. Byron queried whether courts would want to treat motions the same way as rehearing petitions for purposes of the length limits. The Supreme Court's rules, he suggested, treat motions differently from rehearing petitions. Professor Katyal responded that the Supreme Court's Rules do not set page limits for motions or applications. There are page limits, he reported, for certiorari-stage pleadings that are prepared on letter-size paper pursuant to Supreme Court Rule 33.2(b); that is because most of those documents are in *in forma pauperis* cases and many are prepared by prisoners who may hand-write their petitions.

The discussion turned to the basis for developing the numbers shown in the columns in the chart. The Reporter explained that, for illustrative purposes, she had assumed the correctness of the statement in the 1998 Committee Note to Rule 32(a)(7) that the type/volume limits in Rule 32(a)(7)(B) "approximate the current 50-page limit," and had divided those limits by 50 to obtain the word and line equivalents of a single page. Mr. Letter stated, however, that the Committee Note was incorrect in suggesting that a length of 14,000 words was equivalent to a length of 50 pages. As he recalled, 50 pages was the equivalent of some 12,500 words. An appellate judge member suggested that perhaps the difference reflected the fact that additional lines might be included (when length limits are set in pages) by placing material in a footnote instead of in the text.

Mr. Letter suggested that, while litigants are tempted to manipulate the length of briefs, the temptation is less with respect to rehearing petitions and motions because those documents are shorter. He also suggested that clerks may prefer page limits because they are easier to administer. He reported that he had seen lawyers manipulate the length

limits for rehearing petitions, but that this occurred less frequently with such petitions than it had with briefs. Professor Katyal responded that, especially when a litigant is seeking rehearing en banc, the brevity of the page limit generates an incentive to manipulate the limit. Mr. Letter asked Professor Katyal whether he advocated a word limit, for rehearing petitions, that would yield petitions longer than the current 15 pages. Professor Katyal responded that the limit should be equivalent to 15 pages.

A member asked Mr. Gans whether the burden – for the Clerk's Office – of verifying compliance with type/volume limits would be less for papers filed electronically. Mr. Gans responded that electronic word counts work differently for PDF documents than for Word or WordPerfect documents. To count the words in a PDF, it becomes necessary to convert the file to another format; rather than do so, the Clerk's Office asks the attorney to submit a version in either Word or WordPerfect. Participants discussed the possibility that a filer could manipulate the performance of the word-counting software. Mr. Letter suggested that word limits, too, could lead lawyers to waste time cutting words in order to fit within a given limit. Professor Katyal responded, however, that at least the activity of cutting words to comply with a word limit affects the substance of the filing, whereas the activity of fitting more words on a page to comply with a page limit bears no relation to the substance of the filing.

Mr. Garre noted a question that has arisen concerning the operation of the length limit for petitions for rehearing en banc: Does the statement required by Rule 35(b)(1) count for purposes of the 15-page limit set by Rule 35(b)(2)? He reported that the circuits take varying approaches to this question; the Federal Circuit requires the statement to count. Mr. Garre agreed to survey circuit practices on this issue in preparation for the Committee's next meeting. The Chair wondered what is the basis for excluding the statement from the length limit, since the "petition" must not exceed fifteen pages and the "petition must *begin with*" the statement.

Mr. Letter suggested that frequent Rule amendments are undesirable, and he noted that Rule 32(a)(7)'s provisions are still relatively new. An appellate judge member expressed agreement with this view. Justice Eid noted that the Colorado Supreme Court uses word limits and periodically checks briefs for compliance with those limits. She undertook to provide a comparison with the Colorado Supreme Court's rules for the next meeting.

An appellate judge asked whether setting length limits in words creates more work for the Clerk's Office. Mr. Gans predicted that attorneys would in some instances fail to file the required certification. He asked whether the proposal on the table related only to petitions for rehearing or to all of the documents for which length limits are currently set in pages. Professor Katyal responded that it would make sense for all the length limits to take a consistent approach. Although the rule change would give rise to some transition problems, he suggested, the switch to type/volume limits is inevitable. An attorney member agreed that consistency is desirable.

Judge Colloton noted that, if the frequency of rule changes is a concern, proposed amendments can be held for bundling with other proposals. Turning to the option of switching to a type/volume limit, he asked Committee members whether they favored the model used in Rule 32(a)(7), where in effect the length limits for handwritten briefs were shortened, or whether they instead favored the approach shown in the rightmost column of the chart, that is, a model that seeks equivalence between documents prepared on computers and documents prepared on typewriters or by hand. One participant expressed support for the approach shown in the final column of the chart, which would set limits using different methods for typewritten papers than for papers prepared on a computer. An attorney participant asked how one would operationalize that approach; would the litigant have to certify that a computer had not been used in preparing the paper? He suggested that one could avoid making a distinction between papers that were or were not prepared on a computer by instead requiring those submitting typewritten papers to comply with the line-counting option in a type/volume limit. An appellate judge noted, however, that the latter expedient would not address the issue of handwritten briefs; he asked whether concerns over handwritten briefs had been discussed during the development of the 1998 amendments. Mr. Byron stated that rules concerning CM/ECF typically require litigants to obtain a waiver in order to avoid using the CM/ECF system, and he asked whether the Rules concerning length limits could distinguish among filers based on whether they were CM/ECF users or not.

Judge Colloton suggested that it would be useful to prepare alternative drafts of amendments – one set that would impose length limits modeled on Rule 32(a)(7)'s approach (as shown in the leftmost of the three columns) and another set that would track the approach illustrated in the rightmost column. He also asked whether, if the approach in the rightmost column were adopted for the provisions that currently employ page limits, that approach should be considered for Rule 32(a)(7) as well. An appellate judge member responded that it is important to avoid undue length in briefs, and that it would not bother him if the length limits for briefs were set using a different method than the length limits for other papers.

A district judge member observed that the approach shown in the rightmost column would treat pro se filings more similarly to filings by counsel in terms of length; under Rule 32(a)(7)'s approach, by contrast, a pro se filer who uses the page limits option gets less space. On the other hand, this member said, many pro se filers may not need the extra length. An appellate judge member noted that attorneys tend to use the entire permitted length even when a shorter paper would suffice. An attorney participant questioned why short length limits would unduly burden pro se litigants. Mr. Letter observed that pro se briefs tend to be less complicated than briefs prepared by counsel, and suggested that this might render Rule 32(a)(7)'s 30-page limit less of a hardship than it might otherwise appear.

The attorney participant suggested that it might be useful to research whether briefs filed under Rule 32(a)(7)'s 14,000-word length limit are longer than than they were before. An appellate judge member recalled that the way that lawyers fit additional words into the old page limits was by moving portions of the brief from the text into the

footnotes. Mr. Gans stated that the CM/ECF system includes a field for word counts, which he could search in order to produce figures from which to derive an average length. An appellate judge member suggested that the attorney members might be able to survey documents in their firms' archives. Another appellate judge member suggested looking on Westlaw at petitions for rehearing. Judge Colloton asked Mr. Letter whether he recalled this question being studied during the late 1990s by any local rules committees. Mr. Letter responded that word-counting software was at a relatively early stage then.

The Reporter raised one additional issue concerning length limits. Unlike Rule 32(a)(7)(B), Rule 28.1(e) – which sets length limits for briefs in connection with cross-appeals – does not include a list of items that can be excluded for purposes of calculating length. Rule 28.1(a) excludes Rule 32(a)(7)(B) from applying to cross-appeals. Judge Colloton asked the Committee members whether it would be useful to clarify the Rule. Two attorney members stated that they have assumed the same exclusions apply to briefs on cross-appeals. Judge Colloton suggested that the question concerning Rule 28.1(e) be kept on the Committee's docket for future consideration as a housekeeping amendment.

7. Item No. 12-AP-F (class action objector appeals)

Judge Colloton reminded the Committee that he had invited Professor John E. Lopatka, who is the A. Robert Noll Distinguished Professor of Law at Pennsylvania State University Law School, and Professor Brian T. Fitzpatrick, who is a Professor of Law at Vanderbilt Law School, to speak with the Committee about the topic of appeals by class action objectors. Judge Colloton invited the Reporter to briefly introduce this topic.

The Reporter observed that the basics of the problem are well known. In reviewing class action settlements, judges need good information concerning the quality of the settlement. Discussions over the last decade or so have focused on various ways of producing that information, whether through the opt-out mechanism or through encouraging objectors. During the discussions that led to the 2003 amendments to Civil Rule 23, participants noted the difficulty of crafting rules that distinguish between good objectors – who improve the quality of the settlement – and undesirable objectors – who seek merely to extract payments for themselves. There are reports that objectors routinely take appeals from orders approving class settlements. The Court's decision in *Devlin v. Scardelletti*, 536 U.S. 1 (2002) – which allowed a class member to take an appeal even if the member had not intervened below – has facilitated the practice of objector appeals. As a practical matter, such an appeal has the effect of staying the implementation of the settlement. Class counsel may end up offering the objector a payment in order to drop the appeal – a practice that some class action lawyers characterize as a tax on their activities.

The 2003 amendments to Civil Rule 23 included some measures designed to address the behavior of objectors in the district court. Civil Rule 23(e)(5) permits a class member to object to a proposed settlement, and provides that the objection may be withdrawn only with the court's approval. (Interestingly, Civil Rule 23(h)(2), which

permits a class member to object to a request for attorney fees, does not include a requirement of court approval for the withdrawal of such an objection.) The 2003 Committee Note to Civil Rule 23(e) included a passage that seemed apposite to the Committee's current inquiry:

> Subdivision (e)(4)(B) requires court approval for withdrawal of objections made under subdivision (e)(4)(A). Review follows automatically if the objections are withdrawn on terms that lead to modification of the settlement with the class. Review also is required if the objector formally withdraws the objections. If the objector simply abandons pursuit of the objection, the court may inquire into the circumstances.
>
> Approval … may be given or denied with little need for further inquiry if the objection and the disposition go only to a protest that the individual treatment afforded the objector under the proposed settlement is unfair because of factors that distinguish the objector from other class members. Different considerations may apply if the objector has protested that the proposed settlement is not fair, reasonable, or adequate on grounds that apply generally to a class or subclass. Such objections, which purport to represent class-wide interests, may augment the opportunity for obstruction or delay. If such objections are surrendered on terms that do not affect the class settlement or the objector's participation in the class settlement, the court often can approve withdrawal of the objections without elaborate inquiry.
>
> Once an objector appeals, control of the proceeding lies in the court of appeals. The court of appeals may undertake review and approval of a settlement with the objector, perhaps as part of appeal settlement procedures, or may remand to the district court to take advantage of the district court's familiarity with the action and settlement.

This Committee Note, thus, discussed in general terms the topic of objector appeals. The Reporter noted that the Civil Rules Committee – during the discussions that led up to the 2003 amendments – had considered the possibility of addressing the question of objector appeals in the rule text, but had decided not to do so. The Reporter suggested that the dynamics that had been present at the district court level, and which may now be held in check by Rule 23(e)(5)'s requirement of court review for the withdrawal of objections, may be replicating themselves during the appeal.

Judge Colloton noted that he had asked Ms. Leary to conduct some research on the frequency of objector appeals and their disposition, and he invited Ms. Leary to summarize her preliminary findings. Ms. Leary explained that she had decided to focus on appeals from class settlements in districts within the Seventh Circuit because the district courts in that circuit have an average representative level of class action filings. Ms. Leary used an electronic search of the CM/ECF system in the relevant districts in

order to identify all class action cases in which final approval of a Rule 23-certified class action settlement was granted between January 1, 2008, and March 19, 2013, and after which one or more appeals were taken. Through further analysis, Ms. Leary identified those settled class actions from which an appeal was taken by one or more class members who had objected to the settlement in the district court prior to final approval. Ms. Leary identified 27 appeals by objectors in eight class actions. The appeals were concentrated in a few districts. All 27 of the appeals were voluntarily dismissed on motion under Rule 42(b). Among 21 of those appeals, the average time from inception to dismissal was less than three months. In many of those appeals, the appeals were dismissed before the appellant filed a brief. In many of the appeals, the class representatives asked the district court to require the objector to post a cost bond. In one case, the court ordered the objectors to post cost bonds of $4,500 each; in another case, the court refused to require a bond; and in other cases, the objectors dismissed their appeals before a ruling was made on the bond request.

Judge Colloton expressed the Committee's appreciation for Ms. Leary's research. An appellate judge asked if the data reflected the number of class settlements that were approved in the district court and from which no appeal was taken. Ms. Leary stated that she had not gathered those data, but stated her impression that objections to settlements are relatively rare, and appeals from settlements are likewise relatively rare.

Judge Colloton reminded the Committee that Professor Fitzpatrick, along with Professor Brian Wolfman and Dean Alan Morrison, had submitted a proposal concerning Rule 42 to the Committee in 2012. Professor Lopatka and Judge Brooks Smith, he noted, had coauthored an article in the Florida State University Law Review that proposed amendments to the Rules concerning costs and cost bonds. Judge Colloton had invited Professor Fitzpatrick and Professor Lopatka to present their ideas to the Committee. He turned first to Professor Fitzpatrick, as the proponent of the proposal that was formally pending before the Committee.

Professor Fitzpatrick began by commenting on the empirical data concerning class action objector appeals. Professor Fitzpatrick, in researching his article, *The End of Objector Blackmail?*, 62 Vanderbilt Law Review 1623 (2009), reviewed every class settlement that was approved by a federal district court in 2006. Roughly 10 percent of those settlements were appealed. He suggested that the reason why the other settlements are not appealed is that it is not worthwhile for an objector to seek to hold up a settlement unless the settlement carries the prospect of substantial attorney fees. It is the class counsel, he noted, who would pay the objector to abandon the objection. Accordingly, objections are typically made to the big settlements, where the attorney fees will be large.

Professor Fitzpatrick advocated the adoption of a rule that would entirely bar an objector from dropping an appeal in exchange for anything of value. He argued that Rule 23(e)(5) – which does not bar the dropping of objections but does require court approval for their withdrawal – does not go far enough. Responding to the argument that sometimes objectors might raise an objection that is specific to them rather than generally applicable to the members of the class, Professor Fitzpatrick stated that he has never seen

such an objection. If an objector has an objection that is unique to him, then why is he legitimately a member of the class? Dropping an objector appeal, he asserted, affects all of the class members, by depriving them of positive changes that might have been made to the settlement in response to the objection. In addition, he noted, requiring court approval for dropping an appeal would create a lot of work for the court. Professor Fitzpatrick noted that when class counsel pay objectors to drop their appeals, the effect is equivalent to a tax on class action plaintiffs' lawyers. There are no good data on how big that tax is. But he has heard informal reports from class action lawyers of numbers that range from $ 50,000 to $ 1 million per objector. Addressing possible concerns about his proposal, Professor Fitzpatrick stated that the biggest concern is what would happen if an objector filed an appeal but then reached an agreement with class counsel and simply failed to prosecute the appeal.

Professor Fitzpatrick observed that Professor Lopatka and Judge Smith criticize the idea of banning the dismissal of objectors' appeals on the ground that such a ban would merely alter the timing of objectors' demands, by leading them to bargain with class counsel during the 30-day window between the entry of judgment and the deadline for the notice of appeal. But, Professor Fitzpatrick argued, a ban on the withdrawal of appeals would remove the objector's leverage because the threat to file the appeal would no longer be credible.

Responding to the appeal-bond proposal by Professor Lopatka and Judge Smith, Professor Fitzpatrick asserted that requiring an appeal bond would not prevent meritorious objector appeals from being settled in exchange for a payoff to the objector. He stated that appeal bonds are currently an available tool under Rule 7 and yet they have not curtailed objector blackmail. Moreover, he said, even if the district court imposes an appeal bond, it is possible to appeal the imposition of the bond. An approach that would bar the objector from appealing the bond without first posting the bond would, Professor Fitzpatrick argued, likely violate Due Process. In addition, if would-be appellants lack an effective avenue for securing review of the imposition of a bond requirement, then district judges may become too ready to require such bonds. A bond requirement could prevent a good objector, such as Public Citizen Litigation Group, from taking a meritorious appeal.

Judge Colloton thanked Professor Fitzpatrick, and turned next to Professor Lopatka. Professor Lopatka observed that everyone is in agreement about the nature of the problem concerning objector appeals. As to the scope of the problem, he agreed with Professor Fitzpatrick that data are hard to obtain. Looking only at the number of appeals taken may undercount the problem, because such a count would omit appeals that are threatened but then foregone. In addition, while it would be helpful to know more about the scope of the problem, the fact that such extortionate behavior occurs at all offends the purposes of the justice system.

The interaction between objector and class counsel, he stated, is a bargaining game. Taking an appeal is not costly because the appellate briefs typically do not require

much work. There is a need to change the framework so that objectors' threats to take an appeal become less credible.

Professor Lopatka stated that the cost and appeal bond measures that he and Judge Smith advocated would not eliminate the possibility of extortionate behavior by objectors, but that those measures would change the terms of the bargaining. Responding to Professor Fitzpatrick's point that the current appeal bond requirement has not stemmed objector appeals, Professor Lopatka observed that the circuits currently disagree about the items that can be taken into account when a court sets the amount of a Rule 7 bond. Professor Lopatka and Judge Smith propose amending the Rules to make clear the district court's authority to require a bond in the full amount of all projected costs of delay attributable to the appeal, and to bar the objector from appealing the bond order without first posting the bond. Otherwise, Professor Lopatka argued, an appeal from the bond order would give the objector the same bargaining advantage as an appeal from the underlying settlement approval. But the district court would have discretion, under the proposal, to reduce the amount of the bond if the grounds for appeal seemed legitimate and if a bond in the full amount would effectively bar the appeal.

Professor Lopatka argued that Professor Fitzpatrick's proposal, though ingenious, would likely fail to deprive objectors of their leverage. Professor Lopatka offered a hypothetical: Suppose that an objector files an objection in the district court. The district court rejects the objection. The objector uses the thirty days after entry of judgment to put class counsel to a choice: Either the class counsel can pay the objector, in which event the objector will forgo filing a notice of appeal, or class counsel can refuse, in which event the objector will file the notice of appeal. True, once the objector files the notice of appeal, Professor Fitzpatrick's proposal would prevent the objector from dismissing it in exchange for money. But the appeal would not be very costly for the objector to litigate, and it would impose substantial delay costs on class counsel.

Judge Colloton thanked Professor Lopatka for his comments, and invited the Reporter to summarize some feedback that she had informally obtained from members of the Civil Rules Committee's Rule 23 Subcommittee. The Reporter stated that the Subcommittee took the view that this is a serious issue that is worth attention, and one on which it is important for the two Committees to coordinate their efforts. Subcommittee members believed that the bond mechanism proposed by Professor Lopatka and Judge Smith was too blunt a tool. The Subcommittee also expressed a preference for court review of the withdrawal of an objector appeal, rather than an outright ban on dismissals; but the Subcommittee noted that court review carried the possibility of delay. Individual subcommittee members had provided further feedback, some of which the Reporter highlighted without attempting to provide attribution. One question, she noted, concerned instances in which an objector's appeal is dismissed in return for *both* a payment to the individual objector *and* modification of the settlement that results in better terms for the class. Another question concerned the possibility that banning the withdrawal of an appeal in exchange for payment might shift the time for such withdrawals to the certiorari-petition stage. At least one participant did, though, suggest that Professor Fitzpatrick's proposal was appealing because it took a structural,

incentives-based approach rather than relying on ad hoc decisionmaking by a district judge.

Professor Fitzpatrick responded that, if class counsel and the defendant believe that there are grounds for improving the settlement, they can ask the court of appeals to remand the case so that the district court can review and approve the settlement modification. In such an event, the district court could, if appropriate, award fees to the objector for having produced the improvement in the settlement. Turning to the specter of "zombie appeals" (i.e., appeals that the appellant refuses to pursue but that the court is barred from dismissing), Professor Fitzpatrick stated that the problem would only arise if someone actually accedes to an objector's demands. So long as class counsel has refused to pay anything to the objector, then if the objector fails to prosecute the appeal, the appellees can move for dismissal of the appeal and can provide the required certification that they have paid nothing of value to the objector. As for the possibility that a ban on dismissal of appeals to the court of appeals would simply move the bargaining process to the certiorari-petition stage, Professor Fitzpatrick stated that his impression was that the Supreme Court acts fairly quickly on petitions for certiorari.

Professor Lopatka conceded that raising the cap on the permissible size of appeal bonds might create an obstacle to some legitimate appeals. However, he expressed optimism that district judges would not overuse a more robust appeal-bond tool. As evidence that judges do not seek to insulate their rulings from review, Professor Lopatka noted that district judges sometimes certify interlocutory rulings for immediate appellate review under 28 U.S.C. § 1292(b).

An appellate judge asked Professor Lopatka how he would suggest handling appeals from an order imposing a cost bond. Professor Lopatka suggested that allowing the objector to appeal the cost bond order would be tantamount to allowing the objector to appeal the settlement itself, in the sense that it would permit the objector to hold the settlement hostage. On the other hand, he conceded, perhaps the appeal from the cost bond order could be disposed of more quickly.

An appellate judge member asked whether there are other means to control the conduct of objectors, such as suspending membership in the court's bar for an objector's attorney who behaves unethically. Professor Lopatka responded that district judges have sometimes employed such measures, but that they tend not to want to spend judicial time on it. In addition, he stated, class counsel have sometimes sought sanctions against objectors' attorneys; but that, too, has failed to solve the problem. Professor Coquillette observed that disciplinary proceedings are a blunt instrument for addressing a problem of this nature. ABA Model Rules 3.4 and 8.4 provide a basis for discipline, but people are reluctant to pursue it.

A member stated that he agreed that objector conduct can become salient by affecting the big class action settlements, even if those settlements are a small percentage of the total number of class settlements. But he suggested that, even though the amounts mentioned by Professor Fitzpatrick were large numbers, they were very small in

comparison to the typical amount of attorney fees received by class counsel in connection with a large class action settlement. Professor Fitzpatrick noted that the figures he had cited ($ 50,000 to $ 1 million) were settlements with *single objectors*; in connection with any large class action settlement, there are typically multiple objectors.

A member asked whether an objector might find a way around the proposed ban on appeal dismissals by arguing that, when and if class counsel pay the objector a satisfactory settlement, the objector's appeal becomes moot. Professor Fitzpatrick noted Supreme Court precedents holding that when a district court certifies a class action (or erroneously denies such certification), the class gains its own legal status such that subsequent events mooting the individual plaintiff's claim do not thereby moot the class action.[1] The member observed, however, that the Court had recently refused to apply those precedents in the context of a collective action brought by an employee under the Fair Labor Standards Act on behalf of similarly situated employees.[2]

A district judge member observed that by the time a class settlement is on appeal, the district judge has reviewed and addressed the objections in detail. In the habeas context, this member pointed out, the district judge must grant or deny a certificate of appealability ("COA") at the time that he or she enters a final judgment denying the habeas petition. The member stated that he is forthright in giving an accurate view of the merits of the petitioner's claims when he drafts the ruling on the COA. Perhaps, he suggested, it would be useful to require class action objectors to obtain a COA in order to appeal a class settlement. Such a requirement would leverage the district judge's expertise. Professor Lopatka responded that, when he and Judge Smith first started work on their proposal, they considered advocating a COA requirement. However, they turned to a bond requirement instead because a COA is binary (it does or does not issue) while a bond is more nuanced (because the amount can be adjusted). Also, he suggested, if the district court's denial of the COA is reviewable in the court of appeals, then that too could provide an objector with an opportunity to hold up the settlement. An appellate judge asked why appealing the denial of a COA would differ from appealing the imposition of an appeal bond requirement. Professor Lopatka responded that, in either of those instances, it would make a difference whether the appeal of the preliminary matter could be quickly disposed of. Professor Fitzpatrick suggested that the rule could impose a time limit for the disposition of such appeals; but participants noted the Judicial Conference policy against imposing such time limits by rule.

Mr. Letter stated that the discussion thus far suggested to him that the reason objector appeals can cause problems is that the appeal stays the implementation of the settlement. He asked whether one could address this problem by providing that the implementation will proceed, despite the pending appeal, unless the would-be appellant posts a bond. Professor Fitzpatrick responded that if the order approving the settlement is reversed on appeal, it will be hard to unwind an already-implemented settlement if the payments have already gone to the class members. One measure that partly fills this

[1] *See* Sosna v. Iowa, 419 U.S. 393 (1975), and United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980).
[2] *See* Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523 (2013).

function, Professor Fitzpatrick noted, is the use of "quick-pay provisions" – i.e., a provision in the settlement that entitles class counsel to receive their fees upon settlement approval despite the pendency of an appeal (but subject to the return of the fees if the order is reversed on appeal). Quick-pay provisions can provide a fairly good solution, he reported, but defendants are reluctant to agree to such provisions unless they receive security that assures the repayment of the fees if the judgment is reversed on appeal. Mr. Letter observed that the difficulty of recouping amounts paid pursuant to a judgment that is ultimately reversed on appeal is not unique to class suits. Professor Fitzpatrick responded that in a large class suit, the costs of administering the settlement can themselves run into the millions of dollars.

Mr. Letter also suggested that this topic seems to present questions of policy that seem more suitable for treatment by Congress than by the rulemaking process. Congress, he observed, would have the power to subpoena repeat objectors and to question them about their practices. Mr. Letter also noted that one could view this topic as a subset of the broader category of instances in which litigants settle nuisance suits because it makes more sense to settle them than to litigate them. Professor Lopatka responded that, even if addressing objector appeals would leave other nuisance litigation unaddressed, that should not be a reason to reject measures that could address objector appeals. As to quick pay provisions, Professor Lopatka stated that it is not yet clear whether they will catch on; some defendants are unwilling to front money to the class counsel before it is clear whether the settlement will be upheld in the event of an appeal. Mr. Letter asked whether a "partial quick pay" mechanism would provide a useful compromise – i.e., whether objectors would lose their leverage if the defendant paid class counsel a portion of their fee pending disposition of the appeal. Professor Lopatka responded that such a measure would reduce the size of the "tax" objectors can impose on class counsel, but would not eliminate it.

An attorney participant asked whether there exist any other rules that prohibit a party from settling a claim in exchange for money. Professor Fitzpatrick stated that he did not know of any. The attorney participant asked Professor Fitzpatrick to clarify whether the court of appeals would have to approve the settlement as well as the dismissal. If the parties can settle something without needing the court to review the settlement, the settlement could then have possible mootness consequences that would affect the question of dismissal.

Professor Fitzpatrick argued that the proposed Rule 42 amendment would yield a framework that the Clerk's Office could readily administer: If the movant filed the required certification, the appeal would be dismissed, and if the certification were not provided, the appeal would not be dismissed. An attorney participant suggested that an alternative approach could require court approval for the dismissal of an appeal and could direct the court, in reviewing a request for approval, to consider whether the appellant received anything of value in exchange for seeking to dismiss the appeal. Professor Fitzpatrick responded that the courts of appeals would likely be unwilling to scrutinize the arrangements that lead an objector to seek dismissal of an appeal. An appellate judge asked whether the task of reviewing the request to dismiss an appeal could be assigned to

the district judge. An attorney participant asked whether it would be useful to require an objector to certify that the appeal was taken in good faith. Professor Fitzpatrick expressed doubt that such a requirement would be effective in addressing abuses.

The Reporter noted that while Rule 23(e)(5) requires court approval for the withdrawal of an objection to a class action settlement, Rule 23(h)(2) does not include a similar provision requiring court approval for the withdrawal of an objection to an award of attorney fees. She asked whether any difference had arisen in practice between objections focused on settlements and objections focused on attorney fees. Professor Fitzpatrick responded that he had not perceived a difference. Ms. Leary pointed out that objectors typically object to both the settlement and the fee award.

An appellate judge member stated that he was concerned by the potential sweep of proposed solutions that had been discussed. He stated that it was important to avoid chilling appeals by good objectors. Professor Lopatka agreed that this is a key concern. The question, he suggested, is whether the district court can distinguish appeals that have merit from those that do not. He reported that district judges tend to think that they can spot professional objectors.

Judge Colloton thanked Professor Fitzpatrick and Professor Lopatka for their contributions to a very helpful discussion. He invited them to share any suggestions for the direction of future empirical research. Professor Fitzpatrick suggested that it could be useful to perform a confidential survey of class action lawyers and ask them about the size of any side payments they have made to objectors; one could perform a similar survey of the objectors' attorneys as well. The Reporter noted the Committee's debt to Ms. Leary for her research, which had been very labor-intensive due to the lack of ready methods for locating the relevant appeals.

8. Item Nos. 09-AP-D & 11-AP-F (response to Mohawk Industries)

Judge Colloton introduced these items, which arise from proposals concerning the possibility of amending the Rules – in the wake of *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009) – to provide for appellate review of attorney-client privilege rulings.

Judge Colloton observed that the Supreme Court had indicated, both in *Mohawk Industries* and in *Swint v. Chambers County Commission*, 514 U.S. 35 (1995), that the preferred method for determining whether interlocutory orders should be immediately appealable is the Rules Committee process, not further caselaw expansion of the collateral order doctrine. In 1990, Congress amended the Rules Enabling Act to add 28 U.S.C. § 2072(c), which authorizes the rulemakers to "define when a ruling of a district court is final for the purposes of appeal under section 1291." In 1992, Congress amended 28 U.S.C. § 1292 by adding Section 1292(e), which authorizes the rulemakers "to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d)."

Judge Colloton asked the Committee members for their views on whether it would make sense to tackle this general area. Should a project focus on appeals from attorney-client privilege rulings? On other areas where there are conflicts in the caselaw? Judge Colloton suggested that it would be useful to perform research concerning the status of the caselaw; a member agreed with this view. An appellate judge member asked about the Committee's prior discussions of this topic. The Reporter stated that the Committee had considered whether there were areas in addition to attorney-client privilege – for example, qualified immunity – where the law concerning interlocutory review might warrant clarification. But the Committee had decided to start by focusing on attorney-client privilege appeals and to consult the other Advisory Committees for their views. The project had not developed momentum in the other Advisory Committees, but the Evidence Rules Committee had stressed the need for consultation if the Appellate Rules Committee were to proceed in this area.

Professor Coquillette expressed concern about the possible scope of a research project on the law of interlocutory appeals, and suggested the importance of prioritizing the Reporter's tasks. An appellate judge member noted that changes in this area could alter the landscape of appeals. Another appellate judge member suggested consulting academics who have already been writing on this topic.

By consensus, the Committee retained this item on its agenda.

VII. New Business

A. Item No. 13-AP-A (FRAP 29(a) / government amici)

Judge Colloton invited the Reporter to introduce this item, which arises from a suggestion by Dr. Roger I. Roots that Rule 29(a) be amended "to require that *any* party seeking to file an *amicus curiae* brief must obtain leave of court or state that all parties have consented to the filing." Dr. Roots asserts that Rule 29(a)'s current exemptions for certain government amici improperly favor those government entities.

The Reporter noted that governmental amici have always been treated specially under Rule 29. The only change in Rule 29's list of exempt governmental filers came in 1998, with the addition of the District of Columbia. The 1968 Committee Note to Rule 29 does not explain why the Rule exempted governmental filers from the requirement of party consent or court leave. The Committee Note cited five local circuit rules and then stated that Rule 29 "follows the practice of a majority of circuits in requiring leave of court to file an amicus brief except under the circumstances stated therein. Compare Supreme Court Rule 42." Perhaps, the Reporter suggested, the exemption for governmental amici can be explained by considerations of separation of powers and federalism.

Mr. Letter observed that the federal Rules treat the government specially in a number of ways. The federal government makes more filings in federal court than any other litigant. It would be undesirable, he suggested, for the Rules to require the

government to move for leave to file. Not only do comity considerations apply, but also the quality of the government's briefing is high. In fact, the courts of appeals often request briefing from the United States. The DOJ, he noted, litigates on behalf of the people of the United States, and its filings in the courts of appeals require authorization from the Solicitor General.

A member moved to remove this item from the Committee's agenda. The United States, this member agreed, is different from non-governmental litigants both substantively and procedurally. It represents the people, and comity considerations support the exemption. An attorney participant agreed, stating that courts have good reasons to wish to hear from sovereigns as amici and that those sovereigns are not abusing the privilege afforded them by Rule 29(a). The motion was seconded and passed by voice vote without dissent.

B. Item No. 13-AP-B (amicus briefs on rehearing)

Judge Colloton invited Judge Chagares to introduce this item, which arises from a proposal by Roy T. Englert, Jr., that the Committee consider amending the Appellate Rules to address amicus filings with respect to petitions for rehearing and/or rehearing en banc. Judge Chagares stressed that the proposal would not require a court of appeals to permit such amicus filings, but rather it would govern procedural questions (such as length and deadlines) in a circuit chooses to permit them. The circuits, he noted, vary in their treatment of such questions. Adopting a rule that addresses the timing and length of amicus filings with respect to rehearing would foster predictability and uniformity. The courts of appeals review rehearing petitions relatively quickly; thus, Judge Chagares suggested, it is important that amicus filings not lengthen the schedule for filing papers. The amicus should coordinate with the petitioner. If a rule concerning these amicus filings were to follow the model set by Rule 29(d), then one would give the amicus half as much length as the petitioner – which would yield a length of seven and a half pages for the amicus filing.

An appellate judge member stated that it would be useful to provide clear rules on length and timing. Another appellate judge noted that, during past discussions, some had suggested that adopting rules on these topics (even rules that merely addressed timing and length) would encourage amicus filings at the rehearing stage. Another appellate judge member reported that, in the Federal Circuit, there is a slightly greater expectation that a rehearing petition might be granted, given the Federal Circuit's unique role in shaping patent law. The judges are interested, he said, in knowing whether the questions at issue in the appeal have broad importance. Amicus filings can be informative on this point, both because the identity of the amicus can shed light on the perceived importance of the issue and because amici can make points that the petitioner may be unable to include in the petition (due to space constraints and the need to cover technical points). A seven-and-a-half page limit for amicus filings, this member suggested, would often be too short. But, he noted, that does not necessarily mean that the issue must be addressed in the Appellate Rules.

Judge Chagares asked Mr. Gans what the Eighth Circuit's practice is. Mr. Gans responded that his office frequently receives questions on these issues and is unable to provide clear guidance. He observed that if a rule allowed a time lag between the petition and the amicus filing, this might be inefficient from the judges' perspective because it might require them to take two looks at the briefing. An appellate judge noted that such a time lag could also interfere with the timing of a response to the petition (if the court orders a response). An attorney member reported that the Fifth Circuit lacks a local rule on point; this produces uncertainty on the lawyers' part and leads them to take the most conservative approach with respect to length and timing. An appellate judge asked whether members would favor requiring the amicus to file at the same time as the party whose position the amicus supports. The attorney member responded that such an approach would not be ideal from the amicus's perspective but that he would not oppose it. Mr. Gans observed that the court can extend the time to file a petition for rehearing or rehearing en banc. Another member stated that amicus filings with respect to rehearing can add value; thus, he suggested, it would be beneficial to adopt rules on this topic, and such rules would be unlikely to cause a flood of amicus filings. This member agreed that seven and a half pages would be too short a limit; 15 pages would be preferable.

Mr. Letter agreed that certainty on these questions would be valuable. But, he suggested, circuit practices may vary widely, such that local rules would make more sense than a national rule. Some circuits, he noted, grant rehearing en banc much more frequently than others. The United States sometimes files amicus briefs with respect to rehearing. To avoid redundancy between the party's filing and the amicus filing, he suggested, it would be better to have a time lag of two to three days rather than requiring the amicus to file on the same day as the party it supports. Amici, he observed, do not always coordinate their filings with the party whose position they support. Mr. Letter suggested a length limit of eight or ten pages rather than fifteen, on the ground that judges might find longer filings burdensome.

An attorney participant stated that, in recent years, amici have become more likely to coordinate their efforts with those of the party whom they support – especially in briefing before the Supreme Court. Thus, he suggested, it should not be problematic to require amici to meet the same deadline as the party whom they support. He stated that seven pages seemed like an adequate length for amicus filings.

An appellate judge noted that the Ninth Circuit has a local rule providing that the amicus must file its brief no later than ten days after the petition. There are at least a couple of circuits, he suggested, that would not like such a rule. The Reporter recalled that – during the Committee's prior discussions of this general topic – Judge Sutton had informally consulted with judges in several circuits, focusing on circuits that did not have local rules on point. Customarily, Judge Colloton observed, the Rules Committees are wary of encouraging the adoption of local rules. Professor Coquillette agreed that the rulemakers have a policy against doing so. A member pointed out that amicus filings with respect to rehearing may be particularly key where no one anticipated the panel's ruling.

Mr. Gans noted that the Eleventh Circuit has a local rule that sets a length limit of fifteen pages and a time limit of ten days after the filing of the petition. An appellate judge member observed that when amici are briefing issues in the Supreme Court, it is already evident what the questions presented are; by contrast, at the stage of rehearing in the court of appeals, amici may be unsure of the precise nature of the questions and it may not be easy for them to coordinate with the party whose position they are supporting. Mr. Letter noted that, in criminal appeals, Rule 40 sets a presumptive 14-day deadline for rehearing petitions. It may be difficult, he suggested, for amici to prepare their filings within that short time period.

Professor Coquillette reminded the Committee that an Appellate Rule will abrogate inconsistent local rules. The Judicial Conference has delegated to the Standing Committee the task of reviewing local rules for consistency with the national Rules. On the occasions when the Standing Committee points out local rules that are inconsistent with a national Rule, controversy results. Mr. Letter asked whether it would be useful for Judge Colloton to poll the Chief Judges of each Circuit to ask whether they favor adoption of a national Rule. Judge Chagares added that it might be useful to poll the Circuit Clerks concerning their local practices.

Judge Colloton proposed that further information be gathered in advance of the Committee's next meeting.

C. Item No. 13-AP-C (*Chafin v. Chafin* / ICARA appeals)

Judge Colloton invited the Reporter to introduce this item, which arises from the suggestion by Justice Ginsburg (joined by Justices Scalia and Breyer), in *Chafin v. Chafin*, 133 S. Ct. 1017 (2013), that the Civil and Appellate Rules Committees consider adopting uniform rules to expedite proceedings under the Hague Convention on the Civil Aspects of International Child Abduction ("Convention").[3] Congress has implemented the Convention by enacting the International Child Abduction Remedies Act ("ICARA"). The Convention requires U.S. courts to order the return of children to their country of habitual residence under specified circumstances. In *Chafin*, the Court held that a child's return to her country of habitual residence did not render moot an appeal from the order directing that return. The Court in *Chafin* stressed the need for speedy disposition of ICARA proceedings, and cited an FJC study which noted that courts have already followed a practice of expediting such proceedings. The cases highlighted in the FJC study were cases in which the court expedited the disposition of a particular appeal; none of those opinions cited a local circuit rule requiring speedy processing of this particular category of appeal, and a quick search by the Reporter did not disclose any such provisions. Rule 2 authorizes a court of appeals to "suspend any provision of [the Appellate Rules] in a particular case and order proceedings as it directs," in order, inter alia, "to expedite its decision." Thus, the courts of appeals currently possess authority to expedite ICARA appeals. The question, the Reporter suggested, is whether to mandate deadlines for such appeals or to leave the matter to the courts' discretion.

[3] *See* Chafin v. Chafin, 133 S. Ct. 1017, 1029 n.3 (2013) (Ginsburg, J., joined by Scalia & Breyer, JJ., concurring).

Professor Coquillette expressed appreciation for the Justices' willingness to refer matters to the Rules Committees. However, he suggested that there are reasons for the Rules Committees to hesitate before attempting to implement specific pieces of legislation. Judge Sutton had discussed this matter with the Civil Rules Advisory Committee, which had decided to take no action. Judge Sutton was contemplating an informal communication with members of the Supreme Court about the matter, but would welcome the Appellate Rules Committee's views on it.

Mr. Letter reported that the United States has filed amicus briefs in a fair number of ICARA cases. To his surprise, the parties in those cases often failed to move to expedite the proceedings. Perhaps, he suggested, the decision in *Chafin* will produce an improvement in the processing of such cases by encouraging the parties to make more motions to expedite. Article 11 of the Convention, he noted, sets a goal of six weeks for the court to reach a decision. Mr. Letter also stated that it is important to make a distinction between the need to expedite the proceedings and the standards for obtaining a stay; the usual standards should govern the question of the stay. A district judge member reported that, in his experience, the parties usually move quickly to commence the proceeding, but that once the proceeding has commenced, there is often an informal stay in order to give the judge time to rule. Mr. Letter noted that Article 12 of the Convention directs the relevant authority, under specified circumstances, to "order the return of the child forthwith."

A member asked whether there are any Rules that set time limits for judicial action. Mr. Robinson said that he was not aware of any; Professor Coquillette agreed. Judge Colloton asked whether there are any data on how long ICARA appeals take. Mr. Letter stated that his impression is that sometimes they can take a surprisingly long time. Ms. Leary observed that it was unlikely that there would be any code that would enable researchers to readily identify ICARA appeals.

An appellate judge reported that, in his circuit, the clerk alerts the judges if an ICARA appeal is filed, and the court then hears that appeal at the next argument panel. Mr. Gans reported that ICARA cases tend to move very quickly in the district court. Ms. Sellers stated that the Judicial Conference Committee on Federal-State Jurisdiction was monitoring the Rules Committees' discussions of ICARA matters so as to be able to update the Committee's state-court representatives concerning the federal courts' approach. Mr. Robinson reported that Judge Fogel (the Director of the FJC) is aware of the issue raised by the *Chafin* Court. Mr. Robinson suggested the possibility of asking the FJC to raise judicial awareness of the need to expedite ICARA proceedings. Judge Colloton suggested that this was an issue on which judicial education would be useful.

An attorney participant asked whether the Committees ever produce commentary without amending a Rule. The closest example that the Reporter could think of was a 2000 pamphlet by Professor Capra, the Reporter for the Evidence Rules Committee, concerning caselaw that had diverged from the text of the Evidence Rules. Professor

Coquillette noted that in that instance, Professor Capra authored the pamphlet and the FJC published it.

A motion was made to remove this item from the Committee's agenda and to notify the Chair of the Standing Committee that the advisory committee concurs in the idea of coordinating through the Standing Committee a response to Members of the Court. The motion was seconded and passed by voice vote without dissent.

VIII. Adjournment

The Appellate Rules Committee adjourned at noon on April 23, 2013.

Respectfully submitted,

Catherine T. Struve
Reporter

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 9-10, 2014
Phoenix, Arizona
Draft Minutes as of March 13, 2014

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ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Phoenix, Arizona, on Thursday and Friday, January 9 and 10, 2014. The following members were present:

Judge Jeffrey S. Sutton, Chair
Dean C. Colson, Esquire
Roy T. Englert, Jr., Esquire
Gregory G. Garre, Esquire
Judge Neil M. Gorsuch
Judge Susan P. Graber
Chief Justice Wallace B. Jefferson
Dean David F. Levi
Judge Patrick J. Schiltz
Judge Amy J. St. Eve
Larry D. Thompson, Esquire
Judge Richard C. Wesley
Judge Jack Zouhary

Deputy Attorney General James M. Cole was unable to attend. Elizabeth J. Shapiro, Esq., represented the Department of Justice.

Professor Geoffrey C. Hazard, Jr., consultant to the committee, and Professor R. Joseph Kimble, the committee's style consultant, participated. Judge Jeremy D. Fogel, Director of the Federal Judicial Center, also participated.

Professor Daniel R. Coquillette, the committee's reporter, chaired a panel discussion on the political and professional context of rulemaking with the following panelists: Judge Lee H. Rosenthal, former chair of the committee; Judge Diane P. Wood, former member of the committee; Judge Marilyn L. Huff, former member of the committee; Judge Anthony J. Scirica (by telephone), former chair of the committee; Peter G. McCabe, Esq., former secretary to the committee.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Jonathan C. Rose	The committee's secretary and Rules Committee Officer
Benjamin J. Robinson	Deputy Rules Officer
Julie Wilson	Rules Office Attorney
Andrea L. Kuperman	Chief Counsel to the Rules Committees
Tim Reagan	Senior Research Associate, Federal Judicial Center
Frances F. Skillman	Rules Office Paralegal Specialist
Toni Loftin	Rules Office Administrative Specialist

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Steven M. Colloton, Chair
Professor Catherine T. Struve, Reporter (by telephone)
Advisory Committee on Bankruptcy Rules —
Judge Eugene R. Wedoff, Chair
Professor S. Elizabeth Gibson, Reporter (by telephone)
Professor Troy A. McKenzie, Associate Reporter
Advisory Committee on Civil Rules —
Judge David G. Campbell, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Associate Reporter
Advisory Committee on Criminal Rules —
Judge Reena Raggi, Chair

Professor Sara Sun Beale, Reporter (by telephone)
Professor Nancy J. King, Associate Reporter (by telephone)
Advisory Committee on Evidence Rules —
Judge Sidney A. Fitzwater, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Sutton opened the meeting by welcoming everyone and thanking the Rules Office staff for arranging the logistics of the meeting, including a very economical rate for the hotel.

Committee Membership Changes

Judge Sutton announced that the terms of Judges Huff and Wood had ended on October 1, 2013. He thanked them for their distinguished service on the committee, described their many contributions to the committee's work, and presented each with a plaque. Judge Sutton also announced that Mr. McCabe, who had served as secretary to the committee for 21 years, had recently retired from the Administrative Office. Judge Sutton noted that Mr. McCabe had been the longest serving employee of the Administrative Office and had dedicated 49 years to government service. Judge Sutton thanked Mr. McCabe for his extraordinary service to the committee and the courts. He also noted that the committee would be losing three great musicians, as Judges Huff and Wood and Mr. McCabe were all talented musicians.

Judge Sutton introduced the new committee members, Judge Graber and Judge St. Eve, and he summarized their impressive legal backgrounds.

Judge Sutton noted that the representatives from the Civil Rules Committee were at the courthouse holding a hearing on the proposals that are currently out for public comment, but that they would be joining the second day of the meeting.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee, without objection and by voice vote, approved the minutes of the last meeting, held on June 3–4, 2013.

REPORT OF THE ADMINISTRATIVE OFFICE

Judge Sutton reported that the rules committees had been engaged with Congress recently. He said that last June Congress had introduced legislation to deal with patent assertion entities. He said the first draft from the House was aggressive in attempting to

preempt the Rules Enabling Act process. He reported that he and Judge Campbell had met several times with congressional staffers, that the original draft legislation had been modified, that there were several bills under consideration, and that discussions are continuing.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Colloton and Professor Struve presented the report of the advisory committee, as set out in Judge Colloton's memorandum and attachments of December 16, 2013 (Agenda Item 3). Judge Colloton reported that the advisory committee's fall meeting had been cancelled due to the lapse in appropriations during the government shutdown and that it had no action items to present.

Informational Items

Judge Colloton highlighted a few items that the advisory committee currently has on its agenda.

FED. R. APP. P. 4(a)(4)

Judge Colloton reported that 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), which provides that the "timely" filing of certain motions tolls the time to appeal. The advisory committee is considering whether and how to amend the rule to answer this question. Civil Rule 6(b) provides that a district court may not extend the time for filing motions under Civil Rules 50, 52, or 59. Nonetheless, district courts sometimes extend the time to file such motions even though Civil Rule 6(b) does not allow it. In other instances, a party files a motion late, the opposing party does not object, and the district court rules on it on the merits. Thus, the question has arisen whether a motion is "timely" under Appellate Rule 4(a)(4) if it is not within the time set in the Civil Rules but is nonetheless considered on the merits by the district court either because of an erroneous extension or the failure of the opposing party to object.

The Sixth Circuit has held that where the non-movant forfeits its objection to the motion's untimeliness, the motion is timely for purposes of Rule 4(a)(4). However, the Third, Seventh, Ninth, and Eleventh Circuits have held to the contrary. The courts holding that such motions are not timely reason that Rule 4(a)(4) was designed to provide a uniform deadline for the named motions in order to set a definite point in time when litigation would come to an end. Making the time for filing these motions depend on developments in the district court introduces a disparity that Rule 4(a)(4) was designed to eliminate. Judge Colloton noted that the Seventh Circuit has commented that the Sixth

Circuit's approach was uncomfortably close to the "unique circumstances" doctrine that was overruled in *Bowles v. Russell*, 551 U.S. 205 (2007). He added that the advisory committee will address these issues at its spring meeting.

A member stated that he supported the minority view that would forgive a late filing if it was done in reliance on a court order. Judge Sutton questioned whether doing so would overrule *Bowles*. The member responded that it would not; the rules could provide that if the deadline is set by rule and the judge purports to extend it in error, then a litigant who has relied on the erroneous extension is excused from the consequences of late filing. Another member noted it is different if the deadline is set by statute.

Another member suggested a wording change to one of the tentative sketches of possible amendments to address this issue, asking if there was a more sensitive way to reference the limits on judicial authority in the phrase: "a court order that exceeds the court's authority (if any) to extend the deadline . . . ." The reporter responded that she understood the concern, but she did not want the rule language to imply that a court had authority to extend deadlines outside the time allowed in the rules, as judges exceeding their authority in this regard is the root of the problem. She said that all suggestions on wording are welcome. Another member suggested instead using language along the lines of: "a court order that extends the deadline beyond that otherwise permitted by the rules . . . ."

FED. R. APP. P. 4(C)

Judge Colloton reported that the advisory committee has also begun a project to examine Rule 4(c)(1)'s inmate-filing provision for notices of appeal. The advisory committee is considering amendments to the rule that might address, among other things, 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 project grew out of a 2007 suggestion by Judge Diane Wood, suggesting that the committee consider clarifying whether Rule 4(c)(1)'s inmate-filing rule requires prepayment of postage. Judge Colloton reported that there is ambiguity in the case law on whether prepayment of postage is required; whether inmates must file a declaration; and the meaning of the sentence in the rule that says that if a legal mail system exists, the inmate must use the system. He said that a subcommittee is working on these and related issues.

LENGTH LIMITS

Judge Colloton reported that the Appellate Rules have some length limits set out in type-volume terms and some set out in pages. He said that the advisory committee is considering whether all the limits should be measured by type-volume given the

ubiquitous use of computers, and if so, the best means of appropriately converting current limits that are set in pages to type-volume limits. He noted that when the rules governing the length of briefs were changed to convert to type-volume limits, the rules set a type-volume limit that approximated the conversion from a page limit and provided a shorter safe harbor set in pages. The advisory committee is considering the option of taking a similar approach for other limits that are currently set in pages.

Judge Colloton stated that a safe harbor set in pages must be shorter than the type-volume limit to prevent lawyers from using the safe harbor to get around the type-volume limit, but the shorter page limit can create a hardship for pro se litigants. As a result, another option the advisory committee is considering would differentiate between papers prepared on a computer and papers prepared without the aid of a computer. Judge Colloton noted that it was unlikely that lawyers would switch to using typewriters in order to get around the type-volume limits. Another issue is that there is evidence that when the brief page limit was converted from 50 pages to a type-volume limit of 14,000 words, it resulted in an increase in the permitted length of a brief. The advisory committee is considering whether to adjust that limit to 12,500 or 13,000 words as part of the length-limit project.

AMICUS BRIEFS ON REHEARING

Judge Colloton reported that the advisory committee is also considering the possibility of addressing amicus filings in connection with petitions for panel rehearing and/or rehearing en banc. He stated that the advisory committee had heard that lawyers are frustrated that there is no rule with respect to rehearing that sets out when an amicus brief must be filed or how long it must be. The committee is considering whether there should be a national rule on these topics. Judge Colloton noted that some circuits have no local rule on these matters. However, there is a concern that any rule that addresses amicus briefs on petitions for rehearing might stimulate more such amicus briefs, which some courts do not desire. Judge Colloton noted that some courts even have rules that generally prohibit amicus filings on rehearing, or that only allow them with leave of court. 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 judge member noted that amicus briefs are usually helpful on rehearing. She stated that sometimes there are sleeper issues that the appellate court may not be aware of and that she favored explicitly clarifying that such amicus briefs are permissible. Judge Colloton noted that the suggestion, if implemented, would not require allowing amicus briefs on rehearing, but instead would set out the procedure to be followed if the circuit allowed such amicus briefs.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Wedoff and Professors Gibson and McKenzie presented the report of the advisory committee, as set out in Judge Wedoff's memorandum and attachments of December 12, 2013 (Agenda Item 4).

Amendment for Final Approval

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

Judge Wedoff reported that the advisory committee was seeking approval to make a technical and conforming amendment to Rule 1007(a). Subdivisions (a)(1) and (a)(2) of Rule 1007 require the filing at the outset of a case of the names and addresses of all entities included on "Schedules D, E, F, G, and H." The restyled schedules for individual cases that were published for comment in August 2013 use slightly different designations. Under the new numbering and lettering protocol of the proposed forms, the schedules referred to in Rule 1007(a)(1) and (a)(2) will become Official Forms 106 D, E/F, G, and H—reflecting a combination of what had been separate Schedules E and F into a single Schedule E/F. Judge Wedoff stated that in order to make Rule 1007(a) consistent with the new form designations, the advisory committee was proposing a conforming amendment to subdivisions (a)(1) and (a)(2) of that rule. Judge Wedoff reported that the revised schedules would not go into effect until December 1, 2015, so he asked that the conforming rule change be held back to go into effect on the same date.

The committee, without objection and by voice vote, approved the proposed amendment to Rule 1007(a) for transmission to the Judicial Conference for final approval without publication.

Informational Items

CHAPTER 13 PLAN FORM

Professor McKenzie reported on comments received on the published proposed chapter 13 plan form and related rule amendments. The advisory committee had drafted an official form for plans in chapter 13 cases and had proposed related amendments to nine of the Bankruptcy Rules. Professor McKenzie reported that the form and rule amendments were published in August 2013 and have drawn over 30 comments so far. He said that very few comments expressed opposition to the form, but many were long and detailed. Professor McKenzie reported that since so many comments had already come in, the working group had already begun categorizing and reviewing the comments, although of course its work could not be completed until the comment period closed in February and all the comments were received.

Professor McKenzie said that one common theme that had emerged was what to do when the form provides a number of choices to the debtor even though some choices may not be available in the debtor's district. The advisory committee did not take a position on the differences in these choices between districts, but one concern is that providing the choice of various options on the form might indicate that the committee was stating that both choices are available to a debtor. Professor McKenzie noted that the concern is that this might lead to confusion and increased litigation. Judge Wedoff provided an example. He said one open question is, if the debtor wants to pay a mortgage, whether he can pay the mortgagee directly or instead must pay the trustee. If the payment is to the trustee, there is a fee assessed on the payment, meaning that more has to be paid on the mortgage claim. Some jurisdictions require it to be paid through the trustee, while others allow the debtor to be the payment manager. Judge Wedoff noted that providing both options on the form might imply that both options are available in all jurisdictions. Professor McKenzie added that one way to respond to the comments would be to include a warning on the form that the provision of an option does not mean it is available in the debtor's district. The working group will report to the advisory committee at the spring meeting.

A participant asked whether the advisory committee had gotten feedback that the form will be confusing to pro se debtors. Professor McKenzie responded that so far there had only been a couple of comments on how the form might impact pro se litigants. One comment had said it might attract additional pro se litigants, and the other had said it would be confusing to pro se litigants. The participant asked how the advisory committee could get more input from pro se litigants, since such litigants do not often comment on published proposals. Professor McKenzie stated that the advisory committee hopes to get comments from consumer bankruptcy groups, who often think about the nature of pro se litigation, and he noted that it is very difficult for pro se litigants to get through chapter 13 bankruptcies successfully. He said that one thing the working group is considering is more prominent language about that difficulty. Judge Wedoff noted that providing a plan form might help pro se litigants because it would set out what needs to be done and might allow some debtors to do it on their own without an attorney.

Judge Wedoff noted that as part of its Forms Modernization Project, the advisory committee had been looking closely at whether the forms can be used by pro se debtors. He said one of the goals of that project is to make the forms more user-friendly. Another participant noted that law students use the forms when they represent clients in bankruptcy clinics, and he suggested that the advisors for such clinics might be a good source of information on how the forms might be used by law students, which can be analogized to the pro se context. Judge Wedoff noted that the advisory committee, with the help of the Federal Judicial Center, had been vetting the proposed forms with a group of law students.

ELECTRONIC SIGNATURES

Judge Wedoff reported on the comments received on proposed amendments to Rule 5005 on filing and transmittal of papers, which is designed to address the question of how to deal with electronic signatures by someone other than the attorney who is filing a document in a bankruptcy case. He noted that there is no problem with signatures of attorneys who file documents because they have to have a login and password, which constitutes their signature. To date, the rules have not addressed the signatures of nonfilers, which in bankruptcy is primarily the debtor. Judge Wedoff noted that the typical practice has been for local rules to require the filing attorney to retain the original document signed by the nonfiler for a period of time, usually five years. Attorneys have pointed out that this becomes a problem in terms of storage space. Some bankruptcy firms may generate thousands of case filings a year, making the volume of original documents to retain substantial. In addition, some lawyers have reported that they are uncomfortable retaining documents that might later be used to prosecute a crime against their clients. Further, the prosecutor in a future criminal prosecution will be relying on the attorney's good faith in retaining documents with the original signatures.

The proposal published for comment provides that, instead of requiring the retention of a "wet" signed copy, the original signature could be scanned into a computer readable document and the scanned signature would be usable in lieu of the original for all purposes. Judge Wedoff noted that the published proposal asked for comment on two alternatives. One would have a notary certify that it is the debtor signing and that it is the complete document. The other would deem filing by a registered person equivalent to the person's certification that the scanned signature was part of the original document.

Professor Gibson said that only four comments had been received so far. One expressed confusion about when original documents must be retained under the proposed rule. Another erroneously read the proposal to require the entire document, not just the signature page, to be scanned, which would require much more electronic storage space. She said that two recent comments support the proposed amendment and urge adoption without requiring a notary's certification.

The representative for the Department of Justice noted that the Evidence Rules Committee had been planning to host a symposium on electronic evidence this past fall, which would have included a discussion of this issue of electronic signatures, but that the symposium was cancelled due to the government shutdown. She noted that the scheduling of the symposium had nonetheless prompted the Department to come to some tentative conclusions on this issue. While the Department will be submitting formal comments, the representative previewed the initial views of the Department. She reported that there was resistence in the Department to removing the retention of original signatures. She noted that there was a great amount of work done within the Department

in examining this issue. There was a working group that cut across disciplines and there was a survey conducted of U.S. Attorney's offices. She said that prosecutors overwhelmingly thought there was no problem with the current system. They also reported that taking away the requirement of retaining originals would lead to more cases where signatures were repudiated. The vast majority of survey respondents thought the proposed rule would make it much harder to prove authenticity in situations where the signatures were repudiated. She noted that the FBI has a policy that it will not provide definitive testimony to authenticate a signature without the original document. With an electronic signature, the FBI cannot determine certain characteristics that they would look at in comparing signatures, like pressure points and whether there were tremors. Without having an FBI expert, prosecutors would have to resort to circumstantial evidence to prove authenticity, which would often involve measures such as getting warrants to search computers to show that a document was generated from that computer, conducting forensic analysis, tracing IP addresses, and similar actions that would add burden and expense.

The Department's representative explained that the Department also looked at the tax experience because Evidence Rule 902(10) makes certain types of documents self-authenticating when a statute provides for prima facie presumption of authenticity. The advisory committee note states that the tax statute is one example. However, in looking into the possibility of creating a statutory presumption, the Department found that it would have to be either a generic statute that addressed this subject holistically or a bankruptcy-specific statute. The problem with a bankruptcy-specific statute, she said, was that the Department had found at least 101 different crimes that require the authenticity of the signature to be proven as an element of the crime. If a bankruptcy-specific statute were implemented, she said, there was the possibility of needing to do seriatim statutes because bankruptcy might just be the first area to start doing everything electronically. She said eventually there might need to be dozens of statutes. Yet, the alternative of crafting a generic statute now to address the subject holistically created the concern that it would have unintended consequences if all the possibly affected criminal statutes were not first examined. Thus, she noted, it was premature to start trying to get a statute without knowing all of the ramifications. She also stated that survey respondents felt the tax statute was somewhat unique in that taxpayers are required by law to sign a return and if they repudiate their signature on the return that means they have violated the law by not filing a tax return if there is no other valid tax return with their signature. She noted that Judge Wedoff has explained that there are some parallels in bankruptcy.

The Department participant also stated that the working group did not find persuasive the concerns that have been raised about why the rule should be changed. She stated that publicly-filed documents are not privileged, so an attorney should not be concerned about being called upon to produce a client's documents. Further, professional responsibility rules prohibit an attorney from assisting with a crime or fraud. She said

that while storage can be burdensome, there are retention periods, so there should be recycling of the documents and not an ever-increasing amount of documents needing to be retained. She noted that one possibility raised by Judge Wedoff was that perhaps the whole document could be scanned and saved electronically and only the signature page would need to be kept in its original format, and she noted that this option was something to think about. Finally, the working group was not persuaded by the rationale that there are varying retention periods across the country. The group felt that if that was a concern, then it could be fixed simply by creating a uniform retention period. The prosecutors thought that the varying periods actually hurt them the most because the retention periods are often shorter than the statute of limitations for the crimes being prosecuted. In sum, she said, the Department feels that it is premature to remove the retention requirements. There was a feeling in the Department, she said, that technology is continuing to move forward. It might be that in the near future things like thumb prints and biometrics will serve as signatures, which would solve the problem of authenticating without the need to store lots of documents. The participant stated that the Department would have presented this summary of its views in greater detail at the symposium, and that the Department is committed to working with the committee on this issue.

Judge Wedoff said that the advisory committee will await the formal comment from the Department and expressed gratitude for hearing their initial views in the interim. He noted that the prosecuting community has not had the experience of having to use scanned signatures in lieu of having an FBI expert testify to the validity of a wet signature. Whether scanned signatures would present a problem in persuading the trier of fact is not yet clear. Bankruptcy presents a special circumstance, he said. Even without the change to Rule 5005, he said, every document filed by a debtor's attorney is filed under Civil Rule 11, which requires certifying that the filing is authentic. Rule 5005 would only underline the Rule 11 requirement that the signature is authentic. So, the debtor who asserts that a signature on a filed document is not his own will have to overcome the fact that the signature appears to be his own and will have to assert that his attorney lied when the document was filed. It may be that it is not that difficult to persuade a trier of fact of the legitimacy of a debtor's signature on a bankruptcy document. He also noted that, in this regard, there may be some source of empirical evidence as to the difficulty of not having wet signatures because there is at least one jurisdiction in the country—Chicago—that does not have a requirement for retaining wet signatures for debtors' filings for several years. Any prosecutions that have taken place in that district would have taken place on the basis of the debtor's scanned copy. He stated that there are not a lot of these types of prosecutions that come up and that when they do come up, debtors do not contest the legitimacy of their signature. He noted that he had encountered situations where a United States Trustee had filed a motion to deny the debtor a discharge because the debtor supplied deliberately false information on the debtor's schedules. The debtors defend against those arguments not on the basis that they did not sign the schedules, but by arguing things like they told their attorney about the

matter at issue and the attorney did not put it in the schedule or they did not realize it was required to be put on the schedule. He stated that he had never encountered a case where the debtor denied his own signature. Judge Wedoff reported that the Department of Justice representative had agreed to look into the Department's survey results that had come from Chicago.

A member questioned whether the concern was with ensuring the integrity of the judicial process or collateral consequences and enabling future prosecutions. Judge Wedoff responded that the advisory committee's initial approach was designed to ensure the integrity of the judicial process. We want to make sure, he said, that the documents being filed are legitimately signed by the debtor. The informal feedback from the Department has to do with collateral consequences, and the concern is the potential difficulty in proving malfeasance by the debtor. The member responded that a similar concern may be true in many areas of the law and he wondered whether the rules committees' focus ought to be on the judicial process, not necessarily to make it easier or harder for the Department of Justice to prosecute crimes years later.

Judge Sutton emphasized that this is just now out for publication and the advisory committee is awaiting the formal response from the Department. He asked whether the rescheduled Evidence Rules technology symposium will include this issue. Professor Capra responded that it would not because the original idea had been to get ahead of the public comment and to get the Department's views on this issue, which has already been accomplished. While others were going to participate, they now had the ability to comment during the public comment process, which would be over by the time a new symposium could be scheduled. Professor Capra noted that one thing that came up in putting the original symposium together is that the issue is not forgery, but that the true signature might be improperly attached to the document. He said that is the issue that concerned the CM/ECF Subcommittee—someone could just scan a signature and put it on any document. Judge Wedoff said that this is why the two alternative means of assuring that the signature was authentic and was attached to the proper document were published for public comment. The Department's representative noted that the Department did not think that the option of requiring a notary's signature was a good one.

Judge Wedoff noted that it might be that bankruptcy could serve as an experiment for testing this. There are extra protections in bankruptcy, he said, like the attorney certification, that would not necessarily exist in other areas. He said that the advisory committee would have a better idea of what to do next after the comment period ends. The Department of Justice's representative noted that as a matter of evidence, the attorney's certification could not be introduced because it would be hearsay, so there would still be the need for a witness to testify to the person's signature, which might lead to calling lawyers to testify.

A member noted that the Department's concerns were about collateral prosecutions years down the road, and that he was not sure the judiciary should be too concerned about that. He said the requirements to authenticate the signature might impose a burden in current proceedings for the benefit of possible later collateral proceedings. He added that the advisory committee's concerns should be that this document in this litigation is what it purports to be. A certification by the attorney, as an officer of the court, should normally be sufficient for that purpose, he said. He said he was open to the possibility of the need for further assurances, but that the question should be focused on assuring that the document is authentic for the current litigation, not on assuring its authenticity for use in possible later collateral proceedings.

Professor Coquillette commented that the rules committees have a goal of transsubstantive rulemaking, but bankruptcy is really different in this area because of the factors mentioned by Judge Wedoff, such as attorney certification.

A member asked whether the advisory committee is studying what is going on in Chicago, where there is no requirement to retain wet signatures. Judge Wedoff reported that the Department of Justice had done a survey and was going to see if it could pull out data on prosecutions in Chicago. Judge Wedoff said that he would talk to the local United States Trustee's office to find out their experience. He noted that he is not aware of any criminal prosecutions for bankruptcy fraud in Chicago that raised a question of validity of the debtor's signature. The number of prosecutions for bankruptcy fraud is very small to begin with, he said, and then it would be a very small subset of that small subset that would involve the validity of the debtor's signature. So, he said, there would not be a huge amount of empirical data to gather on this.

Judge Sutton thanked Judge Wedoff for the summary of the issues and thanked the Department's representative for previewing the results of the Department's work on this issue.

FORMS MODERNIZATION PROJECT

Judge Wedoff provided an update on the advisory committee's Forms Modernization Project, a multi-year project to revise many of the official bankruptcy forms. The work began in 2008 and is being carried out by an ad hoc group composed of members of the advisory committee's subcommittee on forms, working with representatives of other relevant Judicial Conference committees. The goals of the project are to improve the official bankruptcy forms by providing a uniform format and using non-legal terminology, and to make the forms more accessible for data collection and reporting. The advisory committee decided to implement the modernized forms in stages in order to allow for fuller testing of the technological features and to facilitate a smoother transition. Judge Wedoff said that the first two phases of the project were

nearly complete: a small number of the modernized forms became effective on December 1, 2013, and the balance of the forms used by individual debtors is currently out for comment. Their effective date will be delayed until December 1, 2015, to coincide with the effective date of the non-individual forms. Judge Wedoff said that, surprisingly, not many comments had been received yet on the individual forms out for public comment. He said the comment period was not yet over, but that so far the revised forms seem to have been met with general acceptance.

The final batch will be non-individual forms, which were separated from individual forms because they ask for different information in many situations, and which would be expected to become effective on December 1, 2015. Judge Wedoff noted that people filling out non-individual forms are likely to have access to a more sophisticated legal understanding of the bankruptcy system. Non-individuals have to be represented by an attorney, and are usually associated with corporations or other entities that are likely to have a better understanding of the information called for on the forms.

Judge Wedoff said the agenda materials provided an example of a non-individual form to show the differences from the individual form. The non-individual form is shorter and uses more technical accounting language than the individual form, but not legalese. He said that this is a preview of what the advisory committee will likely be presenting for approval for publication at the Spring 2014 Standing Committee meeting. When this last batch of forms is approved, he said, the advisory committee will be finished with the complete package of form changes.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Campbell and Professors Cooper and Marcus presented the report of the advisory committee, as set forth in Judge Campbell's memorandum and attachments of December 6, 2013 (Agenda Item 9).

Amendments for Publication

FED. R. CIV. P. 82

Professor Cooper reported that the advisory committee sought approval to publish at an appropriate time changes to Rule 82 on venue for admiralty or maritime claims to reflect changes Congress had made to the venue statutes. It has long been understood that the general venue statutes do not apply to actions in which the district court exercises admiralty or maritime jurisdiction, except that the transfer provisions do apply. This proposition could become ambiguous when a case either could be brought in the admiralty or maritime jurisdiction or could be brought as an action at law under the "saving to suitors" clause. Rule 82 has addressed this problem by invoking Rule 9(h) to ensure that the Civil Rules do not appear to modify the venue rules for admiralty or

maritime actions. It provides that an admiralty or maritime claim under Rule 9(h) is not a civil action for purposes of 28 U.S.C. §§ 1391–1392. Rule 9(h) provides that an action cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for purposes of Rule 82. It further provides that if a claim for relief is within the admiralty or maritime jurisdiction but also is within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim.

Professor Cooper reported that legislation had added a new § 1390 to the venue statutes and repealed the former § 1392. The reference to § 1392 in current Rule 82 clearly needs to be deleted as a technical amendment, he said. The advisory committee also thought it was appropriate to add a reference to § 1390, but the reason was a little more complicated.

Professor Cooper explained that new § 1390(b) provides that the whole chapter on venue, apart from the transfer provisions, does not apply in a civil action when the district court exercises jurisdiction conferred by § 1333. Section 1333 provides jurisdiction for admiralty and maritime cases, "saving to suitors in all cases all other remedies to which they are otherwise entitled." By referring to § 1333, § 1390(b) removes application of the general venue statutes for cases that can be brought only in the admiralty or maritime jurisdiction and for cases that might have been brought in some other grant of subject-matter jurisdiction but that have been designated as admiralty or maritime claims under Rule 9(h). Since the general venue provisions do not apply when the court is exercising admiralty or maritime jurisdiction, it seems wise to add § 1390 to Rule 82. Doing so would make claims designated as admiralty or maritime claims under Rule 9(h) exempt from the general venue provisions just as those that get admiralty or maritime jurisdiction under § 1333 are so exempt. Professor Cooper noted that the advisory committee had sent the proposed revision to the Maritime Law Association, which had approved of the proposal. Nonetheless, the advisory committee recommended the proposal for publication, not for approval as a technical amendment, because of the complexity of the subject matter.

The committee, without objection and by voice vote, approved the proposed amendment to Civil Rule 82 for publication.

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

Judge Campbell reported that the advisory committee recommended for publication at a suitable time an amendment to Rule 6(d), which currently provides three extra days for responding to certain types of service, including service by electronic means. The proposed amendment would strike the reference in Rule 6(d) to Rule 5(b)(2)(E), which references electronic service. This change would remove the three extra days for electronic service. Judge Campbell said that the Appellate, Bankruptcy,

and Criminal Rules Committees were working through this same issue now with respect to parallel provisions in each set of rules. He stated that, depending on the timing of approval of similar changes to the other sets of rules, they could all be published together, or the Civil Rules change could be published first as a bellwether. He added that the advisory committee also recommended adding parenthetical explanations to Rule 6(d) that would provide brief explanations of the type of service referenced. This would prevent users from having to flip back to the cross-referenced rules to find the types of service that receive the three added days. The committee note, he said, could explain that service via CM/ECF does not constitute service under Rule 5(b)(2)(F), which covers service by other means to which the party being served has consented, and which is subject to the three-day rule.

A member asked whether the advisory committee had considered removing "consent" from the three-day rule as well. Judge Campbell responded that it had not; the issue was just brought to his attention this morning. The member noted that the three-day rule was invented for mail. He questioned the rationale behind applying it to leaving papers with the clerk when no one knows where the party is. He suggested that the advisory committee consider restricting the three-day rule to service by mail. Judge Campbell said that the advisory committee could consider this point. He added that these other methods of service have always been subject to the three-day rule and the advisory committee had not heard of a problem. Clearly, he said, electronic service no longer requires three extra days; the committee could look more broadly at whether three extra days are warranted in other circumstances. Judge Wedoff noted that there is a proposal to remove the added three days as widely as possible in the Bankruptcy Rules. Judge Sutton added that the member's point about whether three extra days were needed in other circumstances was a good one. At least, he said, the question could be raised in publication as to whether to remove other types of service from the three-day rule. He suggested that the advisory committee discuss it at their next meeting.

Judge Campbell said that the advisory committee would consider these issues and that he would want to hear the views of court clerks as well. However, he said, the advisory committee's plate was so full right now with considering the next steps for the proposals that were published last August, that he would prefer not to do that investigation now. One option, he said, would be to publish the proposal to eliminate electronic service from the three-day rule and ask for comment on whether the committee should also eliminate service by leaving the paper with the clerk or by other means consented to. Judge Sutton noted that the simplest route would be to delay publication during the investigation into the other means of service, but he saw no reason to hold off on removing the extra three days for electronic service. The member who had made the suggestion stated that he would not oppose publication, but that he thought it should ask for comment on whether the three-day rule should be abolished altogether. He noted that service by mail is now mostly limited to pro se litigants or people who do not have

computers. He said the committee could publish the proposal to remove electronic service from the three-day rule and ask for comments as to whether it would be wise to restrict it just to service by mail or to abolish it altogether.

Professor Capra noted that the idea of restricting the three-day rule came from the CM/ECF Subcommittee, and the idea was to have a uniform approach. He said all of the advisory committees would be considering this issue, except for the Evidence Rules Committee, but it was unlikely that it would be resolved by the spring.

A member asked whether there should be a separate three-day rule for pro se litigants. She noted that this is an issue primarily affecting pro se litigants, who often only receive service by mail. Judge Campbell noted that some courts do have CM/ECF for pro se litigants, so some do get instantaneous service.

Judge Sutton suggested that the committee could tentatively approve the proposal for publication with a slight variation in the committee note and questions requesting comment on whether the three-day rule should be deleted altogether or limited to service by mail. The hope, he said, would be for publication this summer. Judge Campbell agreed that this sounded like a fine approach.

The committee, without objection and by voice vote, tentatively approved the proposed amendment to Civil Rule 6(d) for publication, with a slight change in the committee note to address service under Rule 5(b)(2)(F), together with questions on whether the three-day rule should be abolished altogether or limited to service by mail. The committee will consider the final proposal again before publication, likely at its spring meeting.

Informational Items

FED. R. CIV. P. 17(c)(2)

Judge Campbell reported that the advisory committee had decided against further action on Rule 17(c)(2), which directs that "[t]he court must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action." He stated that in *Powell v. Symons*, 680 F.3d 301 (3d Cir. 2012), the Third Circuit had noted the lack of guidance as to when a court should appoint a lawyer or guardian to assist an unrepresented party. He said that research had revealed that six circuits have adopted standards similar to that of the Third Circuit, which is that there is no obligation to *sua sponte* inquire into competence. Under this view, Rule 17(c)(2) only applies when there is verifiable evidence of incompetence. Judge Campbell said that all circuits agree that there is no obligation to appoint a guardian just because a party exhibits odd behavior.

The advisory committee had concluded that it should not attempt to write a rule in this area. Judge Campbell explained that if judges were obligated to inquire about a guardian whenever they saw something less than full competence, the issue would become unmanageable. Further, he said, there were no resources readily available to pay for guardians. In fact, he said, there were not usually funds available to pay for appointed lawyers either. Judge Campbell said that to write a rule that sets standards for the wide variety of circumstances in which this could arise would be nearly impossible. He added that relevant considerations would include evidence of incompetence, other resources available to assist the person, the merits of the claim, the risk to the opposing party in terms of time and delay, case management steps, and more. The advisory committee concluded that this was best left to the common law. Judge Campbell said the advisory committee felt that these issues need to be decided on a case-by-case basis and that principles will develop over time. As a result, he said the advisory committee recommended no action at this time.

A member stated that he agreed with the advisory committee's conclusion, noting that it is a case-by-case judgment call as to how to handle incompetence. Further, he said, there can be verifiable evidence of incompetence even with lawyers involved.

E-RULES

Judge Campbell reported that the advisory committee, along with the other advisory committees, is in the early stages of addressing the question of what to do with electronic communications under the rules. He said one option is to adopt a rule that says anything that can be done in writing can be done electronically, but that raises all kinds of complications. Another option is to go rule by rule and determine what to do with the issue of electronic communications.

DISCOVERY COST SHIFTING

Judge Campbell stated that the advisory committee's discovery subcommittee is in the early stages of examining the question of whether the rules should expand the circumstances in which a party requesting discovery should pay part or all of the costs of responding. He said that Congress and some bar groups had asked for a review of this issue. The proposals published for comment last August include revision of Rule 26(c) to make explicit the authority to enter a protective order that allocates the costs of responding to discovery. If this proposal is adopted, experience in administering it may provide some guidance on the question of whether more specific rule provisions may be useful. Judge Campbell said the advisory committee is in the early stages of examining this issue and will report on its progress in the future.

CACM PROJECTS

Judge Campbell reported that the Court Administration and Case Management Committee (CACM) has raised a number of topics that may lead to Civil Rules amendments, but that action on all of these topics has been deferred pending further development by CACM.

PUBLISHED PROPOSALS

Judge Campbell reported that the advisory committee had held two of the three scheduled public hearings on the proposals published for comment. He said 40 more witnesses were scheduled for an upcoming hearing in Dallas, with 29 more on the waiting list. He said the advisory committee was not scheduling another hearing because it would be too difficult to fit a fourth hearing in all of the members' schedules, and the advisory committee was committed to reading all of the written submissions. He said 405 submissions had already been received and that the committee will review them all carefully. He noted that the hearings have been very valuable and there is work to do to refine the proposals. He added that the advisory committee will decide what to do at its April meeting and will make a recommendation to the Standing Committee at its May meeting.

A participant asked if that schedule was too expedited. He asked whether the advisory committee would have enough time to do the job by the May meeting. Judge Campbell said he thought there was sufficient time. He noted that the advisory committee had been working on the published proposals for five years. He said the committee's task in April will not be gathering information, but using its best judgment in light of everything it had heard through public comment.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raggi and Professors Beale and King presented the report of the advisory committee, as set forth in Judge Raggi's memorandum of December 20, 2013 (Agenda Item 5), and her supplemental memorandum of December 30, 2013.

Amendment for Final Approval

FED. R. CRIM. P. 12

Judge Sutton reported that the advisory committee had been considering amendments to FED. R. CRIM. P. 12 on motions that must be raised before trial and the consequences of late-filed motions since 2006. He provided some background on the current proposals. He noted that the Judicial Conference had approved the proposed

amendment to Rule 12 that the committee had approved at its last meeting and had transmitted it to the Supreme Court. The Court had raised several questions about the proposed amendment. Judge Sutton noted that the package of proposals, including Criminal Rule 12, had been submitted to the Court earlier than in years past to give the Court flexibility in terms of timing its review of the proposals. He noted that one benefit of submitting the proposals early is that if the Court had questions, they might be able to be addressed within the same rulemaking cycle. He stated that this was uncharted territory because in the past, when the proposals were submitted to the Court later, if the Court had questions about the proposals, it would simply recommit them to the advisory committee for further consideration. In this case, however, there might be time to propose changes and have them considered by the Court in the same rulemaking cycle.

Judge Sutton noted that the Court had raised several questions about the Rule 12 proposal. First, as transmitted to the Court, the proposed amendment had stated that the court could consider an untimely motion raising a claim of failure to state an offense (FTSO) if the defendant showed prejudice. The Court had asked to whom the required prejudice would be. Judge Sutton noted that the intent of the amendment was that it would be prejudice to the defendant. Second, the Court had asked, if the prejudice is to the defendant, how the defendant would show prejudice before trial. Judge Sutton stated that one form of prejudice is lack of notice, and another occurs if the grand jury did not properly indict under the elements of the crime. Third, the Court had noted the anomaly of having in proposed Rule 12(c)(3)(A) a required showing of "good cause" for relief from the consequences of failing to timely raise most Rule 12(b)(3) motions, while proposed Rule 12(c)(3)(B) would require prejudice for consideration of late-raised FTSO claims. Judge Sutton noted that by requiring "good cause" alone in (A) and "prejudice" alone in (B), the implication was that there was no requirement of showing "prejudice" in (A). That is not what the committee intended. On the other hand, by requiring "good cause" in (A), and only "prejudice" in (B), the committee had intended the negative implication to be that there was no requirement of showing "cause" under (B) for claims of failure to state an offense. Judge Sutton added that it was odd to have language in the same subsection that intended one negative implication but not another negative implication.

Judge Raggi then explained that the advisory committee recommended resolving the third concern raised by the Court by having one standard for relief from failure to timely raise all Rule 12(b)(3) motions — "good cause," the standard currently used in the rule. She noted that there was disquiet, especially among the members of the defense bar on the committee, about making an FTSO claim a required pre-trial motion when for so long it had been viewed as the equivalent of jurisdiction and something that could be raised at any time. She added that, faced with the fact that it is now recognized as something that should be raised early on, some members of the defense bar had suggested that the committee use a different standard for FTSO claims that would be easier to meet

than "good cause." That is why the advisory committee eventually decided to use just "prejudice" for FTSO claims, no matter what the cause for failing to raise it in timely manner. She noted that everyone recognized that it was a bit curious to have two standards for granting relief from the consequences of belatedly filing a required pretrial motion. She said that the advisory committee has now had more time to think about the proposal. The advisory committee did not want to put the Rule 12 proposal in jeopardy by insisting on two standards. The subcommittee had given it enormous thought and decided that pursuing a separate standard for FTSO claims was not worth the risk to the whole proposal and that "good cause" would be adequate for those claims.

Judge Raggi noted that no one stands convicted of a crime unless every element of the crime is proven beyond a reasonable doubt. The proposed rule addresses only those situations where even though a defendant is proven guilty beyond a reasonable doubt on every element, a failure to charge it correctly should for some reason be heard late on a showing of prejudice. But, she asked, what would the prejudice be in that situation? The advisory committee, she said, had asked what they were really putting at risk by insisting on two standards. She stated that it was now the subcommittee's view and the unanimous view of the advisory committee that it was not worthwhile to pursue a separate standard for FTSO claims, and that a "good cause" standard should apply for all late-raised claims that are not jurisdictional.

Judge Raggi noted that, at the suggestion of a member of the advisory committee, the committee note had been revised to explain that "good cause" is "a flexible standard that requires consideration of all interests in the particular case." She said that this language was in brackets, but that it would be part of the text of the committee note, if approved. This language, she said, would make clear that the court should consider cause, consider prejudice, and consider everything that might be relevant. She explained that the reason the words "cause and prejudice" were not used was to avoid confusion with the use of that phrase in the habeas corpus context. Instead, the revised note language is intended to make clear that "good cause" is a holistic inquiry. She stated that it made sense to trust the district judges to understand that.

Judge Raggi requested that the committee approve the revised proposed amendment to Rule 12 and the accompanying committee note. Finally, Judge Raggi noted that the advisory committee was unsure about whether the change could be accomplished in the current rulemaking cycle. One of the questions the advisory committee had raised, she said, was whether this was a change that would require republication. She reported that the advisory committee was not sure and had consulted with Professor Coquillette, who did not think republication was necessary. She noted that if the committee approved the revised proposal, it could potentially go back to the Court and be considered in this year's rulemaking cycle. She said it was the Standing Committee's decision whether to republish.

Professor Coquillette noted that traditionally the committee republishes when anyone would be surprised by the changes after publication and would feel that they did not have a chance to debate the proposal. But, he noted that in this case, the appropriate standard for relief from late-raised FTSO claims had been debated back and forth for the seven year history of this proposal. Everyone had notice that the appropriate standard was at issue and had a chance to comment on that during the public comment period. Judge Sutton also noted that for the past eight years or so, everyone has known that the rule was being changed to require FTSO claims to be brought before trial and the standard for raising such claims late has been on the table the whole time.

A member stated that his initial reaction was to republish, but that he realized that the Court had the authority to make changes to the committee's proposals itself. If the Court wanted to make a change and just wanted to make sure the rules committees agreed, then it would seem to be a procedure contemplated by the Rules Enabling Act. However, if the proposal is really back in the committee's court, then he said he would have to grapple with the republication question. He stated that he tended to think it is better to republish in the case of a "tie."

Judge Sutton stated that the Court could have proceeded in different ways and this is uncharted territory, but that he believed the committee should treat the proposal as if it were back in front of the committee. Another member asked what the procedure would be if the proposal had gone to a vote in the Court and been rejected. Judge Sutton responded that it depends, and that if a subsequent change by the committees had already been fully vetted, it would not be republished. The reason for republication is if the committee thinks it will get new insights or if someone will be surprised by a change. The member noted that the republication question is similar to a court amending an opinion and giving another opportunity for filing a petition for rehearing. She said that if the changes on rehearing are responsive to the comments already received, the courts usually do not give another opportunity for rehearing.

Professor Beale noted that there had been a previous occasion in which the advisory committee had made changes in response to a remand from the Supreme Court and the committee had not republished. Professor Capra noted that the Evidence Rules Committee had not republished when it made changes after a proposed amendment to Evidence Rule 804(b)(3) was returned by the Court.

Judge Raggi noted that not only had the advisory committee heard lots on this subject, but what it is proposing now is to leave the standard in the current rule in place.

Another member stated that he had no views on the need to republish, but questioned whether there is a negative implication in the new proposed committee note language describing "good cause" as a "flexible standard that requires consideration of all

interests in the particular case." The member explained that the existing standard has been interpreted to require showing, among other things, prejudice, and he wondered whether the note language could potentially be understood to relieve a defendant of having to show prejudice.

Judge Raggi responded that she could not foreclose the possibility of the language being read that way, but from a practical perspective, this is how Rule 12 now treats FTSO claims. She added that, up until the time the jury is empaneled and jeopardy attaches, Rule 12, in another section, lets a trial judge entertain any motion. She stated that presumably on appeal, circuit courts will continue to apply a plain error standard to late-raised claims. So, she said, we are talking about what the judge will entertain in the window of time between when jeopardy attaches and when judgment is entered. Judge Raggi stated that she would be surprised if trial judges would entertain such late motions without a showing of prejudice once jeopardy has attached. She added that if the committee were to see that happening in practice, it could consider amending the rule to spell out a prejudice requirement in the rule, but, given that district judges are constrained by this portion of the rule only in the time between jeopardy attaching and judgment, she thought most judges would require a showing of prejudice. The member stated that as a practical matter that is true, but that he was not sure that the new language in the note added anything. He stated that if it does not add anything substantive, it is not needed.

Judge Raggi explained that the note language explaining that "good cause" is a "flexible standard" makes one of the defense bar members supportive of the proposal, which is something that should not be discounted. She stated that all three advisory committee members who represent defendants voted for this rule in part because of this new language in the note. In fact, she said, something even more detailed had been proposed originally by a defense bar member.

Judge Sutton noted that "good cause" suggests flexibility and that to the extent some have concerns about putting FTSO defenses with all other claims required to be raised before trial, emphasizing flexibility is important to make clear that courts might treat different types of late-raised motions differently, depending on the circumstances.

Another member asked if the new note language is a comfort blanket for some members of the advisory committee. Judge Raggi agreed that it was in part, but noted that the language was derived from the fact that some members wanted to ensure that judges would understand that the seriousness of the motion should also be taken into account in deciding the consequences of a late-raised motion, while recognizing that it would not be appropriate to assume that every FTSO motion is more important than every multiplicity motion, for example.

A member questioned whether there are examples of a change like this going through without being republished. Judge Sutton responded that there were, both with respect to Criminal Rules proposals and Evidence Rules proposals, but the fact that there were other instances in which the committee had made changes after remand from the Supreme Court without republishing does not mean that there should never be republication in response to comments from the Court. But here, he noted, the Rule 12 proposed changes seemed more like the instances in which the committees had not republished. Judge Raggi noted that the advisory committee had already made changes to the Rule 12 proposal after publication without republishing. She added that the advisory committee had received many comments from the defense bar on the published proposals and that while there is the possibility that someone might argue that the last version they saw had a separate standard for FTSO claims, she was not sure that the committee was ever obliged to have two different standards as opposed to the one that is there. The cost of republishing, she noted, would be putting off the effective date of the rule change by another two years. She was comforted by the fact that not one of the defense members of the advisory committee had urged republication.

Judge Sutton noted that the advisory committee had made more substantive changes after publication and before sending it back to the Standing Committee than the current proposed change. Judge Raggi agreed, but noted that the changes after public comment had been made in response to comments received during the public comment period. Professor Coquillette noted that the history of this rule proposal did not require republication here, where the defense bar members of the advisory committee did not have concerns and the issues have been fully discussed. He added that none of the defense bar members of the advisory committee had argued that this change would be a surprise.

A member moved to approve the proposed amendment to Rule 12. The member who had questioned the note language seconded the motion, explaining that as a practical matter, district judges will have no problem applying the amendment and note language. The committee unanimously approved the proposed amendment without republication. Judge Sutton noted that if the proposal is approved in the rest of the Rules Enabling Act process, the committees will closely monitor what happens with FTSO defenses and the "good cause" standard. Judge Sutton thanked Professors Beale and King for their hard work on this proposal.

The committee, without objection and by voice vote, approved the proposed amendment to Criminal Rule 12 for transmission to the Judicial Conference for final approval.

Informational Items

Judge Raggi noted that the advisory committee did not meet in the fall because of the lapse in appropriations due to the government shutdown, but that the advisory committee had a full agenda for its spring meeting.

FED. R. CRIM. P. 4

Judge Raggi reported that the advisory committee was considering the Department of Justice's request to amend Rule 4, which deals with service of summons. The Department had suggested that the rule is deficient for serving foreign organizations who have no agent or place of business in the United States, but whose conduct has criminal consequences in the United States. The current rule allows serving organizations at their last known mailing address in the United States, but these foreign entities do not have any such address. Until there is an appearance by the foreign entity, it cannot be prosecuted, but the Department asserted that if there was a way to properly serve such entities, many of them would enter an appearance rather than risk consequences like forfeiture. Judge Raggi noted that the request appeared to be driven by a desire to have a means of service that would either get foreign entities to respond or would permit the Department to begin forfeiture proceedings if the foreign entity did not respond. Judge Raggi noted that whether it is appropriate for forfeiture proceedings to be instituted based on service is a matter for future litigation.

As to what methods a proposed rule might approve for service, Judge Raggi reported that it is clear that the advisory committee will recommend that if there is an applicable treaty that provides for service in a particular manner, such service will suffice. Similarly, she said, compliance with an agreement with a foreign country on the proper means of service will also suffice. Judge Raggi added that the Department also seeks to have a "catch-all" provision that anything that a judge signs off on will suffice, but some members of the advisory committee were uncomfortable with that because a judge might order service by a U.S. official that would violate the foreign country's laws. She noted that if the object of service is a person, it does not matter how he or she got before the court. She said that the proposal has moved towards including a catch-all provision that would instruct the Department to serve in whatever manner it thinks is reasonable and then the court can deal with the issue of due process once the defendant enters an appearance.

The proposed amendment would ensure organizations that are committing domestic offenses are not able to avoid liability through the expedient of declining to maintain an agent, place of business, or mailing address within the United States. A subcommittee has been assigned to consider the proposal and has approved a proposed amendment for discussion by the full advisory committee. The advisory committee will

take it up at its April meeting.

FED. R. CRIM. P. 41

Judge Raggi reported that the Department has also submitted a proposal to amend Rule 41 to enlarge the territorial limits for warrants to search electronic storage media and electronically stored information. The purpose of the proposed amendment is to enable law enforcement to investigate and prosecute botnets and crimes involving Internet anonymizing technologies. Rule 41(b) does not directly address the circumstances that arise when officers seek to execute search warrants, via remote access, over modern communications networks such as the Internet. The proposed amendment is intended to address two increasingly common situations: (1) where the warrant sufficiently describes the computer to be searched but the district within which that computer is located is unknown, and (2) where the investigation requires law enforcement to coordinate searches of numerous computers in numerous districts. The Department reports problems with determining the district in which to seek the warrant when it does not know where the computer to be searched is located.

The proposed amendment would authorize a court in a district where activities related to a crime have occurred to issue a warrant to be executed by remote access for electronic storage media and electronically stored information whether located within or outside the district. Judge Raggi noted that there were potential concerns about the particularity requirements of warrants when the Department does not know exactly what it is searching. Thus, the advisory committee had asked the Department to draft some warrants of the sort that it thinks might need judicial authorization. Judge Raggi added that once the advisory committee sees examples of the types of warrants that might be presented to federal judges, it will have a better idea of how to proceed. She said that the proposal has been referred to a subcommittee, which is expected to report at the advisory committee's April meeting.

OTHER PROPOSALS

Judge Raggi noted that other proposals under consideration were in the agenda materials and did not need an oral report at this time. One such proposal involved the question of whether there is any need to clarify Rule 53, which prohibits "broadcasting" judicial proceedings in order to clarify the rule's application to tweets from the courtroom. Another requests the committee to consider amending Rules 11 and 32 to make presentence reports available in advance of a guilty plea so that all parties will be aware of the potential sentence. Another proposal under consideration would amend Rule 45(c) to eliminate the three extra days currently provided to respond when service is made by electronic means.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Fitzwater and Professor Capra presented the report of the advisory committee, as set forth in Judge Fitzwater's memorandum of December 2, 2013 (Agenda Item 6). Judge Fitzwater noted that the advisory committee had no action items to present.

Informational Items

Judge Fitzwater reported that the proposed amendment to Rule 803(10), the hearsay exception for the absence of public records, which the Standing Committee approved in June 2012, took effect on December 1, 2013.

He noted that four proposals from the advisory committee were pending before the Supreme Court. The proposed amendments to Rules 801(d)(1)(B) and 803(6)–(8) had been approved by the Standing Committee in June 2013, were approved by the Judicial Conference on the consent calendar at its September 2013 meeting, and had been transmitted to the Supreme Court for consideration.

Judge Fitzwater reported that the Fall 2013 meeting, which would have included a technology symposium and which had been cancelled due to the government shutdown, was rescheduled at the same location for Spring 2014. He said the Department of Justice would not be presenting on the electronic signature issue, as had been planned for the original symposium, although the advisory committee would be willing to host them if continuing dialogue would be desirable. Judge Sutton commented that the advisory committee should think about whether it would be useful to bring people together to discuss the electronic signature issue. Judge Fitzwater noted that it does dovetail with the technology symposium that the advisory committee is planning in conjunction with its next meeting. He added that the symposium might examine things like the ancient document exception to the hearsay rule, which may seem anachronistic in the current era of data storage.

Judge Sutton noted that Professor Capra recently appeared on the cover of the *Fordham Lawyer*, a magazine published by the Fordham Law School, and that the complimentary article featured Professor Capra's work for the rules committees.

PANEL DISCUSSION ON THE POLITICAL AND PROFESSIONAL CONTEXT OF RULEMAKING

Professor Coquillette presided over a panel discussion on the political and professional context of rulemaking. The other panelists included Judge Huff, a former committee member; Judge Wood, a former committee member; Judge Rosenthal, former chair of the Standing and Civil Rules Committees; Judge Anthony Scirica (by phone),

former chair of the committee and former chair of the Executive Committee of the Judicial Conference; and Peter G. McCabe, former secretary to the committee. Professor Coquillette introduced each member and stated their relevant background.

PROFESSOR COQUILLETTE

Professor Coquillette provided background on opposition to the rules committees' work. He noted that historically there have been three groups who are suspicious about the rules committees' work, including the traditional formalists, who believed that the judge's role is to decide cases, not to do anything prospective; the rule skeptics, who thought that uniformity through codification, with transsubstantive rules that apply in all types of cases, was not practical; and the political populists, who believe that rulemaking ought to be done by elected representatives of the people. Professor Coquillette noted that while the rules committees could never please these three groups, they should continue to be sensitive to their concerns.

PETER G. MCCABE

Mr. McCabe provided background on the history of the Rules Enabling Act. He discussed changes the rules committees made over time to make the process more open, transparent, and easily accessible. Mr. McCabe also discussed the committees' efforts to make sure there was a strong empirical basis for amendments. He also emphasized the committees' efforts to ensure evenhandedness and the nonpolitical nature of their role. To get a wide range of views, the rules committees take measures such as inviting members of the bar to come to meetings, conducting surveys and miniconferences, and reaching out to congressional members and staff to inform them about the rulemaking process and about pending rule amendments. Mr. McCabe concluded that the rulemaking system is healthy, effective, and credible, but that the challenge of balancing authority between the judicial and legislative branches will continue to exist and will be an area that the committees will continuously need to focus their attention.

JUDGE ANTHONY J. SCIRICA

Judge Scirica spoke about his experience with the Private Securities Litigation Reform Act and the Class Action Fairness Act and their impact on the rules committees' work. He emphasized the benefits of delegating rulemaking authority to the judiciary through the careful process set out in the Rules Enabling Act, but noted that substantive matters are best addressed by Congress.

JUDGE LEE H. ROSENTHAL

Judge Rosenthal discussed how the rules committees can engage with Congress without becoming politicized. She emphasized the importance of effective and energetic

explanation of the careful, transparent, open, and deliberate nature of the Rules Enabling Act and its process, as well as clear explanation of the purpose behind the delegation of authority under that Act. She noted that the rules committees have worked closely with Congress on a number of issues, including the enactment of Evidence Rule 502 and statutory changes to correspond to recent changes to the Appellate Rules and to the recent Time Computation Project. She concluded that the rules committees need to continue to be vigilant in explaining the importance of the rulemaking process under the Rules Enabling Act and in informing Congress of upcoming changes, while remaining distant from political pressures.

JUDGE MARILYN L. HUFF

Judge Huff discussed her experience with the Time Computation Project, which went through each set of rules to make counting time uniform and easier to apply. She said that as part of the project, the committees had examined the federal statutes that would be affected by such changes and that Congress ultimately amended 29 statutes in conjunction with the project. Judge Huff also discussed her experience as the liaison to the Evidence Rules Committee and as a member of the Standing Committee's Style Subcommittee during the project to restyle the Evidence Rules. Finally, Judge Huff discussed her experience serving on the Standing Committee's Forms Subcommittee. She concluded that these examples show that, consistent with the Rules Enabling Act process, there are often workable solutions within the judiciary, with congressional involvement, to some concerns about the litigation process.

JUDGE DIANE P. WOOD

Judge Wood discussed the triggers for rules committee action, and said triggers include legislative changes; Supreme Court decisions; suggestions from judges, academics, and empirical researchers; and examination of state court practices. She discussed instances in which the rules committees should be skeptical of these triggers. She also introduced the idea of a qualification to the generally accepted norm that the rules are transsubstantive, noting that the committees aim for more than transsubstantivity and seek to make rules that have a broad generality that can be applied in every case in federal court. She concluded that the committees now have the challenge of dealing with problems that may change more quickly than the rulemaking process and that the committees may need another model for that type of problem. She noted that some problems are best addressed outside the rulemaking arena.

REPORT OF THE CM/ECF SUBCOMMITTEE

Professor Capra reported on the work of the CM/ECF Subcommittee, as set out in Judge Michael Chagares's memorandum and attachments of December 4, 2013 (Agenda Item 7). He said there are five main items that the subcommittee has been working on,

and that its work would probably move forward in stages. He added that the reporters to the advisory committees had done outstanding work for the subcommittee.

The first issue the subcommittee was working on was electronic signatures, as explained during the Bankruptcy Rules Committee's report. Professor Capra explained that if the Bankruptcy Rules proposal works, other committees will likely follow with similar proposals, and the CM/ECF Subcommittee will oversee the process. He said that the problem the rule is trying to deal with is not forgery, but using a single signature line and putting it on multiple documents.

Professor Capra said that the second step the subcommittee took was for the reporters to look through their respective rules to see where use of CM/ECF may conflict with existing language. He said addressing all of the items found would be a daunting task. For example, he said, there were dozens of places in the Criminal and Bankruptcy Rules that may not accommodate use of CM/ECF.

The third matter the subcommittee looked at was abrogation of the three-day rule. Professor Capra said that he would take the comments received today on the Civil Rules proposal back to the subcommittee. He added that he thought it was likely that the committees could coordinate a uniform committee note and that the goal would be for the rules to be changed in as uniform a manner as possible. He added that the reporters had been working hard on this issue.

Fourth, Professor Capra said that the subcommittee was looking at the proposal for a civil rule requiring electronic filing. He said he thought this was possibly feasible, but that there are issues about what the exceptions should be. He added that one reason it may be desirable to have a requirement of electronic filing in the federal rules is that the local rules already require it almost universally. On the other hand, he said, the local rules have a lot of exceptions and are not uniform in terms of the exceptions, and that is something that needs to be worked through.

Professor Capra reported that the final issue the subcommittee was considering was whether it would be useful and feasible to have a universal rule that would essentially say that "paper equals electrons." The subcommittee is examining whether, instead of going through all of the rules and changing each rule to accommodate electronic filing and information, there is the possibility of a universal fix. Professor Capra noted that there is a proposed template for such an approach in the agenda materials. The first part of the template would say, "In these rules, [unless otherwise provided] a reference to information in written form includes electronically stored information." Professor Capra said that this tracks what the Evidence Rules have done, but that there can be problems with this approach. For example, he said, the Criminal Rules would need carve-outs. The second part of the template would state: "In these rules, [unless otherwise provided] any action that can or must be completed by filing or sending paper may also be

accomplished by electronic means [that are consistent with any technical standards established by the Judicial Conference of the United States]." He said that there were still a lot of issues and potential problems to think through, including the need for exceptions, as to whether such an approach would work.

Professor Capra said that the subcommittee was working with CACM because the "CM/ECF Next Gen" was being overseen by that committee and it would clearly have implications for the subcommittee's work. He added that the committee does not yet know what Next Gen will do and there is a concern in the subcommittee that the rules committees should be cautious about getting too far out in advance of a problem that does not yet exist. He said that to try to change the rules in advance of Next Gen, when Next Gen might not be what the committees think it is, could create problems. He said that the subcommittee is therefore proceeding with caution.

A member noted that Next Gen is behind schedule and it might be at least two years away from completion. Professor Capra added that there are CACM members on the subcommittee and CACM staff in the Administrative Office who are helping with the subcommittee's work as well.

NEXT COMMITTEE MEETING

Judge Sutton concluded the meeting by thanking the AO staff for the wonderful job in planning the meeting and coordinating all of the logistics. The committee will hold its next meeting on May 29–30, 2014, in Washington, D.C.

Respectfully submitted,

Jonathan C. Rose
Secretary

Andrea L. Kuperman
Chief Counsel

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MEMORANDUM

DATE: April 4, 2014

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 07-AP-I

This item concerns Rule 4(c)(1)'s inmate-filing provision for notices of appeal. The Committee has been considering amendments to the Rule that would address conflicts in authority or concerns about ambiguity that have arisen under the current rule. An amended Rule 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.

This memorandum does not attempt to recapitulate the Committee's research over the past five years; I enclose the dossier in case members wish to refer to it. Rather, Part I of this memo briefly summarizes a list of policy choices for the Committee to consider. Part II sketches proposed amendments that could be pursued based on those choices.

I. Policy choices concerning the inmate-filing rule

Since the Committee's last meeting, the chair asked Justice Eid, Professor Barrett, and Mr. Letter to work with the chair and the reporter to formulate specific proposals for resolving this agenda item. Based on those discussions, this memorandum suggests that the Committee may wish to retain the present requirement of postage prepayment; eliminate the current requirement concerning use of a legal mail system; revise the

treatment of the inmate declaration; consider proposing a new official form concerning inmate filings; and consult with those responsible for promulgating rules that govern other sorts of inmate filings.

A. Should the amendment eliminate the requirement of postage prepayment?

Committee members involved in the interim discussions have expressed support for retaining the postage-prepayment requirement.

Members have noted that, in an appropriate case, an institution's failure to provide postage to an indigent inmate could be addressed by an as-applied constitutional challenge. Members have also questioned whether the Rules could appropriately impose on institutions a requirement of paying postage for inmates.

Chris Vasil, the Chief Deputy Clerk of the U.S. Supreme Court, was skeptical about eliminating the postage-prepayment requirement, and Kenneth Hyle, the Deputy General Counsel of the U.S. Bureau of Prisons, expressed an expectation that BOP would prefer that the requirement be retained.

B. Should the amendment eliminate the requirement concerning use of the legal mail system?

The interim discussions have revealed no support for retaining the 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." Members have questioned this requirement's utility and have suggested eliminating it.

The use of a mail system that logs the date of the inmate's deposit may be desirable. But the Rule itself (in contrast to the Committee Note) does not actually refer to a mail system that logs the date; it instead refers to "a system designed for legal mail." And an institution's designation of a "legal mail" system might well have a different focus than logging dates of deposit. For example, Douglas Letter's research has revealed that the distinguishing feature of the legal mail system in BOP facilities has to do with privacy: Mr. Hyle explained to Mr. Letter that "the legal mail system is not normally monitored, while the system for regular mail is generally monitored for content or subject matter (or both)." This means that BOP is unlikely to care whether the Rule requires use of the legal mail system. Because the legal mail system is designed to serve the privacy interests of inmates, we are informed by the Justice Department representatives that BOP probably does not object to deleting the requirement that an inmate use the legal mail system.

Likewise, Mr. Vasil sees no problem with the deletion of the legal-mail-system requirement, and indeed, he generally favors changes that bring Rule 4(c) into closer conformity with Supreme Court Rule 29.2. Mr. Letter reports that Mr. Vasil "thinks it would be good for the relevant FRAP provisions and Supreme Court 29.2 to match, and

he sees no reason to amend the latter, and cannot think of any reason why the FRAP has the requirement about using the institution's legal mail system."

Thus, the Committee may wish to delete the second sentence of Rule 4(c)(1).[1]

C. Should the Rule's reference to a declaration be clarified?

During the spring 2013 meeting, participants discussed the possibility of amending 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.

Since that meeting, Committee members 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 members have noted that, consistent with the Supreme Court's practice under Rule 29.2, there should be some opportunity for the inmate to provide that proof even if the inmate initially did not provide a declaration.[2]

One possible approach might be to 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, 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."

However, Committee members have questioned whether submitting the declaration should be optional. These members suggest that the Rule should be drafted

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[1] An alternative would be to revise that sentence to provide a functional definition instead of the current reference to "a system designed for legal mail." 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." That seems to me better than the Rule's current language; on the other hand, retaining even this revised form of the second sentence would perpetuate a difference between the Supreme Court's rule and the FRAP.

[2] Interestingly, it appears that when the Committee drafted the original 1993 version of the inmate-filing rule, it intended *not* to require that the declaration be submitted simultaneously with the notice of appeal. Then as now, the Supreme Court's rule referred to a document being "timely filed" if it was "accompanied by" the statement or declaration. At the Committee's April 1991 meeting, the agenda materials apparently included a draft that incorporated that "accompanied by" language. The Committee excised that language intentionally:

> Judge Logan suggested omitting the requirement that a notice of appeal be accompanied by a statement concerning the date of deposit of the notice in the institutional mailing system. He noted that if the notice is not received by the court within the time for filing, the court may require the appellant to supply such a statement. Judge Logan moved that at page two of the memorandum line 18 be amended by placing a period after "filing", by striking the words "and it is accompanied", and by adding in the same place "Timely filing may be shown", and by adding at the end of the line, "by a". Judge Boggs seconded the motion and it carried five to two.

Minutes of the April 17, 1991, Meeting of the Advisory Committee on Federal Rules of Appellate Procedure at 26-27.

so as to encourage inmates to provide the declaration at the time they file the notice of appeal. Members also have expressed concern that the current Rule is ambiguous, because it provides that timely filing may be shown by a declaration but never states when a declaration must be filed.

As a point of comparison, Supreme Court Rule 29.2 directs inmates to file the declaration simultaneously with the document to be filed.[3] Rule 29.2 does not specify what happens if the declaration is not provided. However, Mr. Vasil has explained that the Supreme Court would return a petition filed without a declaration or notarized statement, but then would accept it as timely filed if the inmate refiled with a declaration stating that the original mailing had been deposited in the prison mailbox before the last date for filing with postage prepaid.

Members have expressed support for considering an approach that would track that taken by the Supreme Court but that would specify in the Rule's text what happens when the declaration is not provided initially. The goal would be to direct inmates to file the declaration along with the notice of appeal, but perhaps to provide inmates who fail to follow that directive with a second chance to do so.

To track the Supreme Court rule, the first sentence of Rule 4(c)(1) would be revised to read: "**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 date for filing and is accompanied by a declaration in compliance with 28 U.S.C. § 1746, or by a notarized statement, that sets forth the date of deposit and states that first-class postage is being prepaid**." This sentence would place inmates on notice of the need to include the declaration along with the original filing. The challenge lies in drafting one or more additional sentences that would define whether and how the inmate is accorded a second chance if he or she initially failed to provide the declaration.

One approach seems most consistent with current practice and with the policy objectives of accepting notices that are timely filed while avoiding unnecessary delay by encouraging inmates to provide evidence of timeliness with the notice of appeal. That approach would provide that either a declaration or other evidence accompanying the notice can establish timeliness, and would give the court of appeals discretion to allow a later-filed declaration if the inmate fails to submit sufficient evidence with the notice.

The following two alternatives could implement the suggested approach:

> (1) "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 date for filing and is

[3] Supreme Court Rule 29.2 provides in part: "If submitted by an inmate confined in an institution, a document is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing and is accompanied by a notarized statement or declaration in compliance with 28 U.S.C. § 1746 setting out the date of deposit and stating that first-class postage has been prepaid."

accompanied by a declaration in compliance with 28 U.S.C. § 1746, or by a notarized statement, that sets forth the date of deposit and states that first-class postage is being prepaid. The notice is also timely if it is accompanied by other evidence, such as a postmark and date stamp, that shows the notice was deposited in the institution's internal mail system on or before the last date for filing and that postage was prepaid. If the notice of appeal is not accompanied by such evidence, or by a satisfactory declaration or notarized statement, the notice is timely if it is deposited in the institution's internal mail system on or before the last date for filing and the inmate files a satisfactory declaration or notarized statement within any additional time allowed by the court of appeals [in its discretion]."

(2) "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 date for filing and either (A) the notice is accompanied by a declaration in compliance with 28 U.S.C. § 1746, or by a notarized statement, that sets forth the date of deposit and states that first-class postage is being prepaid or (B) such a declaration or notarized statement is filed within any additional time allowed by the court of appeals [in its discretion]. The notice is also timely if it is accompanied by other evidence, such as a postmark and date stamp, that shows the notice was deposited in the institution's internal mail system on or before the last date for filing and that postage was prepaid."

D. Should the amendment clarify whether the rule applies to represented inmates?

The Committee has discussed whether to clarify that Rule 4(c)(1) applies to represented inmates (when the filing is made by the inmate rather than his or her lawyer) as well as pro se inmates. When a represented inmate files a notice of appeal on his or her own behalf, the justifications for the inmate-filing rule appear to apply: The inmate lacks the access to the full range of means available to a non-incarcerated litigant for filing the document with the court. And it is difficult to think of any realistic scenario in which the inmate-filing rule would be likely to be abused by the lawyer who represents the inmate.

It is unclear, however, why any clarification is necessary. The relevant part of the current Rule (which would be unchanged by the proposals discussed above) already should be read to encompass represented inmates: "an inmate confined in an institution" encompasses all inmates, whether or not represented, so long as the filing is made by the

inmate and not by counsel. And, as noted in a prior memo,[4] no case has actually held that Rule 4(c)(1)'s language excludes represented inmates.[5]

E. Should the Committee propose an official form?

The Committee may wish to consider recommending promulgation of an official form that would walk an inmate through statements that would suffice to establish eligibility for the inmate-filing rule.

Admittedly, there is a current trend away from reliance on official forms. In summer 2013, proposals were published for comment that would abrogate Civil Rule 84 and the Official Forms. The Committee Note to the Rule 84 proposal explains:

> Rule 84 was adopted when the Civil Rules were established in 1938 "to indicate, subject to the provisions of these rules, the simplicity and brevity of statement which the rules contemplate." The purpose of providing illustrations for the rules, although useful when the rules were adopted, has been fulfilled. Accordingly, recognizing that there are many excellent alternative sources for forms, including the Administrative Office of the United States Courts, Rule 84 and the Appendix of Forms are no longer necessary and have been abrogated.

The published proposal would, however, preserve present Forms 5 (request to waive service of summons) and 6 (waiver of service of summons) as official forms appended to Civil Rule 4. Assuming that the Civil Rules Committee moves forward with this proposal,[6] the 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 filings by pro se litigants. Use of an official form concerning inmate filings could reduce the time needed for a clerk or a judge to review the filing.

If the Committee favors adoption of a form, the real test of such a proposal will come in the drafting. The form should be as clear and simple as possible while eliciting the needed information. It may also be advisable to amend Forms 1 and 5 to alert inmate filers to the need to fill out the new form and include it with the notice of appeal.

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[4] See pages 7-8 of my March 25, 2013 memo, which is enclosed.

[5] There do, however, exist cases refusing to apply the judicially-developed prison mailbox rule to filings by represented petitioners. *See id.* at 8.

[6] The Civil Rules Committee's Rule 84 Subcommittee has recommended approval of the published proposal, and that recommendation is on the agenda for the Civil Rules Committee's meeting on April 10-11, 2014.

F. Will the electronic-filing changes that are currently under discussion require changes to the inmate-filing rules?

During fall 2013, the CM/ECF Subcommittee discussed the possibility of adopting "a 'universal fix' for language in the current rules that does not appear to accommodate electronic filing and information." As noted elsewhere in the agenda materials,[7] Professor Capra has developed the following template for consideration by the Advisory Committees:

Information in Electronic Form and Action by Electronic Means

> **a) Information in Electronic Form:** In these rules, [unless otherwise provided] a reference to information in written form includes electronically stored information.
>
> **b) Action by Electronic Means:** In these rules, [unless otherwise provided] any action that can or must be completed by filing or sending paper may also be accomplished by electronic means [that are consistent with any technical standards established by the Judicial Conference of the United States].

It is worth considering briefly whether the adoption of such a provision in the Appellate Rules would affect the operation of the inmate-filing rules. The inmate-filing rules were drafted with paper filings in mind. The first sentence of the inmate-filing rule refers to a "paper," while the third sentence refers to "postage."

Although most inmates lack access to electronic filing, some inmates are already filing electronically. In three federal districts – the Central and Southern Districts of Illinois and the District of Kansas – some or all state correctional facilities recently began participating in electronic-filing programs for inmates. Might a litigant argue that when an inmate attempts to file electronically, the inmate-filing rule applies? If the template above were adopted as part of the Appellate Rules, might a litigant argue that the template's subdivision (a) expands the inmate-filing rule's reference to "[a] paper filed by an inmate" to include a document electronically filed by an inmate? For example, could an inmate argue that attempting to file electronically using the prison's electronic-filing system counts as "deposit[ing] [the filing] in the institution's internal mail system"?[8] On the whole, I do not consider this possibility worrisome. It seems to me unlikely that many inmates will think to make this argument. And if the institution in

[7] See the memorandum concerning Item Nos. 08-AP-A, 08-AP-C, 11-AP-C, 11-AP-D, and 13-AP-D. That memo also discusses (a) amending the "three-day rule" to exclude electronic service and (b) the possibility of eliminating the "three-day rule" altogether. Option (a) does not seem to me to have any particular intersection with the inmate-filing provisions. Option (b) might well raise issues in the context of inmate filings, but I am guessing that any proposal to adopt option (b) is unlikely to come to fruition in the near future, and I do not focus on it in this memo.

[8] An inmate whose last-day electronic filing failed might wish to make this argument because using the inmate-filing provision, if applicable, would be a more attractive option than seeking an extension under Rule 4(a)(5) (for a notice of appeal) or Rule 26(b) (for other documents).

fact provides an electronic-filing system for the inmates' use, why not provide those inmates with the benefit of the inmate-filing rule for such electronic filings?

Finally, I should note that a narrower version of the "e=paper" provision set forth in subdivision (a) of the template already exists in the Appellate Rules. Rule 25(a)(2)(D) currently provides in part that "A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules." Rule 25(a)(2)(D)'s provision applies only to electronic filings "in compliance with a local rule," while the template provision states that any reference to a paper includes an electronic document. But the apparent absence of problems involving inmate filings and current Rule 25(a)(2)(D) suggests that adoption of the template's broader e=paper provision should not be problematic.

As for subdivision (b) of the template, I do not see any problems that would pertain directly to inmate filings. Security and other institutional concerns could arise with respect to inmates' use of electronic systems, but that seems to me a matter for local determination. I suppose one question that might arise is whether the template's subdivision (b) might be read to give inmates (or litigants generally) a *right* to use CM/ECF. Currently, each court decides for itself whether to permit non-lawyers to use CM/ECF; not all courts permit pro se litigants (even those who are not incarcerated) to use CM/ECF. Perhaps the need to maintain careful safeguards (such as training, etc.) when allowing pro se litigants to use CM/ECF provides a reason to ensure that the language of subdivision (b) does not suggest an automatic right for all parties to file electronically. But that seems to me to be a broader issue concerning pro se litigants, not a concern specific to inmates.

G. What should the Committee propose concerning parallel provisions?

I list this question last, because the answer may depend on the changes proposed for Rule 4(c)(1).

In considering whether to propose maintaining parallelism between Rules 4(c)(1) and 25(a)(2)(C), the following may be relevant. Filings under Rule 4(c)(1) will typically be shorter than many filings (briefs, petitions, and the like) under Rule 25(a)(2)(C); thus, the cost of postage may be a more salient factor for the latter than the former. Rule 4(c)(1), because it governs the filing of notices of appeal – a jurisdictional requirement – might seem to present the most compelling case for an inmate-friendly rule that promotes the resolution of appeals on their merits. But the distinction is not as clear as it might at first appear. As Michael Gans noted at the spring 2013 meeting, failure to meet a briefing deadline will result in an order to show cause why the appeal should not be dismissed. Moreover, some types of court of appeals proceedings are initiated by a filing in the court of appeals – i.e., by a filing governed by Rule 25(a)(2)(C) rather than by Rule 4(c)(1). This would be true, for instance, of petitions for permission to appeal (under

Rule 5) or petitions for review of agency determinations (under Rule 15). Lack of parallelism between the two Rules might, thus, be undesirable.[9]

More broadly, it seems desirable for inmate-filing rules to be as uniform as possible across the various types of proceedings in which an inmate might be involved. Currently, the inmate-filing rules governing habeas and Section 2255 proceedings track the inmate-filing rules in the Appellate Rules, but all these rules differ somewhat from the Supreme Court's inmate-filing rule. (Any inmate-filing principles concerning district-court filings (other than notices of appeal, habeas filings, and Section 2255 filings) are set by caselaw rather than by national rule.[10])

II. Drafting Rule and Form amendments and a new proposed Form

In the hopes of bringing together the various strands in the discussion above, I set forth here a sketch of possible amendments to Rules 4(c)(1) and 25(a)(2)(C) and Forms 1 and 5, as well as a proposed new Form 7. These sketches may of course require revision in light of the Committee's answers to the questions posed in Part I.

Rule 4. Appeal as of Right--When Taken

* * *

(c) Appeal by an Inmate Confined in an Institution.

(1) 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~~ and either (A) is accompanied 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~~ is being prepaid or (B) such a declaration or notarized

[9] In addition to the considerations noted in the text, a lack of parallelism could create incongruity in situations where a filing other than a notice of appeal (such as an appellate brief) might be seen to serve as the substantial equivalent of a notice of appeal. For such a brief, qua brief, the relevant inmate-filing rule would be Rule 25(a)(2)(C). But would that be true of the same brief, serving as the equivalent of a notice of appeal?

[10] I have not checked to see whether any districts have local rules concerning the timeliness of inmate filings.

statement is filed within any additional time allowed by the court of appeals [in its discretion]. The notice is also timely if it is accompanied by other evidence, such as a postmark and date stamp, that shows the notice was deposited in the institution's internal mail system on or before the last date for filing and that postage was prepaid.

(2) If an inmate files the first notice of appeal in a civil case under this Rule 4(c), the 14-day period provided in Rule 4(a)(3) for another party to file a notice of appeal runs from the date when the district court dockets the first notice.

(3) When a defendant in a criminal case files a notice of appeal under this Rule 4(c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's docketing of the defendant's notice of appeal, whichever is later.

* * *

Committee Note

Rule 4(c)(1) is revised to streamline and clarify the operation of the inmate-filing rule. The second sentence of the former Rule – which had required the use of a "system designed for legal mail" when one existed – is deleted. This change is designed to clarify that an inmate receives the benefit of the rule whether the inmate uses a prison's legal mail system or a prison's general mail system, and that an inmate is required to show timely deposit and prepayment of postage whether or not the inmate uses a prison's legal mail system.

The first sentence of the Rule is amended to specify that a notice is timely if it is accompanied by a declaration or notarized statement stating the date the notice was deposited in the institution's mail system and attesting to the prepayment of first-class postage. The declaration must state that first-class postage "is being prepaid," not (as directed by the former Rule) that first-class postage "has been prepaid." This change reflects the fact that inmates may need to rely upon the institution to affix postage subsequent to the deposit of the document in the institution's mail system. New Form 7 in the Appendix of Forms sets out the contents of the declaration.

The amended rule also provides that a notice is timely without a declaration or notarized statement if other evidence accompanying the notice shows that the notice was deposited on or before the due date and that postage was prepaid. If the notice is not accompanied by evidence that establishes timely deposit and prepayment of postage, then the court of appeals has discretion to accept a declaration or notarized statement at a later date.

Rule 25. Filing and Service

(a) Filing.

* * *

(2) Filing: Method and Timeliness.

* * *

(C) Inmate filing. A paper filed by an inmate confined in an institution is timely if it is 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~~ and either (A) is accompanied 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~~ is being prepaid or (B) such a declaration or notarized statement is filed within any additional time allowed by the court of appeals [in its discretion]. The paper is also timely if it is accompanied by other evidence, such as a postmark and date stamp, that shows the paper was deposited in the institution's internal mail system on or before the last date for filing and that postage was prepaid.

Committee Note

Rule 25(a)(2)(C) is revised to streamline and clarify the operation of the inmate-filing rule. The second sentence of the former Rule – which had required the use of a "system designed for legal mail" when one existed – is deleted. The purposes of the Rule are served whether the inmate uses a system designed for legal mail or a system designed for nonlegal mail.

The first sentence of the Rule is amended to specify that a paper is timely if it is accompanied by a declaration or notarized statement stating the date the paper was deposited in the institution's mail system and attesting to the prepayment of first-class postage. The declaration must state that first-class postage "is being prepaid," not (as directed by the former Rule) that first-class postage "has been prepaid." This change reflects the fact that inmates may need to rely upon the institution to affix postage subsequent to the deposit of the document in the institution's mail system. New Form 7 in the Appendix of Forms sets out the contents of the declaration.

The amended rule also provides that a paper is timely without a declaration or notarized statement if other evidence accompanying the paper shows that the paper was deposited on or before the due date and that postage was prepaid. If the paper is not accompanied by evidence that establishes timely deposit and prepayment of postage, then the court of appeals has discretion to accept a declaration or notarized statement at a later date.

Form 1. Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court

United States District Court for the _____
District of _____
File Number _____

A.B., Plaintiff v. C.D., Defendant	Notice of Appeal

Notice is hereby given that ___(here name all parties taking the appeal)__, (plaintiffs) (defendants) in the above named case,[1] hereby appeal to the United States Court of Appeals for the _____ Circuit (from the final judgment) (from an order (describing it)) entered in this action on the _____ day of _____, 20___.

(s)
_____
Attorney for _____
Address:_____

*[**Note to inmate filers:** If you are an inmate confined in an institution and you seek the benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration along with the Notice of Appeal.]*

[1] See Rule 3(c) for permissible ways of identifying appellants.

Form 5. Notice of Appeal to a Court of Appeals from a Judgment or Order of a District Court or a Bankruptcy Appellate Panel

United States District Court for the _____
District of _____

In re _____, Debtor _____, Plaintiff v. _____, Defendant

File No. _____

Notice of Appeal to United States Court of Appeals for the _____ Circuit

_____, the plaintiff [or defendant or other party] appeals to the United States Court of Appeals for the _____ Circuit from the final judgment [or order or decree] of the district court for the district of _____ [or bankruptcy appellate panel of the _____ circuit], entered in this case on _____, 20__ [here describe the judgment, order, or decree] _____

The parties to the judgment [or order or decree] appealed from and the names and addresses of their respective attorneys are as follows:

Dated _____
Signed _____
Attorney for Appellant
Address: _____
_____

*[**Note to inmate filers:** If you are an inmate confined in an institution and you seek the benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration along with the Notice of Appeal.]*

Form 7. Declaration of Inmate Filing

_____

[insert name of court, for example,
United States District Court for the District of Minnesota]

A.B., Plaintiff

v. Case No. _____

C.D., Defendant

I am an inmate confined in an institution. I deposited the _____ *[insert title of document, for example, "notice of appeal"]* in this case in the institution's internal mail system on _____ *[insert date]*, and first-class postage is being prepaid either by me or by the institution on my behalf.

I declare under penalty of perjury that the foregoing is true and correct [(see 28 U.S.C. § 1746; 18 U.S.C. § 1621)].

Sign your name here _____

Executed on _____ *[insert date]*

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MEMORANDUM

DATE: March 25, 2013

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 07-AP-I

This item arises from Judge Diane Wood's suggestion that the Committee consider clarifying whether Rule 4(c)(1)'s inmate-filing rule[1] requires prepayment of postage. 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 Committee considered the question raised by Judge Wood, and related issues, over the course of three meetings from spring 2008 through spring 2009.[2] At that point, the Committee decided to retain the item on its study agenda while monitoring further developments in the caselaw. This memo provides an updated overview of relevant caselaw,[3] outlines questions that might be addressed by amendments to Rule 4(c), and (for discussion purposes) sketches a few possible alternatives for such amendments.

I. Does Rule 4(c)(1) require prepayment of postage as a condition of timeliness?

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.[4] By contrast, the Seventh and Tenth Circuits have indicated that, if the institution has a legal mail system

[1] The caselaw often refers to this as the "prison mailbox rule." That term, however, seems misleadingly narrow, given that Rule 4(c)(1) applies to any "inmate confined in an institution."
[2] I enclose relevant prior memoranda and excerpts of relevant meeting minutes.
[3] The memo draws upon, and updates, both the discussions in my prior memoranda and the discussion of the same topics in 16A Federal Practice & Procedure § 3950.12 (for which I serve as a coauthor).
[4] *See* United States v. Craig, 368 F.3d 738, 740 (7th Cir. 2004).

and the inmate uses that system, prepayment of postage is not required for timeliness.[5] (This raises the additional question of what constitutes a "system designed for legal mail" within the meaning of Rule 4(c)(1);[6] I return to that topic in Part III of this memo.) To the extent that a postage-prepayment requirement exists, it is currently unclear whether such a requirement is jurisdictional.[7]

The Committee has also considered whether there are constitutional limits on the government's ability to require prepayment of postage for filings by an indigent litigant. As noted in the enclosed memoranda, "prisoners have a constitutional right of access to the courts." *Bounds v. Smith*, 430 U.S. 817, 821 (1977). *See also* Lewis v. Casey, 518 U.S. 343, 349 (1996) (requiring "that an inmate alleging a violation of *Bounds* must show actual injury"). "The tools [*Bounds*] requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement." *Lewis*, 518 U.S. at 355. My October 2008 memo observed that while a number of courts have recognized (or presupposed) a federal constitutional right to some amount of free postage for an indigent inmate's legal mail, the constitutionally required amount can be relatively small. One could argue that *Bounds* requires the application of a prison mailbox rule in at least some instances. In a 2010 decision, the Sixth Circuit found a *Bounds* violation where a defendant's attempt to file a direct appeal of his state-court judgment of conviction was thwarted by prison officials' delay in mailing his appeal papers and by the absence of a prison-mailbox rule under state law.[8]

An amendment to Rule 4(c)(1) could address these questions in a variety of ways. For example, the amendment shown in I.A below would explicitly extend the postage-prepayment requirement to all inmate filings. Extending the requirement could expedite the processing of inmate litigation: Failure to prepay postage adds to the delay created by the prison mailbox rule. And as a point of comparison, if a non-incarcerated litigant who chooses to file a notice of appeal by mail fails to prepay the requisite postage, and the notice of appeal arrives after the appeal deadline, the litigant's appeal will be time-barred unless the litigant qualifies for, and convinces the district court to provide, an extension of time on the basis of excusable neglect or good cause.

On the other hand, the inmate's situation is distinguishable from that of the nonincarcerated litigant in two ways: The inmate may lack ways to make money to pay for the postage, and the inmate cannot use the alternative of walking to the courthouse and filing the notice of appeal by hand. And, as noted above, foreclosing the use of the inmate-filing rule by indigent inmates could raise constitutional concerns. For these reasons, the amendment sketched in I.A may be undesirable standing alone. It could,

[5] *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).

[6] The 1998 Committee Note to Rule 4(c) explains merely: "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."

[7] This question is discussed in the enclosed March 13, 2008 memorandum at 13-19.

[8] *See* Dorn v. Lafler, 601 F.3d 439, 444 (6th Cir. 2010).

however, be combined with other changes that would mitigate the harsh effects of such a change – for example, a provision authorizing the court to excuse compliance with the postage-prepayment requirement (shown in I.B) and/or a provision requiring the court to excuse such compliance if the inmate is indigent (shown in I.C).

Another possible amendment, shown in I.D, would cabin the postage-prepayment requirement by stating explicitly that the requirement does not apply when the inmate uses an institution's legal mail system. One might wonder whether such a change is optimal. Is there something special about a legal mail system that removes the need for prepayment of postage? Also, even if there is a reason for distinguishing inmate mailings deposited in legal mail systems from other inmate mailings, it might be undesirable to tie the postage-prepayment requirement to that distinction because (as noted in Part III below) an inmate might in some instances be unsure whether a particular mailing system qualifies as a legal mail system under the Rule. For these reasons, some might argue that it makes more sense to extend the postage-prepayment requirement across the board while adding one or more safety valves (such as a good-cause exemption and/or an indigence exemption).

Here are sketches illustrating the options noted above:

A. Extend the requirement of prepayment of postage

This sketch shows an amendment that would make clear that the postage-prepayment requirement extends to all cases under the inmate-filing rule:

> 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~~ To receive the benefit of this rule, first-class postage must be prepaid,[9] and if the institution has a system designed for legal mail, the inmate must use that system. 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.

B. Make clear that the court can excuse failure to prepay postage

This sketch adds a sentence to Rule 4(c)(1) to make clear that failure to prepay postage is excusable for good cause:

[9] I assume that there would be a stylistic objection to the use of the passive voice. However, in this context, the passive voice seems appropriate, given the likelihood that in many instances the postage would be affixed by the institution on the inmate's behalf. For a brief survey of some institutions' policies concerning postage, see the enclosed October 20, 2008 memorandum at 2-5.

> 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. For good cause, the court may excuse a failure to prepay postage.

Such an addition would empower a court to excuse such a failure, and would remove any contention that the failure was a jurisdictional defect. On the other hand, adding this sentence, without making any other changes in the Rule, could give rise to the inference that prepayment of postage is a general requirement under Rule 4(c)(1), except when excused by the court for good cause. As noted above, in at least some circuits, prepayment of postage is not required when the inmate uses the institution's legal mail system.

C. Exemption for indigent inmates

The amendment shown in this sketch would require the court to excuse the failure to prepay postage if the inmate is indigent:

> 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 or that the inmate lacked the funds to prepay the postage. The court must excuse a failure to prepay postage if the inmate lacked the necessary funds.

D. Cabin the requirement of prepayment of postage

The amendment shown in this sketch would narrow the Rule's reference to the prepayment of postage, adopting an approach similar to that taken by the Seventh and Tenth Circuits:

> 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. If the institution does not have such a system, first-class postage must be prepaid. 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 (if required) state that first-class postage has been prepaid.

II. Is the declaration (or statement) discussed in the third sentence of Rule 4(c)(1) required in all instances, and if so, must it be included with the notice of appeal or can the appellant provide it later?

My prior memos noted that caselaw in the Seventh and Tenth Circuits suggested that the statement or declaration need not be provided if the prison has a legal mail system and the prisoner uses that system.[10] Another Tenth Circuit decision questioned that view, and also noted that an inmate might err by thinking the institution's mail system qualified as a legal mail system when it in fact did not.[11] But most recently, the Tenth Circuit held that an appellant who uses the legal mail system need not provide the statement or declaration.[12] The Eighth Circuit has taken differing positions on whether the declaration must be included with the notice of appeal.[13] The Tenth Circuit has stated

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[10] In *Ingram v. Jones*, 507 F.3d 640 (7th Cir. 2007), Ingram "admittedly failed to affix first-class postage" when he deposited his notice of appeal in the prison's legal mail system. *Id.* at 642. But the court held his appeal timely, reasoning that "he satisfies the second sentence of Rule 4(c)(1) and [thus] receives the benefit of the Rule, without our consideration of the third sentence." *Id.* at 644. In *United States v. Ceballos-Martinez*, the court likewise described the Rule's requirements in a way that indicated that the second and third sentences were alternatives: "If a prison lacks a legal mail system, a prisoner *must* submit a declaration or notarized statement setting forth the notice's date of deposit with prison officials and attest that first-class postage was pre-paid." United States v. Ceballos-Martinez, 371 F.3d 713, 717 (10th Cir. 2004).

[11] [A]lthough an inmate seeking to take advantage of the mailbox rule must use the prison's legal mail tracking system where one is in place, it would be unwise to rely solely on such a system. If an inmate relying on a prison legal mail system later learns that the prison's tracking system is inadequate to satisfy the mailbox rule, it would be best if an alternative notarized statement or perjury declaration establishing timely filing were already in place." Price v. Philpot, 420 F.3d 1158, 1166 (10th Cir. 2005). *See also id.* at 1166 n.7 ("Although dicta in *Ceballos-Martinez* suggests that in this Circuit a notarized statement or perjury declaration is required only in the case of an inmate who does not have access to a legal mail system …, a future case may hold otherwise.").

[12] *See* Montez v. Hickenlooper, 640 F.3d 1126, 1133 (10th Cir. 2011).

[13] In a case where the clerk received the notice of appeal after time for filing had run out, the Eighth Circuit held that prisoner's failure to provide proof of timely delivery when he first appealed prevented application of the prison mailbox rule.

> We perceive no good reason to allow an appellant to establish timely filing on remand (the second bite at the apple) when nothing hinders the appellant from proving timely filing when he first appeals. To permit remand for limited fact-finding by a district court when the appellant does not, in the first instance, demonstrate timely filing encourages delay and wasteful use of scarce judicial resources. We acknowledge that remand may be appropriate in the rare case in which the prisoner and the warden present conflicting proof of timeliness, or when other complicated circumstances exist.

Porchia v. Norris, 251 F.3d 1196, 1199 (8th Cir. 2001). But less than half a year later the Eighth Circuit held that the statement need not always be filed at the same time as the notice of appeal. *See* Grady v. United States, 269 F.3d 913, 917 (8th Cir. 2001) (applying a prior version of Rule 4(c) in determining the timeliness of a Section 2255 petition). *See also* Sulik v. Taney County, Mo., 316 F.3d 813, 814 (8th Cir.

that Rule 4(c) does not require the declaration to be included with the notice of appeal, but that doing so is the better practice.[14]

Although the provision of the declaration or statement described in the third sentence of Rule 4(c)(1) is a useful means for establishing the timeliness of an inmate filing, there will be times when such a declaration or statement is not needed. Most obviously, if the clerk's office receives the filing before the due date, there is no further need to demonstrate timeliness. In addition, if the inmate uses an institution's legal mail system, that system should itself provide a means for determining the date on which the inmate placed the document in the legal mail system. Rule 4(c)(1) could be revised to make clear that the declaration or statement is required only if the filing's timeliness is in question and cannot be established by these other means. In addition, the Rule could be revised to make clear that in cases where the declaration or statement is needed, it must be provided upon the court's request but need not be filed along with the notice of appeal itself:

> 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. If the court so directs, the inmate must demonstrate t~~T~~imely 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~~ was prepaid.

III. Could one clarify the Rule's reference to "a system designed for legal mail"?

One might argue that the Rule's reference to a "system designed for legal mail" is somewhat indeterminate.[15] If the only function of the Rule's reference to such a system is to require inmates to use legal mail systems where such systems are in place, then "system designed for legal mail" does not seem like a problematic term: An inmate should readily be able to find out from the institution whether it has a special system for legal mail. But if the use of the institution's legal mail system also triggers special rules – such as an exemption from prepaying postage or an exemption from providing a statement or declaration concerning timeliness – then questions might arise as to whether a particular institution's legal mail system qualifies for the application of those special rules. The Tenth Circuit, for example, has suggested that some systems might not

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2003) (following *Grady* when applying current Rule 4(c)(1) to the filing of a notice of appeal); United States v. Murphy, 578 F.3d 719, 720 (8th Cir. 2009) (following *Sulik*).

[14] "While we note that the text of the rule does not require the prisoner to file this attestation at any particular time, at the very least, the prisoner must file it before we resolve his case. If the prisoner fails to do so, we lack jurisdiction to consider his appeal. Thus, to avoid dismissal of their appeals, *we strongly encourage* all prisoners to include with their notices of appeal a declaration or notarized statement in compliance with Rule 4(c)(1)." United States v. Ceballos-Martinez, 387 F.3d 1140, 1144 n.4 (10th Cir. 2004),

[15] *See supra* note 6 and accompanying text; note 11 and accompanying text.

provide the necessary tracking information that justifies dispensing with the requirement of a statement or declaration concerning timeliness.[16]

No one would wish an inmate's reasonable mistake as to whether an institution's system qualified as a "system designed for legal mail" to result in the loss of appeal rights. However, it is not readily apparent how to redraft the Rule to clarify the meaning of "system designed for legal mail." Clearer language would likely be more cumbersome.

It may be preferable to address concerns about the possible vagueness of this term by including other measures that mitigate the effects of an inmate's reasonable mistake in categorizing a particular mail system. Such mitigating measures could include the "good cause" provision discussed in Part I.B and the amendment to Rule 4(c)(1)'s third sentence discussed in Part II.

IV. Is the term "inmate" too narrow to indicate the intended scope of Rule 4(c)(1)?

During the Committee's November 2008 meeting, a participant asked whether the Rule's use of the term "inmate confined in an institution" is too narrow. The concern was that the use of the word "inmate" might suggest that the Rule is directed only at those incarcerated in correctional institutions. However, I have not found any cases that have confined Rule 4(c)(1) to the correctional context. To the contrary, the Ninth Circuit has applied Rule 4(c)(1) to a filing by person who was civilly detained under California's Sexually Violent Predators Act.[17] Thus, I do not think that it is necessary to change this aspect of Rule 4(c)(1).

V. Does Rule 4(c)(1) extend to filings by an inmate who has a lawyer?

A 2009 student note purported to identify a circuit split on this question.[18] I am not convinced that the caselaw has actually developed a split concerning the interpretation of Rule 4(c)(1) itself, but it would not surprise me if such a split were to develop in the future. The Seventh Circuit has held that the Rule extends to filings by inmates who are represented.[19] A 1996 decision by the Eighth Circuit – concerning a filing made after the effective date of the amendment adopting Rule 4(c) – held that the

[16] *See supra* note 11 (quoting Price v. Philpot, 420 F.3d 1158, 1166 (10th Cir. 2005)).
[17] "[T]he rule … by its terms – and in spite of its popular nickname – applies broadly to any 'inmate confined in an institution.' There is no express limitation of the rule's application to prisoners, or to penal institutions, and neither the rule itself nor defendants suggest any reason to infer such a limitation. Jones is undisputably an inmate confined in an institution, specifically the Atascadero State Hospital." Jones v. Blanas, 393 F.3d 918, 926 (9th Cir. 2004).
[18] *See* Courtenay Canedy, Comment, *The Prison Mailbox Rule and Passively Represented Prisoners*, 16 Geo. Mason L. Rev. 773, 779-80 (2009).
[19] "Rule 4(c) applies to 'an inmate confined in an institution' …. A court ought not pencil 'unrepresented' or any extra word into the text of Rule 4(c), which as written is neither incoherent nor absurd." United States v. Craig, 368 F.3d 738, 740 (7th Cir. 2004).

judicially-recognized prison mailbox rule was limited to pro se prisoners;[20] but the decision failed to cite Rule 4(c), and thus the decision's implications for the interpretation of that Rule seem unclear. The Fifth, Eighth, and Ninth Circuits have held, with respect to the timeliness of habeas petitions, that the judicially-developed prison mailbox rule does not extend to filings by represented petitioners; but none of those decisions resulted in a holding concerning the application of Rule 4(c) (which by its terms concerns only the filing of the notice of appeal).[21] I have not found a decision that actually *held* that Rule 4(c)(1) is inapplicable to represented inmates.[22] The Tenth Circuit has noted the question without deciding it.[23]

Even if there is not yet a circuit split concerning Rule 4(c)(1) specifically, it seems quite possible that, in future, another circuit could disagree with the Seventh Circuit's conclusion and could hold Rule 4(c)(1) inapplicable to represented inmates. Such a development could prove to be a trap for unwary inmates who, in the meantime, might rely on the text of the current Rule.

Rule 4(c)(1) could be amended to provide a clear answer to this question. Should such an amendment restrict the Rule to unrepresented litigants? The arguments for restricting the Rule in that way might start from the premise that the *Houston* Court itself was focused on the difficulties facing *pro se* inmates. If a lawyer has represented the inmate in the proceeding below, that lawyer has an obligation to timely file a notice of appeal if the inmate so desires. The lawyer's failure to do so, the argument would run,

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[20] "Burgs is not entitled to the benefit of *Houston* because he was represented by counsel and thus in the same position as other litigants who rely on their attorneys to file a timely notice of appeal." Burgs v. Johnson County, 79 F.3d 701, 702 (8th Cir. 1996).

[21] *See* Nichols v. Bowersox, 172 F.3d 1068, 1074 (8th Cir. 1999) (en banc) ("The prison mailbox rule traditionally and appropriately applies only to *pro se* inmates who may have no means to file legal documents except through the prison mail system."), *overruled on other grounds by* Riddle v. Kemna, 523 F.3d 850, 856 (8th Cir. 2008) (en banc) ("This court therefore abrogates the part of *Nichols* that includes the 90-day time period for filing for certiorari in all tolling calculations under the 28 U.S.C. § 2244(d)(1)(A)."), *overruled by* Gonzalez v. Thaler, 132 S. Ct. 641, 656 (2012) ("[W]ith respect to a state prisoner who does not seek review in a State's highest court, the judgment becomes 'final' under § 2244(d)(1)(A) when the time for seeking such review expires…."); *Nichols*, 172 F.3d at 1077 n.5 ("For the sake of consistency, we adopt the same requirements for this type of filing by a *pro se* inmate as applies to notices of appeal pursuant to [Appellate] Rule 4(c)(1)…."); Cousin v. Lensing, 310 F.3d 843, 847 (5th Cir. 2002) ("[T]he justifications for leniency with respect to *pro se* prisoner litigants do not support extension of the 'mailbox rule' to prisoners represented by counsel."); Stillman v. LaMarque, 319 F.3d 1199, 1202 (9th Cir. 2003) ("Because Stillman was assisted by a lawyer and because he did not deliver his habeas petition to prison officials for forwarding to the court, he cannot take advantage of the mailbox rule.").

[22] A number of decisions refer to Rule 4(c) in terms indicating the assumption that the provision is limited to *pro se* inmates. *See, e.g.*, Allen v. Culliver, 471 F.3d 1196, 1198 (11th Cir. 2006) ("Allen claimed he was entitled to benefit from the 'prison mailbox rule,' articulated in *Houston v. Lack* … , and codified as Federal Rule of Appellate Procedure 4(c), under which a *pro se* prisoner's NOA is deemed filed in federal court on the date it is delivered to prison authorities for mailing.").

[23] *See* United States v. Ceballos-Martinez, 387 F.3d 1140, 1143 n.3 (10th Cir. 2004) (declining to decide "whether a represented prisoner may take advantage of Rule 4(c)(1).")

should not excuse an untimely appeal by an inmate any more than it would excuse any other litigant's appeal.[24]

There are, however, counter-arguments. Just as incarceration limits the inmate's ability to walk to the courthouse and file the notice of appeal in person (or to log on to the computer and file it electronically), incarceration also may limit the inmate's ability to monitor the litigation and to communicate quickly with his or her lawyer. A provision extending the inmate-filing rule to notices of appeal filed by the inmate would provide a safety valve for cases in which a communication breakdown prevented the inmate from inducing his or her lawyer to timely file the notice of appeal. Although the inmate-filing rule does add some delay to litigation – by extending the span of time during which an appeal may turn out to have been filed – one might wonder how many cases would actually be affected by the application of Rule 4(c)(1) to represented inmates. In most cases where an inmate is represented by counsel, counsel will file the notice of appeal as a matter of course. It is hard to see why an inmate's lawyer would instead rely upon the inmate to file the notice of appeal. Accordingly, the application of Rule 4(c)(1) will likely be limited to the – presumably small – universe of cases in which an inmate is represented by counsel but the only notice of appeal on the inmate's behalf is filed by the inmate himself or herself.

Here is a sketch of an amendment that would limit the inmate-filing rule to unrepresented litigants. As this sketch illustrates, such an amendment would require the Committee to define what constitutes representation:

> 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. <u>This rule does not apply to an inmate who is represented by counsel – in the action in which the appeal is taken – on the day [of entry of the judgment or order to be appealed from] [when the notice of appeal is due].</u>

Here is a sketch that would instead make clear that the inmate-filing rule applies to represented litigants so long as the filing itself is made by the inmate:

> 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

[24] In cases where the Sixth Amendment right to counsel applies, redress could be sought by means of an ineffective-assistance claim.

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. This rule applies to an inmate represented by counsel if the inmate, not counsel, files the notice of appeal.

VI. A consolidated sketch of possible amendments

The precise configuration of amendments to Rule 4(c)(1) would depend, of course, on the Committee's choices concerning each of the questions discussed above. Purely for the sake of illustration – to show how a number of the possible changes might fit together – here is a sketch that consolidates several possible changes:

> If an inmate confined in an institution – whether or not represented by counsel – 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. To receive the benefit of this rule, the inmate also must submit contemporaneously with the notice either ~~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, unless the court excuses a failure to prepay postage for good cause.

VII. Connections with other sets of Rules

In considering changes to Rule 4(c)(1)'s inmate-filing provision, the Committee may wish to keep in mind the connections between that provision and related rules and doctrines. Appellate Rule 25(a)(2)(C) extends the inmate-filing concept to filings in the courts of appeals.[25] The Rules that govern habeas and Section 2255 proceedings now include provisions – added in 2004 – that mirror the Appellate Rules' inmate-filing provisions.[26] Supreme Court Rule 29.2 includes an inmate-filing provision that is similar but not identical to the relevant Appellate Rules.[27] As to filings not directly governed by

[25] Rule 25(a)(2)(C) states: "A paper filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid."

[26] Rule 3(d) in the Rules Governing Section 2254 cases provides: "A paper filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid." The same provision appears as Rule 3(d) in the Rules Governing Section 2255 Cases.

[27] Supreme Court Rule 29.2 provides in part: "If submitted by an inmate confined in an institution, a document is timely filed if it is deposited in the institution's internal mail system on or before the last day

a particular inmate-filing rule, some courts have taken the view that the requirements of Rule 4(c)(1) should be followed for the sake of uniformity.[28]

If the Committee moves forward with proposed amendments to Appellate Rule 4(c)(1), it should consider whether to make conforming amendments to Appellate Rule 25(a)(2)(C). It is not clear that the case for making such amendments to Rule 25(a)(2)(C) would be as strong as the case for amending Rule 4(c)(1). Because Rule 4(c)(1) concerns the means for compliance with what (in civil cases) is a jurisdictional requirement, it is particularly important that Rule 4(c)(1) be clear; and one might also argue that it is particularly important that the Rule make clear a court's authority (where appropriate) to excuse certain types of noncompliance, such as failure to prepay postage. These concerns would be less salient when an inmate is attempting to file a brief in the court of appeals rather than attempting to file a notice of appeal in the district court.[29] On the other hand, introducing differences between the Appellate Rules' two inmate-filing provisions could lead to confusion – which is particularly undesirable in rules designed for use by pro se litigants. It would also be desirable to preserve similarity in approach among the other sets of inmate-filing rules. Thus, consultation with the Criminal Rules Committee and other rulemaking bodies would be an important step in connection with any changes in the Appellate Rules' inmate-filing provisions. It would also be important to gather the views of district and circuit clerks.

VIII. Developments concerning electronic filing

During the Committee's prior discussions of the inmate-filing rule, some participants suggested that, eventually, electronic filing would become available to inmates, rendering moot some of the problems that the current Rule is designed to address. In three federal districts – the Central and Southern Districts of Illinois and the District of Kansas – some or all state correctional facilities are now participating in electronic-filing programs for inmates.[30] But at present, most prison inmates lack access to electronic-filing facilities,[31] and it is clear that measures to provide such access must also balance security and other institutional concerns. For the moment, it would seem

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for filing and is accompanied by a notarized statement or declaration in compliance with 28 U.S.C. § 1746 setting out the date of deposit and stating that first-class postage has been prepaid."

[28] *See, e.g.*, Grady v. United States, 269 F.3d 913, 916 (8th Cir. 2001) ("Under our jurisprudence … a prisoner seeking to benefit from the prison mailbox rule must satisfy the requirements of Rule 4(c) whether he files a notice of appeal, a habeas petition, or a § 2255 motion.").

[29] However, it should be noted that Rule 25(a)(2)(C)'s inmate-filing rule also applies to filings that could involve jurisdictional deadlines, such as an inmate's petition under 28 U.S.C. § 1292(b) for permission to take an interlocutory appeal.

[30] I enclose relevant orders concerning these programs.

[31] *See* Donna Stienstra et al., Assistance to Pro Se Litigants in U.S. District Courts: A Report on Surveys of Clerks of Court and Chief Judges (FJC 2011). This study, reporting on the results of a survey of district clerks' offices, stated that – of 29 clerks' offices that identified specific challenges in handling pro se litigation -- "[s]eventeen … respondents stated that the policies and practices of the Bureau of Prisons, state departments of corrections, or the Department of Justice (DOJ) constrain their handling of pro so litigation. Included in this category are prisons' lack of cooperation in providing materials electronically, prisoners' lack of access to computers and electronic forms, the practice of frequently moving prisoners, and an unwillingness to participate in mediation (the one mention of DOJ)." *Id.* at 19.

that the inmate-filing Rules should be assessed based on the assumption that most inmates will continue to use paper filings.

IX. Conclusion

Provisions that affect compliance with jurisdictional deadlines – such as the deadline for taking a civil appeal – should be clear. That is particularly true of provisions designed for use by pro se litigants. A number of aspects of Rule 4(c)(1)'s inmate-filing provision might usefully be clarified. However, amending Rule 4(c)(1) would require a number of choices concerning the appropriate scope and operation of that Rule, and would raise questions about whether to make conforming amendments to Rule 25(a)(2)(C). In addition, choices made with respect to these Appellate Rules could affect the operation of other Rules that contain inmate-filing provisions.

Encls.

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL AND SOUTHERN DISTRICTS OF ILLINOIS

IN RE: PROCEDURAL RULES FOR ELECTRONIC FILING PROGRAM	)	**GENERAL ORDER: No. 2012-1**

This General Order modifies and supersedes General Order No. 2010-1, which was entered on October 15, 2010.

The United States District Courts for the Central and Southern Districts of Illinois and the Illinois Department of Corrections have agreed to participate in an electronic filing program at certain correctional facilities in the State of Illinois. The electronic filing program is designed to reduce the cost of processing court filings made by prisoners in civil rights and habeas corpus cases brought under 42 U.S.C. §1983, 28 U.S.C. §§ 2241, 2254, or 2255, and any other type of case filed in these federal courts. This program will significantly reduce the expenditures for paper, envelopes, copier supplies, and postage for the correctional facilities and the prisoners. Furthermore, it will substantially reduce the amount of staff time spent processing prisoner filings for both the correctional facilities and the district courts.

The details of this program are as follows:

1. Library staff at the participating correctional facilities will scan prisoner filings into a pre-programmed digital sender which converts the filing to .pdf format and e-mails the document directly to the appropriate court. Each divisional office in the Central District of Illinois and the Southern District of Illinois will have a dedicated e-mail address for such filings.

2. Once the document has been scanned and sent to the Court, library staff will make a free copy of the document for the prisoner, and the original will be mailed, via the United States Postal Service, to the appropriate court with the "SCANNED" stamp affixed on the document. Library staff will collect the original pleadings throughout the business day and send all pleadings to the appropriate court at the end of each day.

3. After receiving the prisoner's document via e-mail from the correctional facility, the document will be filed by court staff into the Case Management Electronic Case Filing (CM/ECF). For any document filed by court staff on behalf of the prisoner (other than a complaint, which requires service of process), the Notice of Electronic Filing (NEF) generated by the CM/ECF system will constitute official service upon and notice to the other parties in the case, if counsel for the other parties are registered for electronic case filing. If a party to the case is not registered, the Clerk of Court will mail a copy of the prisoner's electronically filed document to each non-registered party on behalf of the prisoner, via the United States Postal Service.

4. Each participating correctional facility will establish an e-mail address by which library staff will receive the Notice of Electronic Filing (NEF) which issues when a document has been filed electronically. An NEF contains a hyperlink for a free download of the e-filed document. Library staff will print *every* NEF and provide a copy to the prisoner via the institutional mail. In addition, library staff will print the *entire* document when an NEF is

received for any document filed by the Court (orders, notices, minutes, etc.) and the *first page* of any document filed on behalf of the prisoner (which will show the Court's official file stamp and demonstrate that the document has been electronically filed). These materials will also be provided to prisoner via the institutional mail.

5. Defendants and any other non-prisoner party shall mail to the prisoner, via the United States Postal Service, a copy of any document filed on their behalf. Although library staff will print the NEF for documents filed by Defendants and any other non-prisoner party as set forth above, it is not the responsibility of library staff to print a document filed electronically by another party to the case. Any such document will be received by the prisoner via the United States Postal Service.

6. When the Court receives the prisoner's original (paper) document from the correctional facility via the United States Postal Service, court staff will verify that the electronic version of the document, which was received via e-mail from the correctional facility and electronically filed into CM/ECF, matches the original document. Once it has been determined that the electronic version of the document is in proper form, the original (paper) document will be destroyed.

7. After a merit review hearing or preliminary review of the case has been conducted by the Court, the Clerk of Court will produce the necessary copies of the complaint to accomplish service of process upon the

defendants as directed by the Court.

8. Library staff shall verify that any document printed for the prisoner is legible and immediately notify the appropriate court of any printing issues or other technical difficulties.

9. One of the district courts will provide and deliver a digital sender to each correctional facility participating in the Electronic Filing Program. The equipment will at all times remain property of the United States District Court which supplied the digital sender (and bear a property tag reflecting the ownership), and the Department of Corrections will execute an appropriate property receipt provided by the district court. The Department of Corrections will provide a printer and paper necessary to fulfill the requirements of this General Order at each participating correctional facility.

The effective date of this General Order is November 27, 2012.

ENTERED this 27th day of November, 2012.

JAMES E. SHADID
Chief Judge, United States District Court
Central District of Illinois

DAVID R. HERNDON
Chief Judge, United States District Court
Southern District of Illinois

STANDING ORDER NO. 12-1

The United States District Court for the District of Kansas (the Court) and the Kansas Department of Corrections have agreed to participate in a person electronic filing (e-filing) pilot project at the Lansing Correctional Facility (LCF) for a period of one year. The pilot project is expected to reduce the costs of court filings by prisoners in civil cases by reducing associated expenses for paper, envelopes, copying, and postage for prison litigants and time for both LCF staff and court staff in processing these pleadings. This Standing Order will set forth the rules for managing such pleadings during the pilot project.

In consideration of the foregoing,

IT IS HEREBY ORDERED:

1. Participation in the e-filing pilot project is limited to prisoners incarcerated at the LCF who are filing in the U.S. District Court for the District of Kansas. A prisoner who is transferred to any other facility will resume the submission of pleadings by mail.
2. Participation in the pilot project is mandatory for all prisoner litigants at the LCF, and all correspondence and court filings in civil cases in the District of kansas must be electronically transmitted.
3. The management of pleadings in the pilot project will proceed as follows:
   a. Prisoner litigants at the LCF will scan pleadings in civil actions on a digital sender. One digital sender will be provided by the Court for use at the LCF.

   b. Once the document has been scanned, the prisoner will e-mail the pleading to the Court at ksd_clerks_topeka@ksd.uscourts.gov.

   c. The Court will e-file these pleadings upon receipt by e-mail.

   d. Upon filing, the Court will create a Notice of Electronic Filing (NEF), which will confirm the date the pleading was e-filed by the court and contain an electronic link to the document.

   e. A party may not electronically serve a complaint, but instead must effect service according to Federal Rule of Civil Procedure 4. Once defendants or respondent have accepted such service, however, the NEF for a subsequent prisoner pleading shall constitute service of the document by first class mail, postage prepaid.

   f. The NEF will be transmitted to court_filing@lcf.doc.ks.gov and will be distributed through institutional channels to the inmate.

   g. Documents filed by defendants or respondents will continue to be mailed by those parties, and orders entered by the court will be transmitted by mail.

   h. The electronic transmission of correspondence and court filings is free to prisoners, however, statutory filing fees apply to these actions and are not affected by e-filing.

   i. Prisoner participants in the e-filing pilot project remain subject to the provisions of D. Kan. Rule 9.1. Initial court filings, such as petitions and complaints, submitted by these participants must be transmitted on official forms, and all court filings must contain the prisoners conviction name and KDOC identification number, the name of the opposing party, the case number, if one has been assigned, and signature. The failure to provide this information may result in delay in processing of the incomplete submission. Complete copies of the rules of the Court are available for review in the law library.

   j. Questions regarding filing by prisoners who are in segregated housing should be directed to the faciliy librarian.

4. The Clerk of the Court is authorized to develop, implement, publish, and modify as necessary additional administrative procedures to manage the e-filing pilot project.

IT IS FURTHER ORDERED that this Standing Order shall become effective January 1, 2012, and shall remain in effect for one year, subject to extension upon the agreement of the parties.

IT IS SO ORDERED

Dated this 15th day of December, 2011.

STANDING ORDER NO. 12-2

The United States District Court for the District of Kansas (the Court) and the Kansas Department of Corrections commenced a prison electronic filing (e-filing) pilot project in February 2012 at the Lansing Correctional Facility (LCF) for a period of one year. The pilot project is expected to reduce the costs of court filings by prisoners in civil cases by reducing associated expenses for paper, envelopes, copying, and postage for prison litigants and time for both corrections staff and court staff in processing these pleadings. This Standing Order expands the pilot project to all facilities maintained by the Kansas Department of Corrections (the Department), as designated by the Department, effective June 1, 2012, and sets forth the rules for managing such pleadings during the pilot project.

In consideration of the foregoing, IT IS HEREBY ORDERED:

1. Participation in the e-filing pilot project is extended to prisoners incarcerated at all facilities designated by the Department and filing in the U.S. District Court for the District of Kansas. A prisoner who is transferred to any facility not designated for inclusion by the Department will resume the submission of pleadings by mail.

2. Participation in the pilot project is mandatory for all prisoner litigants assigned to designated facilities, and all correspondence and court filings in civil cases in the District of Kansas must be electronically transmitted.

3. The management of pleadings in this pilot project will proceed as follows:

a. Prisoner litigants at designated facilities will scan pleadings in civil actions on a digital sender or similar equipment.

b. Once the document has been scanned, the prisoner will e-mail the pleading to the Court at: ksd_clerks_topeka@ksd.uscourts.gov.

c. The Court will e-file these pleadings upon receipt by e-mail.

d. Upon filing, the Court will create a Notice of Electronic Filing (NEF), which will confirm the date the pleading was e-filed by the court and contain an electronic link to the document.

e. A party may not electronically serve a complaint, but instead must effect service according to Federal Rule of Civil Procedure.

4. Once defendants or respondents have accepted such service, however, the NEF for a subsequent prisoner pleading shall constitute service of the document by first class mail, postage prepaid.

f. The NEF will be transmitted to an e-mail address established by the court upon the designation of the facility and will be distributed through institutional channels to the inmate.

g. Documents filed by defendants or respondents will continue to be mailed by those parties, and orders entered by the Court will be transmitted by mail.

h. The electronic transmission of correspondence and court filings is free to prisoners; however, statutory filing fees apply to these actions and are not affected by e-filing.

i. Prisoner participants in the e-filing pilot project remain subject to the provisions of D. Kan. Rule 9.1. Initial court filings, such as petitions and complaints, submitted by these participants must be transmitted on official forms, and all court filings must contain the prisoner's conviction name and KDOC identification number, the name of the opposing party, the case number, if one has been assigned, and signature. The failure to provide this information may result in delay in processing of the incomplete submission. Complete copies of the rules of the Court are available for review in the law library.

j. Questions regarding filing by prisoners who are in segregated housing should be directed to the facility librarian.

4. The Clerk of the Court is authorized to develop, implement, publish, and modify as necessary additional administrative procedures to manage the e-filing pilot project.

IT IS FURTHER ORDERED that this Standing Order shall become effective June 1, 2012, and shall remain in effect through February 2013, subject to extension upon the agreement of the parties.

IT IS SO ORDERED.

Dated this 17th day of May, 2012.

BY THE COURT:

KATHRYN H. VRATIL

Chief U.S. District Judge

MEMORANDUM

DATE: March 13, 2008

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 07-AP-I

Judge Diane Wood has asked the Committee to consider whether Appellate Rule 4(c)(1)'s "prison mailbox rule" should be clarified. In particular, Judge Wood suggests that the Committee consider clarifying the Rule's position concerning the prepayment of first-class postage. Questions concerning postage have arisen in two recent Seventh Circuit cases – *United States v. Craig*, 368 F.3d 738 (7th Cir. 2004), discussed in Part II.A of this memo, and *Ingram v. Jones*, 507 F.3d 640 (7th Cir. 2007), discussed in Part II.B. Copies of both those decisions are enclosed.

Rule 4(c)(1) provides:

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

Several issues arise with respect to the prepayment of postage. First, does the rule require prepayment of postage when the institution has no legal mail system? Second, does the rule require prepayment of postage when the institution has a legal mail system and the inmate uses that system? And third, when the rule requires prepayment of postage, is that requirement jurisdictional?

Part I of this memo provides background on Rule 4(c). Part II discusses the issues noted above. Part III concludes.

I. Background and nature of the "prison mailbox rule"

This section reviews the history and development of the "prison mailbox rule."[1] Rule 4(c) – complemented by Rule 3(d)(2),[2] and paralleled by Rule 25(a)(2)(C)[3] – provides the current incarnation of that rule as it applies to notices of appeal. But before the Rules took special account of prisoner filings, two Supreme Court cases dealt with the challenges that arise when inmates in institutions file appeals or other documents. Part I.A. discusses those two key Supreme Court decisions – *Fallen v. United States*[4] and *Houston v. Lack*[5] – and then analyzes the Rules that currently govern inmate filings. Part I.B. reviews the Committee's discussions in 2004 concerning a proposal to amend the Rule.

A. Prior caselaw and the current rules

The Court's 1964 decision in *Fallen* is noteworthy because the concurring opinion prefigures the reasoning of *Houston*. In *Fallen*, the district judge assured the defendant at the time of sentencing on January 15th that he had a right to an appeal. On January 29th -- after the time for appeal had expired -- the clerk of the court received letters from the defendant seeking both a new trial and an appeal. The prisoner had dated the letters January 23 and had mailed them in a single envelope that was not postmarked but showed a government frank. The court of appeals held that both the new trial motion and the notice of appeal were untimely. The Supreme Court reversed. It found "no reason … to doubt that petitioner's date at the top of the

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[1] Part I.A. of this memo is adapted from § 3950.12 of the forthcoming new edition of Federal Practice and Procedure, Vol. 16A.

[2] Rule 3(d)(2) provides: "If an inmate confined in an institution files a notice of appeal in the manner provided by Rule 4(c), the district clerk must also note the date when the clerk docketed the notice."

[3] Rule 25(a)(2)(C) provides:

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

[4] 378 U.S. 139 (1964).

[5] 487 U.S. 266 (1988).

letter was an accurate one and that subsequent delays were not chargeable to him."[6] Reasoning that the "petitioner did all he could under the circumstances," the Court "decline[d] to read the Rules so rigidly as to bar a determination of his appeal on the merits."[7] The four concurring Justices would have reached the same result on a different line of reasoning: "[A] defendant incarcerated in a federal prison and acting without the aid of counsel files his notice of appeal in time, if, within the 10-day period provided by the Rule, he delivers such notice to the prison authorities for forwarding to the clerk of the District Court. In other words, in such a case the jailer is in effect the clerk of the District Court within the meaning of [Criminal] Rule 37."[8]

The Supreme Court revisited the question of inmate filings almost a quarter of a century later, in *Houston v. Lack*. Twenty-seven days after entry of the judgment dismissing his pro se habeas petition, Houston deposited a notice of appeal with the prison authorities for mailing to the court. The record did not reveal when the authorities actually mailed the letter, but the prison's mail log could support an inference that Houston gave the wrong P.O. box number for the federal district court. The district clerk stamped the notice "filed" 31 days after entry of judgment – i.e., one day late. Ultimately, the court of appeals dismissed the appeal as untimely.[9]

The Supreme Court reversed. It adopted the reasoning of the concurring opinion in *Fallen* and held that Houston had filed his notice within the 30-day period when, three days before the deadline, he delivered the notice to the prison authorities for forwarding to the district clerk.[10] The Court emphasized the unique difficulties faced by prisoners litigating pro se: They have no choice but to file by mail; they have to trust that the prison authorities will process the mail without delay; they have no ready way to check that the filing timely arrived in the clerk's office; and they lack the option other litigants have of (as a last resort) making a filing in person if the mailed filing does not timely arrive.[11] The dissenters in the *Houston* case agreed that "the Court's rule makes a good deal of sense" and dissented "only because it is not the rule that we have promulgated through congressionally prescribed procedures."[12]

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[6] 378 U.S. at 143-44.

[7] Id. at 144.

[8] Id. (Stewart, J., joined by Clark, Harlan & Brennan, JJ., concurring). The case was decided under what was then Criminal Rule 37(a).

[9] 487 U.S. at 268-69.

[10] Id. at 270.

[11] Id. at 270-72.

[12] Id. at 277 (Scalia, J., joined by Rehnquist, C.J., and O'Connor & Kennedy, JJ., dissenting).

Soon after the *Houston* decision the Supreme Court amended its own rules to incorporate the result it had reached in that case. In the 1990 revision of the Supreme Court Rules, Rule 29.2 was amended to provide that a document filed in the Supreme Court "by an inmate confined in an institution" is timely if "deposited in the institution's internal mail system on or before the last day for filing and … accompanied by a notarized statement or declaration in compliance with 28 U.S.C. §1746" stating the date of deposit and that first-class postage was prepaid.[13]

The *Houston* decision and the revised Supreme Court Rule were in turn the basis for a new Appellate Rule 4(c), added by the 1993 amendments.[14] This subdivision provides that a notice of appeal by an inmate confined in an institution is timely if deposited in the institution's internal mail system, within the prescribed appeal time, for mailing to the court. The 1993 version of Rule 4(c) left undefined the term "internal mail system"; the rulemakers in 1998 amended Rule 4(c) to provide that if the institution has a system designed for legal mail, the inmate must use it in order to have the benefit of Rule 4(c). Adjustments also were made, both in 1993 and 1998, to the time allowed for appeals by other parties, based on the recognition that several days may elapse between deposit in the institution's mail system and actual delivery to

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[13] Supreme Court Rule 29.2 currently provides:

> A document is timely filed if it is received by the Clerk within the time specified for filing; or if it is sent to the Clerk through the United States Postal Service by first-class mail (including express or priority mail), postage prepaid, and bears a postmark, other than a commercial postage meter label, showing that the document was mailed on or before the last day for filing; or if it is delivered on or before the last day for filing to a third-party commercial carrier for delivery to the Clerk within 3 calendar days. If submitted by an inmate confined in an institution, a document is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing and is accompanied by a notarized statement or declaration in compliance with 28 U.S.C. § 1746 setting out the date of deposit and stating that first-class postage has been prepaid. If the postmark is missing or not legible, or if the third-party commercial carrier does not provide the date the document was received by the carrier, the Clerk will require the person who sent the document to submit a notarized statement or declaration in compliance with 28 U.S.C. § 1746 setting out the details of the filing and stating that the filing took place on a particular date within the permitted time.

[14] The version of Rule 4(c) adopted in 1993 read in relevant part: "If an inmate confined in an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a notarized statement or by a declaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that first-class postage has been prepaid."

the clerk of the district court.[15]

The amended rule is not limited to prisoners; it applies to any "inmate confined in an institution." It applies in both civil and criminal actions. Some courts have held that it is not limited to persons appearing pro se, so long as it is the prisoner, not a lawyer, who is filing the notice of appeal. Although the rule in terms applies only to notices of appeal, some courts have extended the *Houston* decision and, later, Rule 4(c), to some other district-court filings as well. Rule 25(a)(2)(C) extends the prison mailbox rule to filings in the court of appeals.

The general rule is that an appellant bears the burden of showing that the appeal is timely, and courts have applied this principle to inmates.[16] Timely filing may be shown by a notarized statement or declaration stating the date of deposit and stating that first-class postage has been prepaid. Courts have disagreed on whether the inmate must file this statement or

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[15] Rule 4(c)(2) now provides: "If an inmate files the first notice of appeal in a civil case under this Rule 4(c), the 14-day period provided in Rule 4(a)(3) for another party to file a notice of appeal runs from the date when the district court dockets the first notice." And Rule 4(c)(3) provides: "When a defendant in a criminal case files a notice of appeal under this Rule 4(c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's docketing of the defendant's notice of appeal, whichever is later."

[16] *See* Grady v. United States, 269 F.3d 913, 916–17 (8th Cir. 2001) (applying Rule 4(c)'s prison mailbox rule to the filing of Section 2255 motions and stating that the movant "bears the ultimate burden of proving his entitlement to benefit from the rule"); Porchia v. Norris, 251 F.3d 1196, 1198 (8th Cir. 2001) ("[A]n appellant must prove that necessary preconditions to the exercise of appellate jurisdiction-including the timely filing of a notice of appeal-have been fulfilled.").

But see Garvey v. Vaughn, 993 F.2d 776, 781 (11th Cir. 1993) ("*Houston* places the burden of proof for the pro se prisoner's date of delivering his document to be filed in court on the prison authorities, who have the ability to establish the correct date through their logs."); Faile v. Upjohn Co., 988 F.2d 985, 989 (9th Cir. 1993) ("When a pro se prisoner alleges that he timely complied with a procedural deadline by submitting a document to prison authorities, the district court must either accept that allegation as correct or make a factual finding to the contrary upon a sufficient evidentiary showing by the opposing party."). In *United States v. Grana*, the court extended *Houston* to delay by prison officials in delivering notice of entry in criminal case to prisoner, and held that government had burden to establish date of delivery. "The prison will be the party with best and perhaps only access to the evidence needed to resolve such questions…. We therefore interpret *Houston* as placing the burden on the prison of establishing the relevant dates. This allocation of the burden of proof provides the proper motivation for prison authorities to keep clear and accurate mail logs, which are so essential to preserving appellate rights." United States v. Grana, 864 F.2d 312, 316-17 (3d Cir. 1989).

declaration with the notice of appeal,[17] or whether it can instead be filed later.[18] Rule 4(c) does not explicitly address the question of timing, stating merely that "[t]imely filing may be shown" by means of the declaration or statement. The 1993 Committee Note ignores this timing question, but the minutes of the spring 1991 Advisory Committee meeting show that the Advisory Committee intended not to require the filing of the statement with the notice.[19] The

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[17] In a case where the clerk received the notice of appeal after the time for filing had run out, the Eighth Circuit held that the prisoner's failure to provide proof of timely delivery when he first appealed prevented application of the prison mailbox rule:

> We perceive no good reason to allow an appellant to establish timely filing on remand (the second bite at the apple) when nothing hinders the appellant from proving timely filing when he first appeals. To permit remand for limited fact-finding by a district court when the appellant does not, in the first instance, demonstrate timely filing encourages delay and wasteful use of scarce judicial resources. We acknowledge that remand may be appropriate in the rare case in which the prisoner and the warden present conflicting proof of timeliness, or when other complicated circumstances exist.

Porchia v. Norris, 251 F.3d 1196, 1199 (8th Cir. 2001). But in a thoughtful opinion less than half a year later on behalf of a panel including two of the same judges, Judge Bye held that the statement need not always be filed at the same time as the notice of appeal. *See* Grady v. United States, 269 F.3d 913, 917 (8th Cir. 2001), discussed in the following footnote. A later Eighth Circuit decision applied *Grady*. *See* Sulik v. Taney County, Mo., 316 F.3d 813, 814 (8th Cir. 2003).

[18] Grady v. United States, 269 F.3d 913, 917 (8th Cir. 2001) ("The literal terms of the Rule do not require a prisoner to accompany his motion with proof of timely filing and proper postage. The Rule mandates only that a prisoner submit such proof. While it might be sensible to require prisoners to file their affidavits at the same time they file their motions or notices of appeal, it would be imprudent for a court to graft this new requirement onto Rule 4(c) …."); Sulik v. Taney County, Mo., 316 F.3d 813, 814 (8th Cir. 2003) ("The prisoner is not required to attach his affidavit or statement to his notice of appeal." But if the prisoner unduly delays filing the statement, the court can give it less weight or even refuse to consider it.); United States v. Ceballos-Martinez, 371 F.3d 713, 716 n.4 (10th Cir. 2004) ("While we note that the text of the rule does not require the prisoner to file this attestation at any particular time, at the very least, the prisoner must file it before we resolve his case. If the prisoner fails to do so, we lack jurisdiction to consider his appeal. Thus, to avoid dismissal of their appeals, *we strongly encourage* all prisoners to include with their notices of appeal a declaration or notarized statement in compliance with Rule 4(c)(1).") (emphasis in original).

[19] The minutes of that meeting explain: "Judge Logan suggested omitting the requirement that a notice of appeal be accompanied by a statement concerning the date of deposit of the notice in the institutional mailing system. He noted that if the notice is not received by the

Committee's decision makes sense, since the declaration or statement would be unnecessary in cases where the clerk's office notes that it has received the notice within the time for filing. Where the notice has not been timely received by the clerk's office, it seems likely that courts will require the statement or declaration described by Rule 4(c)(1), though two circuits have indicated that the statement or declaration need not be provided if the prison has a legal mailing system and the prisoner uses that system.[20]

B. 2004 Advisory Committee discussion concerning Rule 4(c)

Part II of this memo discusses the issues raised by Judge Wood. A different, though related, aspect of practice under the prison mailbox rule was brought to the Committee's attention a few years ago. The following excerpt from the minutes of the Committee's spring 2004 meeting provides a summary:

> Prof. Philip A. Pucillo, Assistant Professor of Law at Ave Maria School of Law, has directed the Committee's attention to inconsistencies in the way that the "prison mailbox rule" of Rule 4(c)(1) is applied by the circuits....
>
> The circuits disagree about what should happen when a dispute arises over whether a paper was timely filed and the inmate has not filed the affidavit described in the rule. Some circuits dismiss such cases outright, holding that the appellate court lacks jurisdiction in the absence of evidence of timely filing. Other circuits remand to the district court and order the district court to take evidence on the issue of whether the filing was timely. And still other circuits essentially do their own factfinding - holding, for example, that a postmark on an envelope received by a clerk's office is sufficient evidence of timely filing. Prof. Pucillo has proposed that Rule 4(c)(1) be amended to clarify this issue.
>
> The Committee briefly discussed this suggestion at its November 2003 meeting. The Committee tabled further discussion to give Mr. Letter an opportunity to ask the U.S. Attorneys about their experience with this issue and

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court within the time for filing, the court may require the appellant to supply such a statement. Judge Logan moved that at page two of the memorandum line 18 be amended by placing a period after 'filing', by striking the words 'and it is accompanied', and by adding in the same place 'Timely filing may be shown', and by adding at the end of the line, 'by a'. Judge Boggs seconded the motion and it carried five to two."

[20] United States v. Ceballos-Martinez, 371 F.3d 713, 717 (10th Cir. 2004) ("If a prison lacks a legal mail system, a prisoner *must* submit a declaration or notarized statement setting forth the notice's date of deposit with prison officials and attest that first-class postage was pre-paid.") (emphasis in original); Ingram v. Jones, 507 F.3d 640, 644 (7th Cir. 2007).

> get some sense of whether and how federal prosecutors believe that Rule 4(c)(1) should be amended.
>
> Mr. Letter reported that the U.S. Attorneys have not found that this issue is a problem. In general, when a question arises about the timeliness of a filing by a prisoner, U.S. Attorneys find it easier to respond to the prisoner's filing on the merits than to engage in litigation over timeliness. The Department does not believe that Rule 4(c)(1) needs to be amended.
>
> A member said that he did not think that the problem identified by Prof. Pucillo was serious enough to warrant amending Rule 4(c)(1). Other members agreed.

Minutes of Spring 2004 Meeting of Advisory Committee on Appellate Rules, at 33.

The question of whether the absence of the declaration or statement described in Rule 4(c)(1)'s third sentence dooms an appeal was starkly presented in a case decided just months after the Committee's spring 2004 meeting. As described by Judge Hartz in his dissent from the denial of rehearing en banc:

> The issue addressed in the panel opinion is whether Defendant satisfied the prison mailbox rule by depositing his notice of appeal with the prison mail system by September 25, 2002. It is uncontested that he did; the government does not dispute that the notice of appeal was mailed by the prison in an envelope postmarked September 24, 2002. Nevertheless ... the panel reads "may" in Federal Rule of Appellate Procedure 4(c)(1) to say "must," and dismisses Defendant's appeal because the rule required him to establish compliance with the prison mailbox rule by means of either a declaration in compliance with 28 U.S.C. § 1746 or a notarized statement.

United States v. Ceballos-Martinez, 387 F.3d 1140, 1141 (10th Cir. 2004) (Hartz, J., joined by Briscoe & Lucero, JJ., dissenting from denial of rehearing en banc).[21]

II. Issues relating to prepayment of postage

[21] *See also* United States v. Smith, 182 F.3d 733, 734 n.1 (10th Cir. 1999) ("Although Smith is a pro se inmate purporting to have filed his notice of appeal within the prison's internal mail system on April 20, 1998, we do not apply the *Houston v. Lack* ... pro se prisoner mailbox rule because Smith's declaration of a timely filing did not, as required, 'state that first-class postage has been prepaid.' Fed. R.App. P. 4(c)(1)."). (The Smith court, however, held Smith's appeal timely based on another rationale.)

Unlike the Supreme Court rule which it resembles, Rule 4(c) has always treated the payment of postage in a different sentence than the one that states under what conditions an inmate's "notice is timely." This raises the question whether prepayment of postage is a condition of timeliness; Part II.A. considers this question.

Since the 1998 amendments, Rule 4(c)(1) has included three sentences: the first stating when an inmate's notice is timely; the second requiring use of a prison's legal mail system if one exists; and the third (which mentions prepayment of postage) stating a way in which "[t]imely filing may be shown." If an inmate falls within and complies with the second sentence, does the third sentence's reference to postage prepayment apply? Part II.B. notes that two circuits (including the Seventh) have answered this question in the negative.

Assuming that Rule 4(c) requires prepayment of postage in at least some circumstances, what are the consequences of failure to comply with that requirement? Is the failure a jurisdictional defect, and thus not subject to waiver? Or is it a violation of an inflexible claim-processing rule, which can be waived by the other party's failure to timely object? Part II.C discusses these possibilities.

A. Does the rule require prepayment of postage when the institution has no legal mail system?

As discussed in Part II.B. below, some courts have held Rule 4(c)(1)'s third sentence inapplicable to filings by inmates in institutions with legal mail systems. But when the institution has no legal mail system, the third sentence is clearly apposite, and the question is whether that sentence imposes a requirement that the inmate prepay the postage at the time he or she deposits the notice in the prison mail system.[22]

The Seventh Circuit has held that it does impose such a requirement. In *United States v. Craig*, the court dismissed an inmate's notice of appeal as untimely because

> [h]is affidavit states that he deposited the notice in the prison mail system on March 20, 2003, but not that he prepaid first-class postage. Rule 4(c)(1) requires the declaration to state only two things; 50% is not enough. The postage requirement is important: mail bearing a stamp gets going, but an unstamped

[22] Part II.A. does not discuss the related but distinct question posed in the *Ceballos-Martinez* case, where the postmark showed the notice actually was mailed by the prison prior to the appeal deadline and the question was whether the inmate's *failure to submit the statement or declaration* described in the third sentence of Rule 4(c)(1) rendered the appeal untimely. Judge Hartz's critique of the outcome in *Ceballos-Martinez* is persuasive, but that issue is not the focus of Judge Wood's current suggestion to the Committee and, thus, is not treated in detail in this memo.

> document may linger. Perhaps that is exactly what happened: Craig may have dropped an unstamped notice of appeal into the prison mail system, and it took a while to get him to add an envelope and stamp (or to debit his prison trust account for one). The mailbox rule countenances *some* delay, but not the additional delay that is inevitable if prisoners try to save 37¢ plus the cost of an envelope.

United States v. Craig, 368 F.3d 738, 740 (7th Cir. 2004) (emphasis in original).[23]

Assuming that Rule 4(c)(1) does require prepayment of postage, the requirement should not be that *the inmate himself or herself* has prepaid the postage, but only that (to quote the Rule) the postage "has been prepaid." In particular, if the prison has a legal obligation to pay the postage for inmates' legal mail,[24] then the Rule should not be read to require prepayment *by the inmate* (as opposed to by the prison).[25]

There will, however, be times when an inmate has no funds and can assert no legal right to have the prison pay the postage.[26] If the lack of postage prevents the notice from timely proceeding through the mail,[27] then the current Rule can be read to provide that the inmate's

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[23] *Cf.* Hodges v. Frasier, No. 97-50917, 1999 WL 155667, at *1 (5th Cir. Mar. 10, 1999) (unpublished opinion) ("Hodges failed to file timely objections to the magistrate judge's report and recommendation. The objections were timely mailed but were returned because of insufficient postage.... [T]he 'mailbox rule' does not relieve a prisoner from doing all that he can reasonably do to ensure that the clerk of court receives documents in a timely manner.... Failure to place proper postage on outgoing prison mail does not constitute compliance with this standard.").

[24] *Cf. Ingram*, 507 F.3d at 644 n.7 ("Pursuant to a 1981 consent decree, Stateville is obligated to provide appropriate envelopes and pay for postage for all legal mail of the inmates.").

[25] *See Ingram*, 507 F.3d at 645 ("The statement in Rule 4(c)(1) that 'first-class postage has been prepaid' encompasses the notion that the postage has actually been prepaid, either by the prisoner or by the institution.").

[26] Rush, one of the petitioners in *Ingram*, lacked funds to pay for postage and had not yet secured a loan from the prison at the time he deposited his notice of appeal in the prison mail system. The court, reasoning that "[a]lthough prisoners have right of access to courts, they do not have right to unlimited free postage," held that "[p]ostage was not prepaid at the time of deposit because Rush did not secure his right to an exemption for a loan from the warden." 507 F.3d at 645.

[27] If a postmark dated on or before the deadline for taking an appeal shows that the notice timely proceeded through the mail, then the postmark itself ought to demonstrate that the inmate qualifies for the prison mailbox rule. See Part I.B. above, discussing Judge Hartz's

failure to prepay the postage precludes the inmate from showing timely filing.

One might argue that this result is correct. As the *Craig* court noted, failure to prepay the postage will add to the delay created by the prison mailbox rule. And as a point of comparison, if a non-incarcerated litigant who chooses to file a notice of appeal by mail fails to prepay the requisite postage, and the notice of appeal arrives after the appeal deadline, the litigant's appeal will be time-barred[28] unless the litigant qualifies for, and convinces the district court to provide, an extension of time on the basis of excusable neglect or good cause.[29]

On the other hand, the inmate's situation is distinguishable from that of the non-incarcerated litigant in two ways: The inmate may lack ways to make money to pay for the postage, and the inmate cannot use the alternative of walking to the courthouse and filing the notice of appeal by hand. *Cf. Houston*, 487 U.S. at 271 ("Other litigants may choose to entrust their appeals to the vagaries of the mail ... but only the pro se prisoner is forced to do so by his situation.").

B. Does the rule require prepayment of postage when the institution has a legal

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argument to that effect in his dissent from the denial of rehearing en banc in *Ceballos-Martinez*.

[28] *See, e.g.*, 16A Federal Practice & Procedure § 3949.1 ("Deposit of the notice of appeal in the mail ordinarily is not enough if the notice is not actually received in the clerk's office within the designated time.").

[29] *Ramseur v. Beyer*, though it did not involve a failure to prepay postage, provides a possible analogy:

> Ramseur's notice of appeal was mailed on April 10th, a full six days before the 30-day time period expired. Yet it was not "filed" until April 23rd, thirteen days later. Ramseur asserts that this delay was inexplicable and thus qualifies as excusable neglect. We agree. Because his notice of appeal was filed only seven days late, granting Ramseur an extension does not raise overall fairness concerns. More importantly, the delay was not attributable to counsel's bad faith. Rather, Ramseur's notice of appeal was untimely despite counsel's diligent efforts at compliance. By mailing the notice of appeal on April 10th, Ramseur's counsel reasonably believed that it would be filed within the 30-day time period. Further, counsel, upon learning of the delay, acted expeditiously to cure it, by promptly moving for an extension under Rule 4(a)(5).

Ramseur v. Beyer, 921 F.2d 504, 506 (3d Cir. 1990). Similarly, one can imagine a situation involving the failure to prepay postage that might involve excusable neglect. For example, the litigant might affix what he or she believes to be the correct amount of first-class postage but the actual first-class rate is a few pennies higher, leading the post office to reject the mailing.

mail system and the inmate uses that system?

Rule 4(c)(1) mentions prepayment of first-class postage in its third sentence: "Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid." The placement of the reference to postage prepayment in the third sentence – and not elsewhere – in Rule 4(c)(1) raises the question of whether postage prepayment is required when an inmate comes within Rule 4(c)(1)'s *second* sentence by using the prison's legal mail system.

The Seventh Circuit has held that Rule 4(c)(1) does not require postage prepayment when a prisoner uses the prison's legal mail system. In such an instance, the inmate comes within Rule 4(c)(1)'s second sentence, which provides that "[i]f an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule." In *Ingram v. Jones*, 507 F.3d 640 (7th Cir. 2007), Ingram "admittedly failed to affix first-class postage" when he deposited his notice of appeal in the prison's legal mail system. *Id.* at 642. But the court held his appeal timely, reasoning that "he satisfies the second sentence of Rule 4(c)(1) and [thus] receives the benefit of the Rule, without our consideration of the third sentence." *Id.* at 644.

The Tenth Circuit has expressed a similar reading of Rule 4(c)(1):

> The Rule has the following structure. The first sentence establishes the mailbox rule itself (i.e., a notice of appeal is timely filed if given to prison officials prior to the filing deadline). The second sentence is written as a conditional statement, stating that if the prison has a legal mail system, then the prisoner must use it as the means of proving compliance with the mailbox rule. The third sentence applies to those instances where the antecedent of the second sentence is not satisfied (i.e., where there is not a legal mail system).

United States v. Ceballos-Martinez, 387 F.3d 1140, 1144 (10th Cir. 2004).

One might quibble with the *Ceballos-Martinez* court's reasoning, because the court relies in large part on its view of the "structure" of Rule 4(c)(1). A possible problem with relying on the provision's structure is that the third sentence (concerning the declaration or statement) dates from the 1993 amendments, but the second sentence (concerning the legal mail system) was added by the 1998 amendments. Thus, at least as to the period of time between the effective dates of the 1993 and 1998 amendments, the *Ceballos-Martinez* court's "structural" rationale would have been unavailable. A better explanation might be that when an inmate uses an institution's legal mail system, the system will be designed to provide proof of the date of deposit, and thus Rule 4(c)(1)'s third sentence – which concerns how "[t]imely filing may be shown" – need not come into play since the legal mail log itself will show whether the filing was

timely.[30]

The *Ingram* court's approach thus seems reasonable; but it is not inevitable that all circuits will adopt this approach. Some circuits may in the future hold that even when the inmate uses the prison's legal mail system, the inmate must submit the declaration or statement showing that postage was prepaid. And even within a circuit that takes *Ingram*'s approach, an inmate might rely on that approach to his or her detriment, if the inmate is mistaken in his or her belief that the relevant prison's system qualifies as a "legal mail" system under Rule 4(c)(1). For these reasons, the Tenth Circuit provided "[a] word of caution" in a decision that post-dates *Ceballos-Martinez*:

> [A]lthough an inmate seeking to take advantage of the mailbox rule must use the prison's legal mail tracking system where one is in place, it would be unwise to rely solely on such a system. If an inmate relying on a prison legal mail system later learns that the prison's tracking system is inadequate to satisfy the mailbox rule, it would be best if an alternative notarized statement or perjury declaration establishing timely filing were already in place. Therefore, although inmates with an available legal mail system should assert in their filings that they did use that legal system, they would be wise, at least for the sake of thoroughness, to also include a notarized statement or perjury declaration attesting to the date of transmission and stating that postage has been prepaid.

Price v. Philpot, 420 F.3d 1158, 1166 (10th Cir. 2005). The *Price* court suggested that the *Ceballos-Martinez* court's view might not persist: "Although dicta in *Ceballos-Martinez* suggests that in this Circuit a notarized statement or perjury declaration is required only in the case of an inmate who does not have access to a legal mail system ... , a future case may hold otherwise." *Price*, 420 F.3d at 1166 n.7.

C. When the rule requires prepayment of postage, is that requirement jurisdictional?

If a court considers postage-prepayment a requisite to timeliness under Rule 4(c)(1), that court might conclude that prepayment of postage under the current Rule 4(c)(1) is a

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[30] *Cf.* United States v. Craig, 368 F.3d 738, 740 (7th Cir. 2004) (noting that use of a prison's legal mail system "provides verification of the date on which the notice was dispatched"); 1998 Committee Note to Appellate Rule 4(c) ("Some institutions have special internal mail systems for handling legal mail; such systems often record the date of deposit of mail by an inmate, the date of delivery of mail to an inmate, etc.").

jurisdictional requirement rather than a non-jurisdictional claim-processing rule.[31] The rulemakers, however, could alter such a result.

Prior to the Supreme Court's decisions in *Kontrick v. Ryan*, 540 U.S. 443 (2004), and *Eberhart v. United States*, 546 U.S. 12 (2005) (per curiam), it could have made sense to treat a postage-prepayment requirement set by Rule 4(c)(1)[32] as a jurisdictional prerequisite.[33] After all, if one views the prepayment of postage as critical to the application of the prison mailbox rule, then one views postage prepayment as critical to timely filing of the notice of appeal. And timely filing of the notice was widely considered, prior to *Kontrick* and *Eberhart*, as a jurisdictional requirement. *See, e.g.*, *United States v. Robinson*, 361 U.S. 220, 229 (1960) ("[Criminal] Rule 45(b) says in plain words that '* * * the court may not enlarge * * * the period for taking an appeal.' The courts have uniformly held that the taking of an appeal within the prescribed time is mandatory and jurisdictional.").

As the Committee is aware, *Kontrick* criticized the *Robinson* Court's use of the phrase

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[31] A different possibility is that a court might apply Rule 3(a)(2)'s directive that "[a]n appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal." I do not discuss this possibility in the text, because I assume that if a court reads Rule 4(c)(1) to require prepayment of postage as a prerequisite to timely filing under the prison mailbox rule, then such a court would be likely to view prepayment of postage as part of the "timely filing of a notice" rather than as an "other" step that can be excused under Rule 3(a)(2).

[32] This discussion assumes, for purposes of argument, that Rule 4(c)(1) does require prepayment of postage.

[33] For example, the Eighth Circuit's discussion in *Porchia v. Norris* suggests such a view:

> The requirements of Rule 4 are mandatory and jurisdictional, and thus we may not lightly overlook a potential timing defect.... In the ordinary case, a party desiring to proceed in federal court bears the burden of establishing the court's jurisdiction....
>
> Porchia has failed to carry his burden in this instance. Porchia has not explained whether his corrections facility has a separate legal mailing system. He has not indicated whether he used such a mailing system, if indeed the prison operates one. He did not attach an affidavit or a notarized statement setting forth the date of deposit into the prison mail system, and attesting that first-class postage has been prepaid.

Porchia v. Norris, 251 F.3d 1196, 1198 (8th Cir. 2001).

"mandatory and jurisdictional." "Clarity would be facilitated," the *Kontrick* Court explained, "if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." *Kontrick*, 540 U.S. at 454-55. Then, in *Eberhart*, a unanimous Court reinterpreted *Robinson*:

> *Robinson* is correct not because the District Court lacked *subject-matter jurisdiction*, but because district courts must observe the clear limits of the Rules of Criminal Procedure when they are properly invoked…. *Robinson* has created some confusion because of its observation that "courts have uniformly held that the taking of an appeal within the prescribed time is *mandatory and jurisdictional*."….
>
> As we recognized in *Kontrick*, courts "have more than occasionally used the term 'jurisdictional' to describe emphatic time prescriptions in rules of court." …. The resulting imprecision has obscured the central point of the *Robinson* case-that when the Government objected to a filing untimely under Rule 37, the court's duty to dismiss the appeal was mandatory. The net effect of *Robinson*, viewed through the clarifying lens of *Kontrick*, is to admonish the Government that failure to object to untimely submissions entails forfeiture of the objection, and to admonish defendants that timeliness is of the essence, since the Government is unlikely to miss timeliness defects very often.[34]

More recently still, the Court in *Bowles v. Russell*, 127 S. Ct. 2360 (2007), held that Rule 4(a)(6)'s 14-day time limit on reopening the time to take a civil appeal is mandatory and jurisdictional. The *Bowles* Court focused on the fact that the 14-day time limit is set not only in Rule 4(a)(6) but also in 28 U.S.C.§ 2107(c). The Court cited a string of cases stating that appeal time limits are "mandatory and jurisdictional,"[35] as well as a couple of 19th-century cases viewing statutory appeal time limits as jurisdictional.[36] The majority acknowledged that a number of the cases that characterized appeal time limits as "mandatory and jurisdictional" had relied on *United States v. Robinson*, and that it had in recent decisions "questioned *Robinson*'s use of the term 'jurisdictional'"; but the majority maintained that even those recent cases "noted the jurisdictional significance of the fact that a time limit is set forth in a statute," and it stated that "[r]egardless of this Court's past careless use of terminology, it is indisputable that time

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[34] *Eberhart*, 546 U.S. at 17-18.

[35] *Bowles*, 127 S. Ct. at 2363-64 (citing *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 61 (1982) (per curiam); *Hohn v. United States*, 524 U.S. 236, 247 (1998); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 314-315 (1988); and *Browder v. Director, Dep't of Corrs.*, 434 U.S. 257, 264 (1978)).

[36] *Bowles*, 127 S. Ct. at 2364 (citing *Scarborough v. Pargoud*, 108 U.S. 567, 568 (1883), and *United States v. Curry*, 6 How. 106, 113 (1848)).

limits for filing a notice of appeal have been treated as jurisdictional in American law for well over a century."[37] The majority thus concluded that "[j]urisdictional treatment of statutory time limits makes good sense…. Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them."[38]

It makes sense for the Committee to consider *Bowles*'s implications for the prison mailbox rule. An initial question might be whether the rulemakers have authority to adopt a rule like Rule 4(c)(1) if – as *Bowles* holds – statutory appeal time limits are jurisdictional. Fortunately, that question has already been answered by the Court's reasoning in *Houston*. Although *Houston* was decided well prior to the *Bowles* decision, the *Houston* Court addressed and rejected the argument that the statutory nature of the Section 2107 civil appeal deadline deprived the Court of authority to adopt a "prison mailbox" rule:

> Respondent stresses that a petition for habeas corpus is a civil action ... and that the timing of the appeal here is thus ... subject to the statutory deadline set out in 28 U.S.C. § 2107. But, as relevant here, § 2107 merely provides:
>
> "[N]o appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree."
>
> The statute thus does not define when a notice of appeal has been "filed" or designate the person with whom it must be filed, and nothing in the statute suggests that, in the unique circumstances of a *pro se* prisoner, it would be inappropriate to conclude that a notice of appeal is "filed" within the meaning of § 2107 at the moment it is delivered to prison officials for forwarding to the clerk of the district court.

Houston, 487 U.S. at 272.

Houston of course concerned the adoption of a judicially-crafted prison mailbox rule, but its reasoning also supports the conclusion that the rulemakers possess authority to adopt such a rule: Section 2107 sets a time limit for filing, but does not define when filing occurs or with whom the notice of appeal must be filed. Thus, the longstanding view that the rulemakers lack authority to alter the courts' subject matter jurisdiction (absent a specific statutory delegation of authority for that purpose) poses no obstacle to the adoption of a prison mailbox rule such as

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[37] *See Bowles*, 127 S. Ct. at 2364 & n.2 (discussing *United States v. Robinson*, 361 U.S. 220, 229 (1960); *Kontrick v. Ryan*, 540 U.S. 443 (2004); and *Eberhart v. United States*, 546 U.S. 12 (2005) (per curiam)).

[38] *Bowles*, 127 S. Ct. at 2365.

Rule 4(c)(1).

Having concluded that Rule 4(c)(1) is valid, it remains for us to ask whether that Rule's requirements are jurisdictional. A number of courts have held, post-*Bowles*, that appeal-time requirements set only by Rule and not by statute are not jurisdictional.[39] A Rule 4(c)(1) postage-prepayment requirement could thus be regarded as a claim-processing rule rather than a jurisdictional requirement. But it is not clear that courts will uniformly adopt the view that all non-statutory, rule-based requirements are for that reason non-jurisdictional.

Some courts have reasoned that when Rule 4 fills in details concerning the nature of the appeal-time deadline in Section 2107, those gap-filling provisions in Rule 4 themselves take on jurisdictional status. Thus, although Rule 4(a)(4)'s tolling provisions are absent from Section 2107, the Ninth Circuit has held that the time limits incorporated by Rule 4(a)(4)(A)'s reference to "timely" tolling motions must be jurisdictional (if Rule 4(a)(4)(A) is actually to be effective in tolling Section 2107's jurisdictional appeal time limits):

> *Bowles* does not specifically discuss Fed. R.App. P. 4(a)(4), the tolling provision relevant here. The government argues that "Rule 4(a) does not incorporate a statutory time limit in its provision of tolling for Rule 59(e) or Rule 60 motions" and therefore that any failure to comply with the rule should be immunized against belated attack. However, although Fed. R.App. P. 4(a)(4) does not contain language from 28 U.S.C. § 2107, which lacks a tolling provision, the Supreme Court's decision in *Bowles* suggests that the same characterization applies: "Today we make clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement." *Id.*
>
> And even if *Bowles* did not settle the matter with respect to Fed. R.App. P. 4(a)(4), we could not consider the underlying order granting the Rule 41(g) motion. In order to accept the government's argument, we would have to grant the jurisdictional benefit of tolling while denying the tolling rule's jurisdictional significance. We cannot defeat logic or text in this manner. If Fed. R.App. P. 4(a)(4) is jurisdictional, the government's motion does not qualify for tolling because it was filed outside the time frame specified in that rule. *See* Fed. R.App. P. 4(a)(4)(iv), (vi) (permitting tolling for such motions only if they are filed within 10 days of entry of judgment). If Fed. R.App. P. 4(a)(4) is *non* jurisdictional, satisfaction of that provision (or forfeiture of a claim that the government failed to satisfy it) would not enable us to ignore the jurisdictional

[39] Examples are the defendant's deadline for taking a criminal appeal under Rule 4(b)(1)(A), *see United States v. Martinez*, 496 F.3d 387, 388 (5th Cir. 2007); *United States v. Garduno*, 506 F.3d 1287, 1290-91 (10th Cir. 2007), and Rule 4(b)(4)'s authorization of extensions of criminal appeal time for excusable neglect of good cause, *see Garduno*, 506 F.3d at 1290-91.

> 60-day rule of Fed. R.App. P. 4(a)(1). *See Bowles*, 127 S.Ct. at ----, Slip Op. at 8. Under either interpretation of Fed. R.App. P. 4(a)(4), the government's notice of appeal was untimely as to Judge Cooper's underlying order granting the Rule 41(g) motion and must be dismissed for lack of jurisdiction.

United States v. Comprehensive Drug Testing, Inc., 513 F.3d 1085, 1100-01 (9th Cir. 2008) (emphasis in original) (footnotes omitted).[40]

Likewise, though the 150-day cap set by Civil Rule 58 and Appellate Rule 4(a)(7)(A)(ii) – for instances when a separate document is required but never provided – does not appear in Section 2107,[41] the Ninth Circuit has reasoned that the cap is jurisdictional:

> 28 U.S.C. § 2107(a) and Federal Rule of Appellate Procedure 4(a)(1) require that a notice of appeal be filed in a civil case "within 30 days after the judgment or order appealed from is entered." Fed. R.App. P. 4(a)(1)(A). Because the district court did not enter judgment on the order to compel arbitration, CCI had 180 days to appeal the order. *See* Fed. R.App. P. 4(a)(7)(A)(ii); *see also Bowles v. Russell*, --- U.S. ----, 127 S.Ct. 2360, 2363, 168 L.Ed.2d 96 (2007) (stating that "the taking of an appeal within the prescribed time is mandatory and jurisdictional" (internal quotation marks omitted)).
>
> CCI filed its first notice of appeal of the district court's order compelling arbitration on May 16, 2005, 287 days after the order was entered on August 2, 2004. This is well beyond the 180 days allowed by Federal Rule of Appellate Procedure 4(a)(7)(A)(ii). CCI's appeal of the district court's order compelling arbitration is untimely, and we lack jurisdiction to hear the appeal of that issue.

Comedy Club, Inc. v. Improv West Associates, 514 F.3d 833, 841-42 (9th Cir. 2007) (as amended Jan. 23, 2008).

It is thus possible that a court which reads Rule 4(c)(1) to set prepayment of postage as a prerequisite to a timely appeal could conclude, post-*Bowles*, that the postage-prepayment requirement is jurisdictional (at least with respect to civil appeals). That conclusion is not inevitable, however; some courts might instead reason that a requirement set only in Rule 4(c) and not in any statute is not, under *Bowles*, jurisdictional. In any event, because Rule 4(c)

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[40] By contrast, the Sixth Circuit panel majority in *National Ecological Foundation v. Alexander*, 496 F.3d 466, 476 (6th Cir. 2007), held that "where a party forfeits an objection to the untimeliness of a Rule 59(e) motion, that forfeiture makes the motion 'timely' for the purpose of Rule 4(a)(4)(A)(iv)."

[41] Section 2107 simply sets an appeal deadline of "thirty days after the entry of" the relevant judgment, order or decree; it does not define "entry."

constitutes permissible gap-filling by the rulemakers, the rulemakers have authority to alter Rule 4(c)'s requirements. Thus, it would be possible to amend Rule 4(c) to provide that failure to prepay postage is not always fatal to timeliness. For example, the rule might be amended to excuse failure to prepay postage if the inmate has no money with which to pay the postage and no right to require the prison to pay it.

III. Conclusion

Published opinions intepreting Rule 4(c)(1) are relatively rare; most decisions applying the prison mailbox rule are unpublished and nonprecedential. But the caselaw discussed in this memo suggests that courts may disagree about whether Rule 4(c)(1) always requires prepayment of postage as a condition of timely filing under the prison mailbox rule, and, if so, whether that requirement is jurisdictional. A lack of clarity on such matters is undesirable, since failure to comply with a jurisdictional requirement is fatal to an appeal, and even a non-jurisdictional requirement can doom an appeal when an objection is properly raised. If the Committee feels that an amendment to Rule 4(c)(1) is desirable, *Bowles* would appear to pose no barrier to further rulemaking concerning the contours of the prison mailbox rule.

Encls.

Minutes of Spring 2008 Meeting of
Advisory Committee on Appellate Rules
April 10 and 11, 2008
Monterey, California

I. Introductions

Judge Carl E. Stewart called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, April 10, 2008, at 8:30 a.m. at the Monterey Plaza Hotel in Monterey, California. The following Advisory Committee members were present: Judge Kermit E. Bye, Judge Jeffrey S. Sutton, Justice Randy J. Holland, Dean Stephen R. McAllister,[1] Mr. Mark I. Levy, Ms. Maureen E. Mahoney, and Mr. James F. Bennett. Solicitor General Paul D. Clement attended the meeting on April 10, and Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice ("DOJ"), was present on April 10 and represented the Solicitor General on April 11. Also present were Judge Lee S. Rosenthal, Chair of the Standing Committee; Judge Harris L. Hartz, liaison from the Standing Committee; Mr. Peter G. McCabe, Secretary to the Standing Committee; Mr. Charles R. Fulbruge III, liaison from the appellate clerks; Mr. John K. Rabiej, Mr. James N. Ishida and Mr. Jeffrey N. Barr from the Administrative Office ("AO"); and Ms. Marie Leary from the Federal Judicial Center ("FJC"). Prof. Catherine T. Struve, the Reporter, took the minutes.

Judge Stewart welcomed the meeting participants. Judge Stewart noted the Committee's appreciation that Solicitor General Clement was attending the meeting. The Reporter observed that congratulations are due to Judge Stewart for his recent receipt of the 2007 Celebrate Leadership Award from the Shreveport Times and the Alliance for Education; the award honors top community leaders. Mr. Levy reported that Justice Alito sent his greetings to the Committee.

II. Approval of Minutes of November 2007 Meeting

The minutes of the November 2007 meeting were approved, subject to some minor edits to the minutes' discussion of model local rules.

III. Report on January 2008 Meeting of Standing Committee

Judge Stewart reported that the Standing Committee, at its January 2008 meeting, approved for publication the proposed amendment to Rule 29 concerning amicus brief disclosures. Judge Stewart reminded the Committee that the proposed amendment to Rule 1(b)

[1] Dean McAllister attended the meeting on April 10 but was unable to be present on April 11.

Judge Stewart stated that the issue raised by Judge Hartz warrants further study. Mr. Fulbruge will survey the circuit clerks. Also, the Committee should check with the FJC to see what information on the separate document requirement the FJC includes in its training materials for new staff attorneys. Judge Bye noted that the Eighth and Tenth Circuits would be meeting together in summer 2008, and he observed that it would be useful to raise the topic at that meeting. By consensus, the matter was retained on the study agenda.

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

Judge Stewart invited the Reporter to discuss the questions raised by Judge Diane Wood concerning Rule 4(c)'s inmate-filing provision. Judge Wood has asked the Committee to consider whether Appellate Rule 4(c)(1)'s "prison mailbox rule" should be clarified. In particular, Judge Wood suggests that the Committee consider clarifying the Rule's position concerning the prepayment of first-class postage. Questions concerning postage have arisen in two recent Seventh Circuit cases – *United States v. Craig*, 368 F.3d 738 (7th Cir. 2004), and *Ingram v. Jones*, 507 F.3d 640 (7th Cir. 2007).

As discussed in the agenda materials, questions include whether Rule 4(c)(1) requires prepayment of postage when the institution in question has no legal mail system; whether the answer changes when the institution has a legal mail system and the inmate uses it; and whether, when the Rule requires prepayment of postage, that requirement is jurisdictional. The origins of the current Rule can be traced to the Court's decision in *Houston v. Lack*, 487 U.S. 266 (1988), in which the Court held that Houston filed his notice of appeal when he delivered the notice to the prison authorities for forwarding to the district clerk. After deciding *Houston*, the Supreme Court revised its Rule 29.2 to take a similar approach. In 1993, the Appellate Rules were amended to add Rule 4(c). In 1998, Rule 4(c) was amended to provide that if the institution has a system designed for legal mail, the inmate must use that system in order to get the benefit of Rule 4(c). In 2004, the Committee discussed a suggestion by Professor Philip Pucillo that the Rules be amended to clarify what happens when there is a dispute over timeliness and the inmate has not filed the affidavit mentioned in Rule 4(c)(1). The Committee decided to take no action on that suggestion. Shortly thereafter, a Tenth Circuit decision illustrated the problem identified by Professor Pucillo: in *United States v. Ceballos-Martinez*, 371 F.3d 713, 717 (10th Cir. 2004), the defendant's notice of appeal was postmarked with a date prior to the deadline for filing the notice of appeal, but the court held his appeal untimely because he had failed to provide a declaration or notarized statement setting forth the notice's date of deposit with prison officials and attesting that first-class postage was pre-paid.

Turning to the questions raised by Judge Wood's suggestion, the Reporter observed that the rule could be read to require postage prepayment when the institution has no legal mail system; that was, indeed, the Seventh Circuit's view in *Craig*. As the *Craig* court noted, failure to prepay the postage will add to the delay created by the prison mailbox rule. And as a point of comparison, if a non-incarcerated litigant who chooses to file a notice of appeal by mail fails to prepay the requisite postage, and the notice of appeal arrives after the appeal deadline, the

litigant's appeal will be time-barred unless the litigant qualifies for, and convinces the district court to provide, an extension of time on the basis of excusable neglect or good cause. On the other hand, the inmate's situation is distinguishable from that of the non-incarcerated litigant in two ways: The inmate may lack ways to make money to pay for the postage, and the inmate cannot use the alternative of walking to the courthouse and filing the notice of appeal by hand.

When the institution has a legal mail system and the inmate uses that system, it may be the case that prepayment of postage is not required. This was the view adopted by the Seventh Circuit in *Ingram*, and the Tenth Circuit's *Ceballos-Martinez* opinion accords with such a view. But a later Tenth Circuit case has questioned this aspect of the *Ceballos-Martinez* court's reasoning. And it could be risky for an inmate to rely on such a view, even in the Seventh Circuit: what if the inmate's assumption that his or her institution's system qualifies as a legal mail system turns out to be incorrect?

As indicated by the Committee's earlier discussion of *Bowles v. Russell*, it is unclear whether courts will consider any postage-prepayment requirements in Rule 4(c)(1) to be jurisdictional. Rule 4(c)(1) itself is not mirrored in any statute. On the other hand, that provision fills a gap in the statutory scheme for civil appeals, by defining timely filing for purposes of 28 U.S.C. § 2107. As noted previously, some Ninth Circuit decisions have viewed similar gap-filling provisions in Rule 4 to be jurisdictional. Thus, it is possible – though certainly not inevitable – that a court might consider Rule 4(c)(1)'s requirements to be jurisdictional, at least in civil appeals. But the rulemakers have authority to alter those requirements through a rule amendment; as the *Houston* court explained, Section 2107 does not define the filing of a notice of appeal or say with whom it must be filed – and thus the rulemakers' authority to adjust the details of Rule 4(c)(1)'s requirements continues to be clear even after *Bowles*.

An attorney member stated that Judge Wood has identified an ambiguity in the Rule, and that provisions concerning the timeliness of an appeal should not be ambiguous – especially not when the provisions in question deal with appeals by inmates. A judge member agreed that this issue warrants study by the Committee. An attorney member wondered whether prison regulations require the inmate to affix postage to outgoing legal mail. Another attorney member observed that policies vary by institution. Judge Rosenthal observed that the Committee should include in its consideration any rules that may apply to incarcerated aliens. Judge Stewart reported that at the March 2008 Judicial Conference meeting, he attended a session dealing with issues relating to pro se prisoners. He noted that there are a great many pro se prisoner appeals, and that the Committee should also consider immigration appeals. By consensus, the matter was retained on the Committee's study agenda.

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

Judge Stewart invited the Reporter to discuss Judge Alan Lourie's proposal concerning word limits on cross-appeals. Judge Lourie has expressed concern that litigants are abusing the

MEMORANDUM

DATE: October 20, 2008

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 07-AP-I

At the Committee's April 2008 meeting, members discussed Judge Diane Wood's suggestion that the Committee act to clarify ambiguities in Rule 4(c)'s inmate mailbox rule concerning the prepayment of postage. Relevant questions include whether Rule 4(c)(1) requires prepayment of postage when the institution in question has no legal mail system; whether the answer changes when the institution has a legal mail system and the inmate uses it; and whether, when the Rule requires prepayment of postage, that requirement is jurisdictional. The current rule could be read to require postage prepayment when the institution has no legal mail system. On the other hand, it may be the case that when the institution has a legal mail system and the inmate uses that system, prepayment of postage is not required. Under *Bowles v. Russell*, 127 S. Ct. 2360 (2007), it is possible – though certainly not inevitable – that a court might consider Rule 4(c)(1)'s requirements to be jurisdictional, at least in civil appeals. But 28 U.S.C. § 2107 does not define the filing of a notice of appeal or say with whom it must be filed – and thus the rulemakers' authority to adjust the details of Rule 4(c)(1)'s requirements continues to be clear even after *Bowles*.

During the April 2008 discussion of these questions, it was noted that provisions concerning the timeliness of an appeal should not be ambiguous – especially not when the provisions in question deal with appeals by inmates. Participants in the discussions raised a number of factual questions about institutions' policies concerning legal mail; Part I of this memo sketches answers to some of those questions. Part II briefly considers the extent to which indigent inmates may have a constitutional right to some amount of free postage for legal mail.

I. Institutional policy concerning legal mail

Litigants who might be affected by Rule 4(c)'s inmate-filing provision include inmates in federal and state prisons, pretrial detainees, incarcerated aliens, and inmates in mental

institutions. So far, I have obtained information concerning federal prison policy[1] and the policies that apply in some state and local facilities.

A. Federal prison policy

Federal Bureau of Prisons regulations provide:

> (a) Except as provided in paragraphs (d), (e), (f), and (i) of this section, postage charges are the responsibility of the inmate. The Warden shall ensure that the inmate commissary has postage stamps available for purchase by inmates.
>
> . . . .
>
> (c) Inmate organizations will purchase their own postage.
>
> (d) An inmate who has neither funds nor sufficient postage and who wishes to mail legal mail (includes courts and attorneys) or Administrative Remedy forms will be provided the postage stamps for such mailing. To prevent abuses of this provision, the Warden may impose restrictions on the free legal and administrative remedy mailings.
>
> . . . .
>
> (i) Holdovers and pre-trial commitments will be provided a reasonable number of stamps for the mailing of letters at government expense.

28 C.F.R. § 540.21.

From the definitional provisions in this Chapter of the C.F.R., it appears that Section 540.21 applies to all federal penal or correctional institutions[2] and that it governs correspondence by convicted prisoners and detainees of various kinds.[3]

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[1] By the time of the November meeting, I also expect to have information concerning federal policy with respect to alien detainees.

[2] Section 500.1(a) defines the Warden to include, inter alios, "the chief executive officer of a U.S. Penitentiary, Federal Correctional Institution, Medical Center for Federal Prisoners, Federal Prison Camp, Federal Detention Center, Metropolitan Correctional Center, or any federal penal or correctional institution or facility." 28 C.F.R. § 500.1.

[3] Section 500.1(c) provides: "Inmate means all persons in the custody of the Federal Bureau of Prisons or Bureau contract facilities, including persons charged with or convicted of offenses against the United States; D.C. Code felony offenders; and persons held as witnesses,

B. State and local facilities

It was not practicable for me to locate and analyze all the legal provisions governing prisoner mail in state and local facilities throughout the U.S. However, the following are some examples of state and local policies.

Some entities' regulations appear to require that postage be affixed to outgoing mail.[4] Some facilities will periodically provide a set amount of free postage.[5] Other facilities are directed to supply a "reasonable" amount of free postage for legal mail;[6] sometimes such "reasonable" amounts are subject to upper limits.[7] Florida provides free postage to indigent

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detainees, or otherwise." 28 C.F.R. § 500.1(c).

[4] See, e.g., Oregon Admin. R. 291-131-0020(2) ("Outgoing mail, except business mail to department officials in Central Administration sent through the intra-departmental mail system, shall be enclosed in an approved DOC envelope with U.S. postage.").

[5] See, e.g., Wash. Admin. Code 137-48-060(3) ("Indigent inmates shall be authorized to receive postage up to the equivalent to the mailing cost of ten standard first class letters per week. This indigent postage provision shall cover both legal and/or regular letters."); Policies of Lawrence County Jail, South Dakota, available at http://www.lawrence.sd.us/Sheriff/so_corrections.htm (last visited Sept. 14, 2008) ("The jail will provide 1 stamp a day for any out going mail."); Policies of Stearns County Jail, Minnesota, available at http://www.co.stearns.mn.us/3782.htm#mail (last visited Sept. 14, 2008) ("Upon request, indigent inmates may receive three prepaid postcards per week.).

[6] See, e.g., La. Admin Code. tit. 22, pt. I, § 765(E)(5)(b) ("Indigent youth shall have access to the postage necessary to send out approved legal mail on a reasonable basis and the basic supplies necessary to prepare legal documents."); 20 Ill. Admin. Code 525.130(a) ("Offenders with insufficient money in their trust fund accounts to purchase postage shall be permitted to send reasonable amounts of legal mail and mail to clerks of any court or the Illinois Court of Claims, to certified court reporters, to the Administrative Review Board, and to the Prisoner Review Board at State expense if they attach signed money vouchers authorizing deductions of future funds to cover the cost of the postage. The offender's trust fund account shall be restricted for the cost of such postage until paid or the offender is released or discharged, whichever is soonest."); Michigan Admin. Code R. 791.6603(2) ("A prisoner determined to be indigent by department policy shall be loaned a reasonable amount of postage each month, not to exceed the equivalent of 10 first-class mail stamps for letters within the United States of 1 ounce or less. Additional postage shall be loaned to prisoners as necessary to post mail to courts, attorneys, and parties to a lawsuit that is required for pending litigation.").

[7] The Kansas provision, for example, provides:

inmates for legal mail.[8] Some states recoup the cost of free postage from the inmate when funds are available in the inmate's prison account.[9] Wisconsin provides inmates with a revolving $200

> (2) Indigent inmates, as defined by the internal management policies and procedures of the department of corrections, shall receive reasonable amounts of free writing paper, envelopes, and postage for first-class domestic mail weighing one ounce or less, not to exceed four letters per month.
>
> (3) All postage for legal and official mail shall be paid by the inmate, unless the inmate is indigent, as defined by the internal management policies and procedures of the department of corrections. The cost of postage for legal or official mail paid by the facility on behalf of an indigent inmate shall be deducted from the inmate's funds, if available. Credit for postage for legal and official mail shall be extended to indigent inmates under the terms and conditions of the internal management policies and procedures of the department of corrections....

Kansas Admin. Regs. 44-12-601(f).

[8] The Florida provision states:

> The institution shall furnish postage for mail to courts and attorneys and for pleadings to be served upon each of the parties to a lawsuit for those inmates who have insufficient funds to cover the cost of mailing the documents at the time the mail is submitted to the mailroom, but not to exceed payment for the original and two copies except when additional copies are legally required. The inmate shall be responsible for proving that copies in addition to the routine maximum are legally necessary. Submission of unstamped legal mail to the mailroom or mail collection representative by an inmate without sufficient funds shall be deemed to constitute the inmate's request for the institution to provide postage and place a lien on the inmate's account to recover the postage costs when the inmate receives funds.

33 Fla. Admin. Code. Ann. R. 33-210.102(10)(a).

[9] See, e.g., Wash. Admin. Code 137-48-060(4) ("The department shall recoup any expenditures made by the institution for postage due on incoming mail and/or indigent postage for letters, (as identified in subsection (3) of this section) may be recouped by the institution whenever such indigent inmate has ten dollars or more of disposable income in his/her trust fund account."); 33 Fla. Admin. Code. Ann. R. 33-210.102(10)(b) ("At the time that postage is provided to an inmate for this purpose, the Bureau of Finance and Accounting, Inmate Trust Fund Section, shall place a hold on the inmate's account for the cost of the postage. The cost of providing the postage shall be collected from any existing balance in the inmate's trust fund account. If the account balance is insufficient to cover the cost, the account shall be reduced to zero. If costs remain unpaid, a hold will be placed on the inmate's account, subject to priorities of

loan to defray the cost of paper, copies and postage for legal mail; the superintendent can raise the $200 limit in cases of "extraordinary need."[10] There are some indications in the caselaw that some institutions, at some points in time, have had policies that did not provide free postage for indigent inmates.[11]

II. Constitutional requirements concerning access to courts

Though the overview in Part I is not complete, the data suggest that it may be a common practice to provide indigent inmates with some amount of free postage for legal mail, but also that such free postage is often subject to quite strict limits. Both of these observations seem consistent with my quick survey of relevant federal constitutional doctrine. As discussed below, there is support in the caselaw for the proposition that the Constitution requires the government to provide indigent inmates with some amount of free postage for legal mail – but the caselaw also indicates that the constitutionally required amount of free postage may not be very much.

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other liens, and all subsequent deposits to the account will be applied against the unpaid costs until the debt has been paid."); 20 Ill. Admin. Code 525.130(a); Kansas Admin. Regs. 44-12-601(f)(3).

[10] Wisconsin Administrative Code § DOC 309.51(1) provides in part:

> Correspondence to courts, attorneys, parties in litigation, the inmate complaint review system under ch. DOC 310 or the parole board may not be denied due to lack of funds, except as limited in this subsection. Inmates without sufficient funds in their general account to pay for paper, photocopy work, or postage may receive a loan from the institution where they reside. No inmate may receive more than $200 annually under this subsection, except that any amount of the debt the inmate repays during the year may be advanced to the inmate again without counting against the $200 loan limit. The $200 loan limit may be exceeded with the superintendent's approval if the inmate demonstrates an extraordinary need, such as a court order requiring submission of specified documents. The institution shall charge any amount advanced under this subsection to the inmate's general account for future repayment....

The Seventh Circuit has held that a Wisconsin inmate who had used up his $200 loan balance and who had sought but not yet received permission to borrow more than the $200 limit did not meet what the court viewed as Rule 4(c)(1)'s requirement that postage be prepaid at the time the notice of appeal is deposited in the prison mail system. Ingram v. Jones, 507 F.3d 640, 645 (7th Cir. 2007).

[11] See, e.g., Smith v. Erickson, 884 F.2d 1108, 1111 (8th Cir. 1989) (reversing dismissal of challenge to Minnesota state prison policy based on conclusion that "the district court erred in dismissing Smith's claim that the no-postage policy was facially unconstitutional").

"[P]risoners have a constitutional right of access to the courts." *Bounds v. Smith*, 430 U.S. 817, 821 (1977). The *Bounds* Court stated: "It is indisputable that indigent inmates must be provided at state expense with paper and pen to draft legal documents[,] with notarial services to authenticate them, and with stamps to mail them." *Bounds*, 430 U.S. at 824-25.[12] The Court continued: "This is not to say that economic factors may not be considered, for example, in choosing the methods used to provide meaningful access. But the cost of protecting a constitutional right cannot justify its total denial." *Id*. at 825.

More recently, the Court has defined its ruling in *Bounds* narrowly by requiring "that an inmate alleging a violation of *Bounds* must show actual injury." *Lewis v. Casey*, 518 U.S. 343, 349 (1996). As the *Lewis* Court explained: "Because *Bounds* did not create an abstract, freestanding right to a law library or legal assistance, an inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is subpar in some theoretical sense." Instead, the inmate must show how the defect in the prison's program impeded the inmate's access to the courts: "He might show, for example, that a complaint he prepared was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison's legal assistance facilities, he could not have known. Or that he had suffered arguably actionable harm that he wished to bring before the courts, but was so stymied by inadequacies of the law library that he was unable even to file a complaint." *Lewis*, 518 U.S. at 351. Moreover, the *Lewis* Court stated that not all types of inmate claims trigger rights of access under *Bounds*: "*Bounds* does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims. The tools it requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. Impairment of any *other* litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration." *Lewis*, 518 U.S. at 355.

Citing *Lewis v. Casey*, courts have upheld limitations on indigent inmates' ability to proceed in forma pauperis. *See, e.g., Lewis v. Sullivan*, 279 F.3d 526 (7th Cir. 2002) (upholding the three-strikes provision in the Prison Litigation Reform Act).[13] Litigation over i.f.p. status

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[12] This memo focuses principally on institutional policies concerning the provision of postage to an inmate who has been determined to be indigent. It should be noted that an additional issue concerns the institution's policies for determining who counts as indigent. For example, in his dissent from the affirmance of the dismissal of a complaint raising an access-to-court claim, Judge Murnaghan questioned the reasonableness of a policy that determined inmates' indigency at monthly intervals based on the funds in the inmate's account on the 15th of each month. See White v. White, 886 F.2d 721, 728 (4th Cir. 1989) (Murnaghan, J., dissenting).

[13] The PLRA's three-strikes provision is contained in 28 U.S.C. § 1915(g), which states: "In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while

often concerns such questions as whether the litigant will be permitted to proceed without prepaying (or giving security for) fees or costs. One might argue that an inmate's need for assistance in paying postage is qualitatively different from an inmate's need for assistance in paying a filing fee, because the inmate's incarceration *requires* the inmate to file by mail rather than in person (assuming that the option of electronic filing is not available) – and thus the need for postage might be seen to stem from the fact of incarceration. *Cf. Lewis v. Sullivan*, 279 F.3d at 530 ("Prisons curtail rights of self-help (and for that matter means of earning income) and have on that account some affirmative duties of protection. ... This is why the right of access to the courts entails some opportunity to do legal research in a prison library (or something equally good); the prison won't let its charges out to use other libraries, so it must make substitute provision, though not necessarily to the prisoner's liking.").

The caselaw varies by circuit and generalizations are tricky because the discussions can be fact-specific. However, it seems fair to say that while a number of courts have recognized (or presupposed) a federal constitutional right to some amount of free postage for an indigent inmate's legal mail, the constitutionally required amount can be relatively small. Cases applying right-of-access principles to prison postage policies include the following (sorted by circuit):

- *Gittens v. Sullivan*, 848 F.2d 389, 390 (2d Cir. 1988) (New York state prison system) (holding that pro se prisoner "was not denied meaningful access to the courts" where the prison "not only provided Gittens with $1.10 per week for stamps, but also provided him with an additional advance of at least $36 for postage for legal mail").

    - Compare *Chandler v. Coughlin*, 763 F.2d 110, 115 (2d Cir. 1985): Court of appeals reversed dismissal of complaint challenging New York state regulation providing that "an inmate may send five one-ounce letters per week at state expense but may not accumulate credit for unused postage or send one five-ounce document in a week in which he mails nothing else" and barring the provision of free postage for any legal brief.

    - Apparently, the relevant regulation was revised in response to *Chandler*. The application of the revised version was upheld in *Gittens*, and was then upheld on remand in *Chandler*. *See Chandler v. Coughlin*, 733 F.Supp. 641, 647 (S.D.N.Y. 1990).

- *Bell-Bey v. Williams*, 87 F.3d 832, 839 (6th Cir. 1996) (Michigan state prison system) ("MDOC has fulfilled its affirmative duty to provide indigent prisoners access to the courts. By allotting ten stamps per month, a prisoner may send ten sealed letters without

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incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury."

being subject to inspection. If a postage loan is needed for a current suit, a prisoner may either submit proof that the mail pertains to pending litigation, or he may wait until the next month's allotment of postage.").

- *Gaines v. Lane*, 790 F.2d 1299, 1308 (7th Cir. 1986) (assessing prior version of relevant provision concerning Illinois state prison): "The regulations set forth a minimum number of privileged or non-privileged letters which may be sent at state expense. This provision is supplemented by a 'safety valve' provision which permits the additional expenditure of state funds for legal mail when such an expenditure is reasonable. We cannot say that, on its face, this regulation amounts to an unconstitutional impediment on an inmate's access to courts.... Should prison officials abuse these regulations by interpreting them in such a way as to block a prisoner's legitimate access to the courts, the prisoner is not without remedy."

- *Smith v. Erickson*, 884 F.2d 1108, 1111 (8th Cir. 1989) (reversing dismissal of challenge to Minnesota state prison policy based on conclusion that "the district court erred in dismissing Smith's claim that the no-postage policy was facially unconstitutional").

    - *See also Hershberger v. Scaletta*, 33 F.3d 955, 956 (8th Cir. 1994) (Iowa Men's Reformatory): The court of appeals affirmed a judgment which "enjoined the practice of imposing a 50 cent per month service charge on negative balances resulting from purchases of legal postage; enjoined the practice, as currently implemented, of requiring inmates with negative balances over $7.50 to show 'exceptional need;' and ordered the reformatory to provide indigent inmates with at least one free stamp and envelope per week for purposes of legal mail."

    - *Compare Blaise v. Fenn*, 48 F.3d 337, 338 (8th Cir. 1995) (Iowa State Penitentiary): Court of appeals affirmed the dismissal of a claim challenging Iowa state policy of providing "a monthly allowance of $7.70 to all inmates regardless of their disciplinary status. Inmates may use this income in any way they wish, including to pay postage for legal mail. Under ISP regulations, if an inmate has no funds, he may charge up to $3.50 in legal expenses to his account as an 'advance' on the next month's pay or allowance.... If an inmate needs further funds for legal expenses, he can obtain approval for debt over $3.50 from the deputy warden with a showing of 'exceptional need.'"

- *King v. Atiyeh*, 814 F.2d 565, 568 (9th Cir. 1987): Court of appeals reversed the dismissal of a claim challenging "the policy of the Oregon State Hospital limiting indigent patients to three stamps per week." Liberally construed, plaintiffs' allegation that they "have often found it necessary to communicate with the courts more than three (3) times per week and often the pleadings need more than twenty (20) cents postage" sufficed to state a claim.

- *Twyman v. Crisp*, 584 F.2d 352, 358 (10th Cir. 1978) (Oklahoma state prison): Court of

appeals affirmed dismissal of complaint challenging prison's policy that "an inmate must have less than $5.00 in his inmate account to qualify for free postage. He then receives postage for a maximum of two letters per week (eight per month), legal or otherwise. Only if a prisoner has zero in his trust fund will stamps for legal mail (no other type) be provided in excess of the eight."

- *Hoppins v. Wallace*, 751 F.2d 1161, 1162 (11th Cir. 1985) (Alabama state prison system) ("[T]he furnishing of two free stamps a week to indigent prisoners is (1) adequate to allow exercise of the right to access to the courts, and (2) adequate to allow a reasonable inmate to conduct reasonable litigation in any court.").

III. Conclusion

The research summarized above provides the basis for two preliminary observations. First, a number of institutions provide a limited amount of postage assistance to indigent inmates who wish to send legal mail. Second, there is some support in the caselaw for the proposition that the Constitution requires some minimal level of assistance for inmates who cannot afford to pay the postage for their legal mail.

However, these observations are necessarily tentative and incomplete. To understand the likely effect of various possible approaches to the inmate-filing provisions in Rule 4(c), it may be useful to engage in further research, for example by contacting organizations which may be able to shed light on the practices of a broader range of state and local prisons and mental institutions around the country.

Minutes of Fall 2008 Meeting of
Advisory Committee on Appellate Rules
November 13 and 14, 2008
Charleston, SC

I. Introductions

Judge Carl E. Stewart called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, November 13, 2008, at 8:30 a.m. at the Charleston Place Hotel in Charleston, South Carolina. The following Advisory Committee members were present: Judge Kermit E. Bye, Judge Jeffrey S. Sutton, Judge T.S. Ellis III, Dean Stephen R. McAllister,[1] Mr. Mark I. Levy, Ms. Maureen E. Mahoney, and Mr. James F. Bennett. Solicitor General Gregory G. Garre joined the meeting after lunch on November 13, and Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice ("DOJ"), attended the whole meeting. Also present were Judge Lee S. Rosenthal, Chair of the Standing Committee; Judge Harris L. Hartz, liaison from the Standing Committee; Professor Daniel R. Coquillette, Reporter to the Standing Committee; Mr. Peter G. McCabe, Secretary to the Standing Committee; Mr. Charles R. Fulbruge III, liaison from the appellate clerks; Mr. John K. Rabiej, Mr. James N. Ishida and Mr. Jeffrey N. Barr from the Administrative Office ("AO"); and Ms. Marie Leary from the Federal Judicial Center ("FJC"). Mr. Timothy Reagan from the FJC and Professor Richard Marcus joined the meeting on the morning of the 14th. Prof. Catherine T. Struve, the Reporter, took the minutes.

Judge Stewart welcomed the meeting participants.

II. Approval of Minutes of April 2008 Meeting

The minutes of the April 2008 meeting were approved.

III. Report on June 2008 Meeting of Standing Committee

Judge Stewart and the Reporter summarized the FRAP-related actions taken by the Standing Committee at its June 2008 meeting. The Standing Committee gave final approval to a

[1] Dean McAllister was present on November 13 but was unable to be present on November 14.

ripe for appeal).

Judge Stewart suggested that compliance could be improved by raising awareness of the issue, for example, by placing an item on the agenda at meetings for district judges. A letter from the chief judge to the district judges in the district could highlight the issue. Judge Rosenthal noted that if the Committee believes such a reminder would be helpful, it could be useful for the Committee to make a recommendation along those lines. For example, the Committee might ask the Director of the AO to send out such a letter, with examples of documents that comply with the separate document provision. Mr. Rabiej noted that such a letter could be sent to both judges and district clerks. Mr. McCabe noted that there are a number of possible additional avenues for distributing the information, for example, through newsletters. Perhaps it might also be possible to insert a measure into the CM/ECF system that would prompt users to comply. A district judge member suggested that the Director's letter could be followed by another letter from a judge. Judge Rosenthal suggested that the letter could present the matter as a problem which is easy to solve.

Mr. Letter moved that the Committee recommend to the Standing Committee that appropriate steps be taken to raise awareness of the problem, in coordination with the Civil Rules Committee and Bankruptcy Rules Committee. The motion was seconded and was approved by voice vote without objection.

C. Item No. 07-AP-I (FRAP 4(c)(1) and effect of failure to prepay first-class postage)

Judge Stewart invited the Reporter to summarize the status of the inquiries concerning Judge Wood's proposal with respect to Rule 4(c)(1)'s inmate filing rule. At the Committee's Spring 2008 meeting, members raised a number of questions about institutional practices with respect to inmate legal mail – and, in particular, the extent to which indigent inmates have access to funds for postage for use on legal mail. Mr. Letter has made inquiries concerning the policy of the federal Bureau of Prisons. He reports that the issues raised by Judge Wood are not currently of concern to federal agencies or to the DOJ. The Bureau of Prisons has special procedures for legal mail; it provides indigent prisoners with a reasonable supply of postage for use on legal mail; and it requires the prisoners to affix the postage themselves. Thus, if Rule 4(c) were interpreted or amended to require prepayment of postage when an inmate uses an institution's legal mail system, that would not alter existing practice within the Bureau of Prisons. Mr. Letter has also put the Reporter in touch with an official who can provide information concerning the practice in immigration facilities; the Reporter will follow up with her directly.

The Reporter noted that researching the practices in state and local facilities is challenging because of the variety of policies and because many institutions' policies do not seem to be memorialized in readily accessible documents. Some institutions provide set, periodic sums to indigent prisoners; some institutions instead state that they will allow indigent

inmates a reasonable amount of free postage; some institutions advance money for postage to such inmates and then seek to recoup the money once there is a balance in the inmate's account.

The caselaw appears to recognize that indigent prisoners have a federal constitutional right to some amount of free postage in order to implement the inmate's right of access to the courts. The Supreme Court's 1977 decision in *Bounds v. Smith*, 430 U.S. 817 (1977), provides authority for this view. However, *Bounds* has been narrowed in some respects by *Lewis v. Casey*, 518 U.S. 343 (1996). The caselaw from the different circuits varies, and the decisions are very fact-specific; however, common themes appear to be that indigent inmates do have a right to some free postage for legal mail – but also that the constitutionally required amount may not be very large.

Mr. Fulbruge noted that roughly 40 percent of the Fifth Circuit's docket consists of cases involving prisoner litigants. A district judge member asked whether the high percentages of inmate filings in the Fifth and Ninth Circuits are atypical. Mr. Fulbruge responded that, nationwide, the percentage of appellants in the courts of appeals who are pro se is roughly 40 per cent, and that most of those pro se litigants are inmates. The Ninth, Fifth and Fourth Circuits have the greatest proportion of inmate litigation, and the Eleventh Circuit has a large share of inmate litigation as well.

Mr. Letter noted that he sympathizes with Judge Wood's original inquiry: the Rule could definitely be written more clearly. A member noted that the Rule's use of the word "inmate" might be misleading, to the extent that the Rule is intended to cover other institutionalized persons such as people in mental institutions; he suggested that a broader term would be "person" rather than "inmate." A judge member agreed that the Rule should be clarified. An attorney member wondered whether it might be useful to take a more global look at the inmate-filing rule, as opposed to treating only the question of postage. Judge Hartz noted that a related but distinct issue is raised by cases such as *United States v. Ceballos-Martinez*, 387 F.3d 1140 (10th Cir. 2004), in which the court of appeals dismissed a prisoner's appeal – even though it was undisputed (and shown by the postmark) that he had deposited his notice of appeal with the prison mail system within the time for filing the appeal – merely because the prisoner had not included a declaration or notarized statement setting forth the date of deposit and stating that first-class postage had been prepaid.

Judge Sutton, Dean McAllister, and Mr. Letter agreed to work with the Reporter to formulate some possible options for the Committee's consideration at the next meeting.

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

Judge Stewart invited the Reporter to summarize the status of the inquiries concerning this item, which concerns Mr. Levy's suggestion that the Committee consider amending the Appellate Rules to clarify the procedure for amicus briefs with respect to rehearing. At the

Minutes of Spring 2009 Meeting of
Advisory Committee on Appellate Rules
April 16 and 17, 2009
Kansas City, Missouri

I. Introductions

Judge Carl E. Stewart called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, April 16, 2009, at 8:30 a.m. at the Hotel Phillips in Kansas City, Missouri. The following Advisory Committee members were present: Judge Kermit E. Bye, Judge Jeffrey S. Sutton, Justice Randy J. Holland, Dean Stephen R. McAllister, Mr. Mark I. Levy, and Mr. James F. Bennett. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice ("DOJ"), was present representing the Solicitor General. Also present were Judge Harris L Hartz, liaison from the Standing Committee; Mr. Peter G. McCabe, Secretary to the Standing Committee; Mr. Charles R. Fulbruge III, liaison from the appellate clerks; Mr. John K. Rabiej, Mr. James N. Ishida and Mr. Jeffrey N. Barr from the Administrative Office ("AO"); and Ms. Marie Leary from the Federal Judicial Center ("FJC"). Prof. Catherine T. Struve, the Reporter, took the minutes.

Judge Stewart welcomed the meeting participants. He expressed regret that Maureen Mahoney, Judge Ellis, Judge Rosenthal and Professor Coquillette were unable to be present. Judge Stewart noted the Committee's great appreciation of Judge Rosenthal's work on all the Committee's matters including the package of proposed time-computation legislation that is currently before Congress.

II. Approval of Minutes of November 2008 Meeting

The minutes of the November 2008 meeting were approved subject to the correction of a typographical error on page 11.

III. Report on January 2009 meeting of Standing Committee

Judge Stewart and the Reporter highlighted relevant aspects of the Standing Committee's discussions at its January 2009 meeting. The proposed amendment to Appellate Rule 40(a)(1) had been approved by the Appellate Rules Committee at its fall 2008 meeting. Judge Stewart presented that proposed amendment to the Standing Committee for discussion rather than for action, in order to provide an opportunity for the new administration to consider the proposal before the presentation of the proposal for final approval by the Standing Committee. Judge Stewart also described to the Standing Committee the Appellate Rules Committee's ongoing work on other matters such as the question of manufactured finality.

sometimes be raised by the court on its own motion; the Tenth Circuit has provided a thoughtful discussion of this question in *United States v. Mitchell*, 518 F.3d 740 (10th Cir. 2008).

By consensus, the Committee retained this item on its study agenda. Judge Stewart promised that the Reporter would keep the Committee updated on her research concerning *Bowles*-related issues and would also update the Committee on relevant discussions by the joint Civil / Appellate Subcommittee.

c. Item No. 07-AP-I (FRAP 4(c)(1) and effect of failure to prepay first-class postage)

Judge Stewart summarized the Committee's fall 2008 discussion concerning this item, which relates to Rule 4(c)(1)'s provision for notices of appeal filed by inmates confined in institutions. Judge Diane Wood has suggested to the Committee that Rule 4(c)(1) is not as clear as it might be concerning the prepayment of postage. At the fall 2008 meeting, Judge Sutton, Dean McAllister and Mr. Letter had agreed to work with the Reporter to analyze these questions; in preparation for the spring 2009 meeting, they had listed relevant issues for the Committee's consideration.

The Reporter sketched a number of the issues. One question is whether Rule 4(c)(1) requires prepayment of postage as a condition of timeliness; this question is sometimes treated differently depending on whether the institution does or does not have a legal mail system. It is unclear under current caselaw whether the prepayment requirement (to the extent that it exists) is jurisdictional. But even if such a requirement is jurisdictional it could be changed via rulemaking. Another question is whether Rule 4(c)(1) *should* condition timeliness on the prepayment of postage. Admittedly, a first-class stamp costs little, but on the other hand an inmate may lack any funds to buy the stamp. And an inmate, unlike a free person, lacks the option of filing the notice of appeal in person. Another question is whether it makes sense for prepayment of postage to be treated differently for an institution with a legal mail system than for an institution without one. A further question is whether Rule 4(c)(1) might be amended to specify circumstances under which the failure to prepay postage might be forgiven. Yet another question is whether the Rule might be amended to respond to *United States v. Ceballos-Martinez*, 387 F.3d 1140 (10th Cir. 2004), in which the court of appeals dismissed a prisoner's appeal because the prisoner had not included a declaration or notarized statement setting forth the date of deposit and stating that first-class postage had been prepaid (even though the postmark demonstrated that the notice of appeal was deposited in the prison mail system within the time for filing the notice). Still another question is whether Rule 4(c)(1)'s use of the term "inmate" appropriately denotes the range of persons who are confined in institutions and who may invoke the rule.

The Reporter observed that Rule 4(c)(1)'s inmate-filing provision relates to other provisions: Appellate Rule 25(a)(2)(C), Supreme Court Rule 29.2, and Rule 3(d) of the rules governing habeas and Section 2255 proceedings. To the extent that the Appellate Rules

Committee is inclined to proceed with proposals on this topic, consultation with other Advisory Committees seems desirable. The Committee may also wish to consider the question of the project's scope. Should the project encompass other appellate timeliness issues such as delays in an institution's transmittal to an inmate of notice of the entry of a judgment or order? On this point, the Reporter noted that the Rules already address the possibility that a party may fail to learn of the entry of judgment in time to take an appeal, but the existing provisions do not focus on the circumstances of inmates in particular. Another question is whether the project should encompass the timeliness of trial court filings such as tolling motions or complaints.

Mr. Fulbruge described the policy of the Texas Department of Criminal Justice ("TDCJ"). Under that policy, if an inmate is on the "indigent list," the inmate is provided five legal letters per month. If the inmate does not put a stamp on a legal letter, the prison checks to see whether the inmate is on the indigent list and if he is, the prison puts a stamp on the letter, up to the five-letter limit per month (unless there are extraordinary circumstances that justify lifting this limit). Mr. Fulbruge expressed uncertainty as to whether this policy is applied in a uniform fashion by all units within the TDCJ. Mr. Fulbruge noted that if the timeliness of a filing is in question, the Fifth Circuit clerk's office will sometimes request clarification on that point from the district court or the institution.

An appellate judge asked whether the concern that an inmate may lack funds to pay for postage is already addressed by the caselaw indicating that inmates have a constitutional right to some amount of free postage for court filings. Another appellate judge suggested that it might be worth considering a provision that would permit an inmate who lacked the funds for postage to attest that he or she had a constitutional right to have the postage paid by the government. An attorney member suggested that the best course might be to retain the item on the Committee's study agenda so that the issues can percolate further in the courts. Mr. McCabe predicted that in five to ten years most prisons will provide a system that enables inmates to make electronic filings. By consensus, the Committee retained this item on its study agenda and directed the Reporter to monitor relevant developments in the caselaw and in practices relating to electronic filing.

d. Item Nos. 08-AP-D, 08-AP-E, & 08-AP-F (possible changes to FRAP 4(a)(4))

Judge Stewart invited the Reporter to introduce these items, which concern Rule 4(a)(4)'s treatment of timing with respect to tolling motions. These issues form one of the topics that will be considered by the joint Civil / Appellate Subcommittee. One of the items was raised by Peder Batalden, who points out that there can sometimes be a time gap between the entry of an order resolving a tolling motion and the entry of an amended judgment pursuant to that order. The other item responds to suggestions by Public Citizen Litigation Group and the Seventh Circuit Bar Association Rules and Practice Committee, who suggest amending Rule 4(a) so that an initial notice of appeal encompasses appeals from any subsequent order disposing of postjudgment motions.

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MEMORANDUM

DATE: April 4, 2014

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 12-AP-E

The Committee is considering three major questions concerning length limits set by the Appellate Rules: Whether to express all length limits in type-volume terms (and, if so, what to do about filings prepared without a computer); whether to rationalize the treatment of items excluded when computing length; and whether to shorten the type-volume limit for briefs. Part I of this memo highlights relevant considerations; it notes that if existing page limits (in Rules 5, 21, 27, 35, and 40) are replaced with type-volume limits, the two major options for implementing such a change are:

- The "computer brief" approach: i.e., set a page limit that nets out to the same length as the type-volume limit but make the page limit available only for papers produced without a computer.

- The "safe harbor" approach: i.e., create a "safe harbor" page limit that is shorter than the type-volume limit.

Part I also notes two possible ways to rationalize the treatment of exclusions:

- The "form and substance" approach: i.e., create a separate list of exclusions, globally applicable, to which the other Rules would refer.

- The "substance-only" approach: i.e., the exclusions would be revised so that like items in each document are treated alike for purposes of computing length, but the exclusions would not be relocated to a separate globally-applicable provision.

Finally, Part I discusses whether the 1998 revisions resulted in an increase in the length limit on briefs and whether the current type-volume limits for briefs should be reduced.

The chair asked a subcommittee of Judge Chagares, Justice Eid, and Professor Katyal to work with him and the reporter to narrow the issues and formulate a proposal for consideration by the full committee. The sketch in Part II, which employs the "computer brief" approach to length limits and the "form and substance" approach to

exclusions, illustrates the subcommittee's suggested approach, with an open question about the best ratio to use for converting pages to words.

I. Key issues

Drawing upon the Committee's prior discussions and upon discussions with Committee members during the past year, this Part highlights key policy choices to be made.

A. Should existing page limits be converted into type-volume limits?

The 1998 amendments to the Appellate Rules set type-volume length limits for merits briefs; those limits are currently set forth in Rules 32(a)(7) and 28.1(e). But limits denoted in pages remain in Rules 5, 21, 27, 35, and 40.

Neal Katyal has pointed out that some lawyers manipulate length limits that are set in pages by altering fonts and line spacing. Replacing the current page limits with type-volume limits would reduce this opportunity for gamesmanship, because the type-volume limit is harder to manipulate than a page limit. Moreover, technological developments have made it much easier to count words. The Rules of the Supreme Court, for example, now rely exclusively on type-volume limits for all filings printed in booklet format.

Further (and perhaps countervailing) considerations include the following: Multiple rules would require amendment; there currently are more rules of appellate procedure that apply a page limit than there are rules that apply a type-volume limit. Some pro se litigants continue to file non-computer briefs; because some briefs will be handwritten or typed on a typewriter, it is necessary to determine how to handle the length limits for such briefs. When courts order or permit supplemental filings, they often express the length limits for those filings in pages; would a shift to type-volume limits in the rules create a need to set the length limits for supplemental filings in type-volume terms and, if so, would the computation of such limits add an extra layer of complexity? Finally, the type-volume limit will entail the inclusion of an additional item – a certificate of compliance.

B. If amendments are adopted, should those amendments track the approach in current Rules 32(a)(7) and 28.1(e)? If so, should the necessary changes be in the direction of shorter or longer briefs?

The approach reflected in Rule 32(a)(7) suggests the adoption of a particular type-volume limit, cf. Rule 32(a)(7)(B), and the adoption of a safe harbor denominated in pages, cf. Rule 32(a)(7)(A). For the safe harbor to serve its function as a safe harbor (rather than a loophole), there needs to be a difference between the effective length under the type-volume limit and the effective length under the page limit. In the 1998 amendments that put Rule 32(a)(7) in place, the Committee chose to shorten the effective

length under the page limit (to 30 pages for a principal brief) and to select a type-volume limit that purported to approximate the pre-1998 page limit of 50 pages.

If the Committee adopts the type-volume-limit-plus-safe-harbor approach for the length limits in Rules 5, 21, 27, 35, and 40, it will face a choice: Should it choose a safe-harbor limit that is shorter than the present page limit, and a type-volume limit that approximates the current page limit? Or should it set the safe-harbor limit at the current page limit, and choose a type-volume limit that nets out to something longer than the current page limit? Going longer (with the type-volume length) might raise concerns among judges who object to the added length; going shorter (with the safe-harbor page limits) might raise concerns about access to justice for the (largely poor and pro se) filers who would be using the safe-harbor limit rather than the type-volume limit.

C. Should the amendments instead set differently-expressed limits for computer briefs and non-computer briefs?

An alternative approach would retain the current page limits (alongside new type-volume limits), but make those page limits available only to those who prepare their briefs without the use of a computer.[1] Lawyers with access to computers are unlikely to hand-write their briefs or have them typed on a typewriter merely to circumvent type-volume limits.

D. What conversion formula should the Committee employ in transmuting page limits into type-volume limits? Should the length limits for briefs be reduced?

Under either the safe-harbor or the computer-brief approach, it will be necessary to convert pages into an equivalent number of lines and words.

The project that resulted in the 1998 amendments assumed that a brief would typically have 26 lines of text per page; that assumption seems reasonable.[2]

The 1998 project appears to have assumed that a brief would typically have 280 words per page; however, that estimate seems high. At the Committee's spring 2013 meeting, participants questioned the choice – made in the 1998 amendments – to replace the old 50-page brief length limit with a new 14,000-word type-volume limit. It was suggested that this choice increased the length of appellate briefs without sound justification.

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[1] Participants have noted that some pro se litigants file handwritten papers with no margins, covered in tiny handwriting. Such filings are problematic. But there appears to be no obvious way to address this problem; and the problem would arise with any system that retains the option of page limits (including the safe-harbor approach described in I.B).

[2] A page of text with 1-inch margins, double-spaced, in Courier New 12, has 24 lines. Given Appellate Rule 32(a)(4)'s instruction that "[t]he text must be double-spaced, but quotations more than two lines long may be indented and single-spaced," an overall guess of 26 lines per page sounds plausible.

Doug Letter noted that, prior to 1998, the D.C. Circuit had adopted a word limit and had chosen 12,500 words as the appropriate limit. In 1993, the D.C. Circuit's advisory committee on procedures studied representative briefs that did not include an excessive number of single-spaced footnotes or block quotes. Based on that review, the committee recommended that the court adopt a maximum word rule based on an average of 250 words per page. The D.C. Circuit accepted that recommendation and employed the 12,500 word limit for appellate briefs with no reported negative consequences until the 1998 amendments to the federal rules superseded the local rule.[3]

In summer 2013, without the benefit of the D.C. Circuit advisory committee report, Michael Gans researched the issue further. His findings also suggest that the shift from a 50-page limit to a 14,000-word limit increased the length limit for briefs. He found that, on average, briefs filed under the pre-1998 rules had 259 words per page. That average, moreover, is based on a survey that included pages with more than 26 lines of text per page through the use of block quotes and single-spaced footnotes.[4] If one uses 259 words per page as a benchmark, then the word-limit equivalent, for a 50-page brief, would be 12,950 words. Following the D.C. Circuit's pre-1998 rule, and using the round number of 250 words per page, principal briefs would be limited to 12,500 words and reply briefs would be limited to 6,250 words.

An additional question would then arise: What changes should be made in the length limits for briefs in connection with a cross-appeal? Presumably Rule 28.1(e)(2)(A)'s 14,000-word limit for the appellant's principal brief should be reduced to 12,500 to parallel the treatment of length limits under Rule 32(a)(7). And it seems reasonable to accord the same treatment to the length limit for the appellant's response and reply brief (which likewise is currently set by Rule 28.1(e)(2)(A) at 14,000 words). A similar mathematical exercise (16,500 / 280 * 250) would yield a length limit of 14,732 words for the appellee's principal and response brief; presumably, it would be desirable to round this figure up or down and amend Rule 28.1(e)(2)(B) accordingly. Finally, it does not seem that any adjustment would be necessary for Rule 28.1(e)(2)(C), which sets the limit for the appellee's reply brief at half the length specified by Rule 28.1(e)(2)(A).

E. If the Committee proceeds with length-limit amendments, should it also clarify and rationalize the statements of items excluded when computing length limits?

In applying any length limit, litigants will want to know what to count and what to exclude. Some length limits address this question, while others do not:

Rule	Length limit	Exclusions specified?
5(c)	20 pages (petition for permission to appeal; answer; cross-petition)	Rule 5(c): "exclusive of the disclosure statement, the proof of service, and the accompanying documents required by

[3] I enclose Doug Letter's July 14, 1993 letter on behalf of the D.C. Circuit advisory committee.
[4] I enclose Michael Gans' September 3, 2013 letter summarizing his research.

Rule	Length limit	Exclusions specified?
		Rule 5(b)(1)(E)."
21(d)	30 pages (mandamus petition; response)	Rule 21(d): "exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 21(a)(2)(C)."
27(d)(2)	20 pages (motion; response)	Rule 27(d)(2): "exclusive of the corporate disclosure statement and accompanying documents authorized by Rule 27(a)(2)(B)."
27(d)(2)	10 pages (reply)	No.
28(j)	350 words (letter regarding supplemental authorities; response)	Rule 28(j): "[t]he body of the letter."
28.1(e)(1)	30 pages (appellant's principal brief) 35 pages (appellee's principal and response brief) 30 pages (appellant's response and reply brief) 15 pages (appellee's reply brief)	No.
28.1(e)(2)	14,000 words or 1,300 lines (appellant's principal brief; appellant's response & reply brief) 16,500 words or 1,500 lines (appellee's principal and response brief) 7,000 words or 650 lines (appellee's reply brief)	No.
29(d)	"no more than one-half the maximum length authorized by these rules for a party's principal brief" (amicus briefs)	Yes for type-volume limits, via incorporation of Rule 32(a)(7)(B)(iii).
32(a)(7)(A)	30 pages (principal brief) 15 pages (reply brief)	No.
32(a)(7)(B)	14,000 words or 1,300 lines (principal brief) 7,000 words or 650 lines (reply brief	Rule 32(a)(7)(B)(iii): "Headings, footnotes, and quotations count toward the word and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules or regulations, and any certificates of counsel do not count toward the

Rule	Length limit	Exclusions specified?
		limitation."
35(b)(2)	15 pages (petition for en banc hearing or rehearing)	Rule 35(b)(2): "excluding material not counted under Rule 32."
40(b)	15 pages (petition for panel rehearing)	No.

Assuming the Committee agrees that it is worthwhile to review and rationalize the treatment of exclusions, there are two main questions – what to change, and how to change it.

1. What to change

As to the substantive question – how to ensure that exclusions are treated uniformly across different types of filings – I suggest that the Committee consider the following changes:

- **Treat exclusions the same for Rules 28.1(e)(2) and 32(a)(7)(B)**

Rule 28.1's length limits for briefing in connection with cross-appeals differ in one respect from Rule 32(a)(7)'s length limits for briefing in connection with other appeals. Whereas Rule 32(a)(7)(B)(iii) specifies items that are excluded for purposes of calculating the type-volume limitation, Rule 28.1(e)(2) includes no such provision. The 2005 Committee Note to Rule 28.1(e) does not explain the omission.

The Committee's discussion in spring 2013 supported the view that lawyers, in computing the type-volume limit for briefs in cross-appeals, may simply be assuming that it is permissible to exclude the items that Rule 32(a)(7)(B)(iii) lists as excludable. But if other length-related amendments are to be made, it is worthwhile to consider amending the Rules so that exclusions function similarly for purposes of Rules 28.1(e)(2) and 32(a)(7)(B)(iii).

- **Clarify whether the Rule 35(b)(1) statement counts toward length limits for petitions for hearing or rehearing en banc**

During the Committee's spring 2013 meeting, Greg Garre noted a question that has arisen concerning the operation of the length limit for petitions for hearing or rehearing en banc: Does the statement required by Rule 35(b)(1) count for purposes of the 15-page limit set by Rule 35(b)(2)?

The Rule text suggests an affirmative answer: Rule 35(b)(2) states that the "petition … must not exceed 15 pages" and Rule 35(b)(1) states that the "petition must begin with" (not "be preceded by") the statement. And the fact that Rule 35(b)(2)

specifies that "material not counted under Rule 32" should be excluded from the page count might be taken to suggest that *other* items should be *included*. Including the Rule 35(b)(1) statement is also consistent with the notion that the substance of a party's argument should count toward the length limit, while excluded material is non-substantive.

Only two local circuit rules speak to this issue, and they take opposite approaches. The Eleventh Circuit excludes the local circuit equivalent of the Rule 35(b)(1) statement from the 15-page length limit; by contrast, the Federal Circuit *includes* its local circuit equivalent of that statement.[5] Although the Eleventh Circuit's approach might be taken as a departure from the better reading of Appellate Rule 35(b), such a departure is explicitly authorized: Appellate Rule 35(b)(2)'s length limit applies "[e]xcept by the court's permission."

- **Address exclusions for Rules 28.1(e)(1), 32(a)(7)(A), and 40(b)**

If it proceeds with the other length-related amendments discussed above, I suggest that the Committee consider specifying exclusions in Rules 28.1(e)(1) and 32(a)(7)(A) (safe-harbor page limits on briefs)[6] and Rule 40(b) (page limit for petitions for panel rehearing).

2. How to make the change

Assuming that the Committee wishes to make the changes noted above, there are two basic possibilities for doing so. One could list the excluded items in each rule that sets a length limit. Or one could instead create one list of exclusions and add cross-references to that list in each rule that sets a length limit. I show the latter approach in Part II.

II. Illustrating the "computer brief" approach to length limits and the "form and substance" approach to exclusions

This part offers a sketch that adopts the "computer brief" approach to length limits and that adds a new Rule 32(f) setting out a global list of items excluded from length computations. The certificate-of-compliance provision currently in Rule 32(a)(7)(C) would be relocated to a new Rule 32(g) and would apply to filings under all type-volume limits, including the new type-volume limits in Rules 5, 21, 27, 35, and 40. Conforming amendments would be made to Form 6.

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[5] *See* Eleventh Circuit IOP accompanying Rule 35; Eleventh Circuit Rule 35-5(c); and Federal Circuit Rule 35(c)(2).

[6] It may be that litigants simply assume that they can exclude when counting pages (under Rule 32(a)(7)(A)) the same items that they can exclude when counting words or lines (under Rule 32(a)(7)(B)). But clarity seems desirable in a provision that is most likely to be employed by pro se litigants.

Rule 5. Appeal by Permission

* * *

(c) **Form of Papers; Number of Copies**. All papers must conform to Rule 32(c)(2). ~~Except by the court's permission, a paper must not exceed 20 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 5(b)(1)(E).~~ An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case. Except by the court's permission, and excluding items listed in Rule 32(f) and the accompanying documents required by Rule 5(b)(1)(E):

(1) a handwritten or typewritten paper must not exceed 20 pages; and

(2) a paper produced using a computer must comply with Rule 32(g) and not exceed

(A) 5,000 words; or

(B) 520 lines of text printed in a monospaced face.

* * *

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 were subject to manipulation by lawyers. For papers produced using a computer, those page limits are now replaced by type-volume limits. The type-volume limits were derived from the current page limits using the assumption that one page is equivalent to 250 words or to 26 lines of text. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the type-volume limits and the page limit, the calculation excludes the accompanying documents required by Rule 5(b)(1)(E) and any items listed in Rule 32(f).

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

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(d) **Form of Papers; Number of Copies**. All papers must conform to Rule 32(c)(2). ~~Except by the court's permission, a paper must not exceed 30 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 21(a)(2)(C).~~ An original and 3 copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

Except by the court's permission, and excluding items listed in Rule 32(f) and the accompanying documents required by Rule 21(a)(2)(C):

(1) a handwritten or typewritten paper must not exceed 30 pages; and

(2) a paper produced using a computer must comply with Rule 32(g) and not exceed

(A) 7,500 words; or

(B) 780 lines of text printed in a monospaced face.

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 were subject to manipulation by lawyers. For papers produced using a computer, those page limits are now replaced by type-volume limits. The type-volume limits were derived from the current page limits using the assumption that one page is equivalent to 250 words or to 26 lines of text. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the type-volume limits and the page limit, the calculation excludes the accompanying documents required by Rule 21(a)(2)(C) and any items listed in Rule 32(f).

Rule 27. Motions

* * *

(d) Form of Papers; Page Limits; and Number of Copies.

* * *

(2) **Page Limits**. Except by the court's permission, and excluding ~~A motion or a response to a motion must not exceed 20 pages, exclusive of the corporate disclosure statement~~ items listed in Rule 32(f) and accompanying documents authorized by Rule 27(a)(2)(B)~~, unless the court permits or directs otherwise~~.:

(A) A handwritten or typewritten motion or response to a motion must not exceed 20 pages;

(B) A motion or response to a motion produced using a computer must comply with Rule 32(g) and not exceed

(i) 5,000 words; or

(ii) 520 lines of text printed in a monospaced face;

(C) A handwritten or typewritten reply to a response must not exceed 10 pages; and

(D) A reply produced using a computer must comply with Rule 32(g) and not exceed

(i) 2,500 words; or

(ii) 260 lines of text printed in a monospaced face.

* * *

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 were subject to manipulation by lawyers. For papers produced using a computer, those page limits are now replaced by type-volume limits. The type-volume limits were derived from the current page limits using the assumption that one page is equivalent to 250 words or to 26 lines of text. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the type-volume limits and the page limit, the calculation excludes the accompanying documents required by Rule 27(a)(2)(B) and any items listed in Rule 32(f).

Rule 28.1. Cross-Appeals

* * *

(e) Length. Excluding items listed in Rule 32(f), the following limits apply:

(1) **Page Limitation**. Unless it complies with Rule 28.1(e)(2) and (3), the appellant's principal brief must not exceed 30 pages; the appellee's principal and response brief, 35 pages; the appellant's response and reply brief, 30 pages; and the appellee's reply brief, 15 pages.

(2) **Type-Volume Limitation**.

(A) The appellant's principal brief or the appellant's response and reply brief is acceptable if it complies with Rule 32(g) and:

(i) ~~it~~ contains no more than ~~14,000~~ 12,500 words;[7] or

[7] This sketch reflects a proposed reduction from the current rule, as discussed in Part I.D.

(ii) ~~it~~ uses a monospaced face and contains no more than 1,300 lines of text.

(B) The appellee's principal and response brief is acceptable if it complies with Rule 32(g) and:

(i) ~~it~~ contains no more than 14,700 words;[8] or

(ii) ~~it~~ uses a monospaced face and contains no more than 1,500 lines of text.

(C) The appellee's reply brief is acceptable if it complies with Rule 32(g) and contains no more than half of the type volume specified in Rule 28.1(e)(2)(A).

~~(3) **Certificate of Compliance**. A brief submitted under Rule 28.1(e)(2) must comply with Rule 32(a)(7)(C).~~

* * *

Committee Note

When Rule 28.1 was adopted in 2005, it modeled its type-volume limits on those set forth in Rule 32(a)(7) for briefs in cases that did not involve a cross-appeal. At that time, Rule 32(a)(7)(B) set word limits based on an estimate of 280 words per page. The basis for the estimate of 280 words per page is unknown, and the 1998 adoption of Rule 32(a)(7)(B) superseded at least one local circuit rule that used an estimate of 250 words per page based on a study of appellate briefs. The committee believes that the use of the estimate of 280 words per page inadvertently increased the length limits for briefs. Rules 28.1 and 32(a)(7)(B) are amended to reduce the word limits accordingly.

Rule 28.1(e) is amended to refer to new Rule 32(f) (which sets out a global list of items excluded from length computations) and to new Rule 32(g) (which now contains the certificate-of-compliance provision formerly in Rule 32(a)(7)(C)).

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

(a) Form of a Brief.

* * *

(7) Length. Excluding items listed in Rule 32(f), the following limits apply:

[8] This sketch reflects a proposed reduction from the current rule, as discussed in Part I.D.

(A) Page limitation. A principal brief may not exceed 30 pages, or a reply brief 15 pages, unless it complies with Rule 32(a)(7)(B) and (C).

(B) Type-volume limitation.

(i) A principal brief is acceptable if it complies with Rule 32(g) and:

- ~~it~~ contains no more than 12,500 words;[9] or
- ~~it~~ uses a monospaced face and contains no more than 1,300 lines of text.

(ii) A reply brief is acceptable if it complies with Rule 32(g) and contains no more than half of the type volume specified in Rule 32(a)(7)(B)(i).

~~(iii) Headings, footnotes, and quotations count toward the word and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules or regulations, and any certificates of counsel do not count toward the limitation.~~

~~**(C) Certificate of compliance.**~~

~~(i) A brief submitted under Rules 28.1(e)(2) or 32(a)(7)(B) must include a certificate by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either:~~

~~• the number of words in the brief; or~~

~~• the number of lines of monospaced type in the brief.~~

~~(ii) Form 6 in the Appendix of Forms is a suggested form of a certificate of compliance. Use of Form 6 must be regarded as sufficient to meet the requirements of Rules 28.1(e)(3) and 32(a)(7)(C)(i).~~

* * *

[9] This sketch reflects a proposed reduction from the current rule, as discussed in Part I.D.

(f) Items excluded from length. In computing any length limit set by these Rules, headings, footnotes, and quotations count toward the limit but the following items do not count:

- Corporate disclosure statement
- Amicus authorship-and-funding disclosure statement
- Table of contents
- Table of citations
- Statement with respect to oral argument
- Addendum containing statutes, rules, or regulations
- Certificates of counsel
- Signature block
- Proof of service

(g) Certificate of compliance. (1) A brief submitted under Rules 28.1(e)(2) or 32(a)(7)(B), and a paper submitted under Rules 5(c)(2), 21(d)(2), 27(d)(2)(B), 27(d)(2)(D), 35(b)(2)(B), or 40(b)(2), must include a certificate by the attorney, or an unrepresented party, that the [brief or paper] [document] complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the [brief or paper] [document]. The certificate must state either:

- the number of words in the [brief or paper] [document]; or
- the number of lines of monospaced type in the [brief or paper] [document].

(2) Form 6 in the Appendix of Forms is a suggested form of a certificate of compliance. Use of Form 6 must be regarded as sufficient to meet the requirements of Rule 32(g)(1).

Committee Note

When Rule 32(a)(7)(B)'s type-volume limits for briefs were adopted in 1998, the word limits were based on an estimate of 280 words per page. The basis for the estimate of 280 words per page is unknown, and the 1998 rules superseded at least one local circuit rule that used an estimate of 250 words per page based on a study of appellate briefs. The committee believes that the 1998 amendments inadvertently increased the length limits for briefs. Rule 32(a)(7)(B) is amended to reduce the word limits accordingly.

A new subdivision (f) is added to set out a global list of items excluded from length computations, and the list of exclusions in former subdivision (a)(7)(B)(iii) is deleted. The certificate-of-compliance provision formerly in Rule 32(a)(7)(C) is relocated to a new Rule 32(g) and now applies to filings under all type-volume limits, including the new type-volume limits in Rules 5, 21, 27, 35, and 40. Conforming amendments are made to Form 6.

Rule 35. En Banc Determination

* * *

(b) **Petition for Hearing or Rehearing En Banc**. A party may petition for a hearing or rehearing en banc.

* * *

(2) Except by the court's permission, ~~a petition for an en banc hearing or rehearing must not exceed 15 pages,~~ and excluding items listed in Rule 32(f) [and the statement required by Rule 35(b)(1)] ~~material not counted under Rule 32~~:

(A) a handwritten or typewritten petition for an en banc hearing or rehearing must not exceed 15 pages; and

(B) a petition for an en banc hearing or rehearing produced using a computer must comply with Rule 32(g) and not exceed

(i) 3,750 words; or

(ii) 390 lines of text printed in a monospaced face.

(3) For purposes of the ~~page~~ limits in Rule 35(b)(2), if a party files both a petition for panel rehearing and a petition for rehearing en banc, they are considered a single document even if they are filed separately, unless separate filing is required by local rule.

* * *

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 were subject to manipulation by lawyers. For papers produced using a computer, those page limits are now replaced by type-volume limits. The type-volume limits were derived from the current page limits using the assumption that one page is equivalent to 250 words or to 26 lines of text. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the type-volume limits and the page limit, the calculation excludes [the statement required by Rule 35(b)(1) and] any items listed in Rule 32(f).

Rule 40. Petition for Panel Rehearing

* * *

(b) **Form of Petition; Length**. The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. ~~Unless the court permits or a local rule provides otherwise~~ Except by the court's permission, and excluding items listed in Rule 32(f):~~,~~

(1) a handwritten or typewritten petition for panel rehearing must not exceed 15 pages; and

(2) a petition for panel rehearing produced using a computer must comply with Rule 32(g) and not exceed

(A) 3,750 words; or

(B) 390 lines of text printed in a monospaced face.

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 were subject to manipulation by lawyers. For papers produced using a computer, those page limits are now replaced by type-volume limits. The type-volume limits were derived from the current page limits using the assumption that one page is equivalent to 250 words or to 26 lines of text. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the type-volume limits and the page limit, the calculation excludes any items listed in Rule 32(f).

Form 6. Certificate of Compliance with ~~Rule 32(a)~~ Type-Volume Limit

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This ~~brief~~ document complies with the type-volume limitation of Fed. R. App. P. ~~32(a)(7)(B)~~ [*insert Rule citation, e.g., 32(a)(7)(B)*] because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) [and [*insert applicable Rule citation if any*]]:

[ ] this ~~brief~~ document contains [*state the number of*] words~~, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)~~, *or*

[ ] this ~~brief~~ document uses a monospaced typeface and contains [*state the number of*] lines of text~~, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)~~.

2. This ~~brief~~ document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

[ ] this ~~brief~~ document has been prepared in a proportionally spaced typeface using [*state name and version of word processing program*] in [*state font size and name of type style*], *or*

[ ] this ~~brief~~ document has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

(s)_____

Attorney for _____

Dated: _____

III. Conclusion

The Committee's discussions, thus far, have produced three areas for possible action. Extending the type-volume limits to filings other than briefs will require choices concerning the treatment of documents prepared without the aid of a computer. In addition, the Committee may wish to review and standardize the extent to which the Rules specify items that can be excluded when applying the length limits. And the Committee may wish to reconsider the number of words specified in the type-volume limits for briefs.

Encls.

TAB 3B

U.S. Department of Justice

DNLetter:lcb

Telephone:
(202) 514-3602

Washington, D.C. 20530

JUL 14 1993

Honorable Abner J. Mikva
Chief Judge, United States Court of Appeals
for the District of Columbia Circuit
333 Constitution Ave., N.W.
Washington, D.C. 20001-2866

Honorable Ruth Bader Ginsburg
Circuit Judge, United States Court of Appeals
for the District of Columbia Circuit
333 Constitution Ave., N.W.
Washington, D.C. 20001-2866

Dear Chief Judge Mikva and Judge Ginsburg:

When I sent you the final version of the Advisory Committee's recommended local rule changes, I indicated that we would be conducting a survey to determine the proper number of words to allow in briefs under the new proposed Rule 28. (As you recall, the Committee recommended that the length requirement for briefs be shifted from a page maximum to a word maximum.) Jack Goodman of the Advisory Committee, and I have now conducted that survey, although we have had difficulty gathering data from law firms.

For the reasons described below, we recommend that the Court adopt a maximum word rule based on an average of 250 words per page, which would translate to a limit of 12,500 words for a party's main brief, 6,250 for a reply brief, and 8,750 for an intervenor or amicus curiae brief. (For shorter documents, such as petitions for rehearing and motions, the Committee had recommended that the Court retain the current page limits rather than switching to a word count, although these documents could now be prepared in proportional fonts of acceptable size.)

Mr. Goodman and I analyzed data first from the Department of Justice Civil Division archive of appellate briefs. We took ten briefs that were approximately 50 pages in length, and which did not contain what could reasonably be considered an excessive

number of single spaced footnotes or block quotes. We then also obtained from that archive ten reply briefs of approximately 25 pages in length, also avoiding briefs with too many footnotes or block quotes. By computer, we determined the total number of words in these briefs. In doing so, we began counting with the first page of the brief, and excluded the cover, the tables, and any addenda. Thus, we determined the number of words that would be contained in an acceptable 50 or 25 page brief that begins on the first page with a case caption and ends with a signature block. This computer counting included names and numbers in citations.

We found that the briefs of approximately 50 pages had an average total word count of 12,275 words, but some of the briefs were only 49 pages long. The average per page word count for this group was 247. For the reply briefs of approximately 25 pages, the average total word count was 6,244, with an average per page word count of 251.

We then obtained data from eight appellate briefs filed by the Federal Communications Commission and the law firm of Wilmer, Cutler & Pickering. The combined total average words per page from these briefs was 250 (although the briefs from the FCC averaged higher than that amount and the briefs from Wilmer, Cutler averaged lower than that amount).

Based on these data, a brief with a maximum average of 250 words per page appears to be close to what the Court would expect to be the limit for "normal" briefs under the current rules. Consequently, Mr. Goodman and I think that if the Court adopted the word limits proposed above, those limits will on average be close to what the Court would currently find as the maximum allowed (although reply briefs would be longer than currently allowed since the Court has accepted our recommendation that, if a page length limit were used, reply briefs could be 25 pages -- as FRAP allows -- rather than the current 20).

We note that this proposal means that there will be some variations in brief page numbers, and briefs within the maximum word limit will sometimes exceed 50 pages. As described in our earlier recommendation, however, we expect that adoption of this proposed rule will lead to extensive use of proportional fonts, and many briefs will actually be shorter in pages than currently received briefs, but more easily legible.

Mr. Goodman and I will continue to attempt to obtain data from several law firms to make sure that the data we have

developed are not unusual in some unknown way. I have attached to this letter a copy of the gross data that we developed. Please contact me if any further explanation is needed.

Sincerely,

Douglas Letter
Chairman
Advisory Committee on Procedures

cc: Ron Garvin
Clerk, U.S. Court of Appeals for the
District of Columbia Circuit
333 Constitution Ave., N.W., Room 5423
Washington, D.C. 20001-2866

Mark Langer
Chief Staff Counsel
U.S. Court of Appeals for the
District of Columbia Circuit
333 Constitution Ave., N.W.
Washington, D.C. 20001-2866

OVERALL WORDS PER PAGE: 249 WORDS PER 54 LINES W/DOUBLE SPACE

LIST OF BRIEFS WITH 49 TO 50 PAGES

	WORD COUNT
ANESTHESIOLOGISTS AFFILIATED (49 PAGES)	b11,371/pp232
ARMSTRONG (50 PAGES)	b11,793/pp236
TREASURY V. FLRA (50 PAGES)	b12,070/pp241
PARKER V. RYAN (50 PAGES)	b12,777/pp256
WABASH VALLEY POWER ASSOCIATION, INC.(49 PAGES) .	b12,438/pp254
KHADER MUSA HAMIDE (50 PAGES)	b11,402/pp228
MT. DIABLO HOSPITAL MEDICAL CENTER (50 PAGES) . .	b13,292/pp266
PENTHOUSE INTERNATIONAL, LTD. (49 PAGES)	b13,246/pp270
PETER ROSETTI (50 PAGES)	b12,345/pp247
AMALGAMATED TRANSIT UNION (50 PAGES)	b12,019/pp240
TOTAL AVERAGE WORDS PER BRIEF/PAGE	b12,275/pp247

LIST OF REPLY BRIEFS WITH 24 TO 25 PAGES

CARTERET REPLY (25 PAGES)	r5,977/pp239
DAVIDSON V. SULLIVAN (24 PAGES)	r5,864/pp244
HAITIAN REFUGEE CENTER, INC. (25 PAGES)	r6,787/pp271
JONES V. SULLIVAN (25 PAGES)	r6,141/pp246
MARTINEZ V. LANNOM (25 PAGES).	r6,856/pp274
TASHIMA (25 PAGES)	r6,297/pp252
ANNI WATERFLOW (25 PAGES).	r6,417/pp257
WINSTAR (25 PAGES)	r5,667/pp227
JOHNSON V. HHS (25 PAGES).	r6,382/pp255
FARMER (25 PAGES).	r6,053/pp242
TOTAL AVERAGE WORDS PER 25 REPLY/PAGE	r6,244/pp251

BRIEFS

SOURCE	NO. OF PAGES	NO. OF WORDS	WORDS PER PAGE
FCC	49	11660	237.9591837
FCC	48	13836	288.25
FCC	50	13585	271.7
FCC	47	12408	264
FCC	47	12563	267.2978723
WC&P	14	3037	216.9285714
WC&P	21	4806	228.8571429
WC&P	19	4230	222.6315789
AVGE.	34	7945	230.2953813

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United States Court of Appeals
For the Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

Michael E. Gans
Clerk of Court

VOICE (314) 244-2400
FAX (314) 244-2780
www.ca8.uscourts.gov

September 3, 2013

The Honorable Steven M. Colloton
United States Circuit Judge
Des Moines, Iowa

Re: Advisory Committee on Federal Appellate Rules

Dear Judge Colloton:

During this past spring's Advisory Committee meeting, some questions arose concerning the length of briefs and Federal Rule of Appellate Procedure 32(a)(7)(B)(i). You asked me to take a look at the length of briefs under the former version of FRAP 32, FRAP 28(g), which set the length of briefs at 50 pages.

As part of this inquiry, I contacted Mark Langer, the clerk of the D.C. Circuit, regarding his court's adoption of word limits for briefs. Mr. Langer confirmed the information provided in Doug Letter's June 6, 2013 e-mail to Professor Struve, which recounts Mr. Letter's recollections of the DC Circuit Rule Advisory Committee's discussions on the topic. As you will recall, Mr. Letter and some other members of the DC bar conducted informal surveys of their own briefs and determined that 50-page briefs were about 12,500 words in length. Based on this informal survey, the DC Circuit set a 12,500 word limit for principal briefs as an alternative to the 50-page limit. Mr. Langer did not have any backup materials, reports, or statistical analysis to share with the Advisory Committee.

In addition to discussing this with Mr. Langer, I conducted my own study of principal briefs. I retrieved 20 boxes of closed 1995-1998 files from the Federal Archives; these were the last four years in which FRAP 28(g) and its 50-page limit were in effect. These boxes contained 210 attorney-filed briefs. I had my summer intern, Ms. Robyn Parkinson, a first-year student at Westminster College in Fulton, Missouri, perform a full word count for each brief, counting the words in the sections that counted against the page limit under Rule 28(g). (The following sections counted against the page limits: Jurisdictional Statement, Statement

of Issues, Statement of the Case, Statement of Facts, Summary of Argument, Argument, and Conclusion.)

As might be expected, the range of words on a page varied greatly, from as few as 1 to as many as 472. Averaging all of the word counts from all of the briefs, however, yielded an average word count per page of 259 words (and a median of 261 words). Multiplying that average by 50 pages yields a total of 12,950 words. It would appear, therefore, that the informal survey conducted by Mr. Letter and the other members of the DC Circuit Rules Advisory Committee may have slightly underestimated the length of 50-page briefs under the Rule 28(g) by between 3 and 4%.

I also undertook one other study. I used CM/ECF to run a report on the word length of principal briefs filed in the 2008 calendar year. There were 1,175 attorney-filed briefs which reported word length in 2008 (some attorney-filed briefs are filed under the page or line limits and do not report words). Of those 1,175 briefs, 32 (3%) were filed under an order permitting an overlength brief. My count showed 180 briefs (15%) were between 12,500 and 14,000 words, while the remaining 963 briefs were less than 12,500 words in length. In other words, 82% of the principal briefs filed in 2008 under FRAP 32(a)(7)(B)(i) would have been an acceptable length under FRAP Rule 28(g), assuming 50 pages equals 12,500 words. If we use 12,950 words as the equivalent of 50 pages, the number of 2008 briefs which would have been an acceptable length under the old rule rises to 85%, and the number between 12,950 and 14,000 words falls to around 12%.

I hope this information is useful. Please let me know if you wish me to undertake any other studies or analysis.

Sincerely,
Michael E. Gans
Clerk of Court

TAB 4

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TAB 4A

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MEMORANDUM

DATE: April 4, 2014

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 13-AP-B

Roy T. Englert, Jr., has proposed that the Committee consider amending the Appellate Rules "to address the permissible length and timing of an amicus brief in support of a petition for rehearing and/or rehearing en banc, in Circuits that permit such filings."[1] He emphasizes that he does not propose a Rule that would tell courts "*whether* to permit such filings,"[2] but rather a Rule that would "resolve questions of timing and length" in instances where such filings are permitted. The Committee's discussions, though, have addressed a broader range of issues than Mr. Englert's proposal.

Part I of this memo summarizes policy choices to be made concerning this topic: whether to proceed at all with a national rule, and if so, what the content of such a rule should be. Part II sketches a possible amendment. (Further context for this discussion – including a survey of relevant local circuit provisions – can be found in my September 2013 memorandum, which I enclose.)

I. Policy choices

The most basic policy choice, of course, is whether to proceed with a proposal on this topic at all. If the Committee is interested in doing so, then other questions concern timing, length, and additional issues that a national rule could address. In drafting this discussion, I have benefited from guidance provided since the Committee's last meeting by Judges Chagares and Fay and by Mr. Katsas, who participated in interim discussions on this topic. Those discussions produced consensus that a national rule could helpfully clarify matters by setting default rules from which circuits can opt out by local rule.

[1] I enclose Mr. Englert's letter.

[2] As the Committee has previously noted, the circuits take widely divergent approaches to that question. The Fourth Circuit disfavors requests to file an amicus brief for the first time when a rehearing petition is pending, and the D.C. Circuit presumptively bars amicus filings while an en banc rehearing petition is pending. The Fifth, Ninth, and D.C. Circuits bar amicus filings that would cause a judge's disqualification. (So does the Second Circuit, but that provision is not specific to the rehearing context.) The Ninth and Eleventh Circuits have local provisions that permit amicus filings (in connection with rehearing) on terms roughly similar to Appellate Rule 29(a).

A. Should there be a national rule on this topic?

Mr. Englert has pointed out that in some circuits there is little or no guidance concerning the length of and timing for amicus filings in connection with rehearing. He notes that the absence of guidance forces cautious attorneys to comply with the most restrictive approach to both questions. A national rule on timing and length would not force a circuit to permit such filings, but would provide welcome guidance to practitioners.

On the other hand, the absence of local circuit rules on point may also reflect considerable variation in views, among judges, concerning the utility of such filings. Some judges are not eager to highlight the topic of amicus filings at the rehearing stage lest those filings increase in number.

Participants in the interim discussions voiced some support for, and no opposition to, the adoption of a national rule. They agreed that a national rule could provide useful clarity and would particularly assist lawyers who have a national appellate practice.

B. As to amicus filings in support of a rehearing petition, should the Committee follow Rule 29(d)'s half-length approach, or should it choose a length limit within the range specified by circuits that have local rules on point?

Rule 29(d) provides that amicus filings in connection with the merits briefing of an appeal are presumptively limited to half the length of "a party's principal brief." The half-length approach yields a length of 7 ½ pages, which would be very impractical to enforce; if the Committee wished to approximate that result, I would think that stating a limit of 8 pages would make more sense.

The four circuits that address the question set limits within a range of 10 to 15 pages; thus, a limit longer than 8 pages might be appropriate. The interim discussions revealed some support for a 10-page limit.

C. Should the proposed rule specify length limits for amicus filings in opposition to a rehearing petition?

Such filings will be much more rare than filings in support of the petition, and any details concerning amicus filings in opposition to a rehearing petition can be dealt with by order in the case. There seems to be no pressing need for a national rule concerning amicus opposition to rehearing. However, some local rules address the matter.

If the Committee decides to propose a length limit for filings in support, then I suggest drafting it so that it covers *any* amicus filing permitted while a rehearing petition

is pending,[3] including any filing that the court permitted an amicus to make in opposition to the petition. There does not appear to be any reason to set a different length limit for opposition amicus filings (or amicus filings in support of neither party) than for amicus filings in support of the petition.

D. Should the rule address the timing of an amicus filing in support of a rehearing petition – and if so, what length and trigger for the deadline?

Rule 29(e) currently provides a seven-day stagger for covered amicus filings – that is to say, an amicus files its brief and motion "no later than 7 days after the principal brief of the party being supported is filed." The 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. The Rules provide no deadline for a party's response to a rehearing petition – which is unsurprising given that they presumptively bar such a response. A court may deny rehearing petitions quite promptly: In the Third Circuit, for example, a petition will be denied 10 calendar days after the petition's circulation by the clerk if, by that time, no judge has voiced support for considering it further.[4]

Presumably, if the rule addresses only one timing question for amicus filings, it should address the timing of amicus filings in support of the petition. What deadline should the rule set for such a filing, and should the deadline be pegged to the due date for the party's petition or to the filing date of the party's petition?

Three of the four local circuit rules that address the timing of such filings set the deadline solely by reference to the rehearing petition's *filing* date rather than the petition's *due* date. That choice seems wise; a court faced with a rehearing petition is unlikely to desire to stay its hand to await amicus filings that lag far behind the losing party's petition. Moreover, it seems advisable to parallel, to the extent possible, the approach taken in Rule 29 with respect to amicus filings in connection with an appeal's initial briefing.[5]

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[3] Existing local circuit provisions illustrate that a rule might also address filings after the grant of rehearing. I do not focus on filings after the grant of rehearing because that seems further afield from the suggestion that gave rise to this project.

[4] *See* Third Circuit IOP 8.1 ("A petition for panel rehearing is sent to the members of the panel, including senior judges or visiting judges, with the request that they notify the authoring judge within ten (10) calendar days of the date of the clerk's letter forwarding the petition whether they vote to grant the petition or desire that an answer be filed…."); Third Circuit IOP 8.3.1 ("The author … enters an order granting panel rehearing if two members of the panel vote for panel rehearing, and vacates the panel's opinion and the judgment entered thereon…."); Third Circuit IOP 9.5.4 ("An active judge who does not communicate with the authoring judge concerning rehearing within ten (10) calendar days after the date of the clerk's letter transmitting the petition for rehearing is presumed not to desire rehearing en banc or that an answer be filed…."); Third Circuit IOP 9.5.5 ("If, during the ten-day period for circulation of petitions for rehearing, one judge has timely voted for rehearing, another judge may obtain an extension of time to consider en banc rehearing ….").

[5] Alan Morrison has recently submitted a suggestion that the Committee reconsider Rule 29's choice of filing date rather than due date as the trigger for amicus briefs in connection with the appeal's initial briefing. That suggestion is addressed in a separate memo.

All four of the local circuit rules on point stagger the amicus filing, with the stagger ranging from 7 days to 14 days. Arguments in favor of a stagger include the observations that parties and amici do not always coordinate their filings, that the party may be working on its filing right up to the deadline, and that a filing drafted by an amicus who had a chance to review the party's filing may be more succinct and less redundant.

One the other hand, a generous stagger period could delay or interfere with the parties' briefing or a court's regular processing of rehearing petitions. Suppose that, on the day the petition for rehearing is filed, the court directs the opposing party to respond and sets a 10-day period for the response.[6] If amici filing briefs in support of the petition have a deadline of 7 days from the filing of the petition, then the opposing party may receive such amicus filings only a few days prior to the due date for its own response. Another concern relates to the speed with which a court might deny a petition: In a circuit that typically denies rehearing petitions 10 days after their circulation, amicus briefs would be irrelevant if filed after that tenth day.

Such concerns might lead some to favor a shorter stagger or a requirement that the amicus file its brief on the same day as the petition is filed. However, a same-day deadline that is pegged to the actual filing date of the petition could be impossible for an amicus to comply with where the petition is filed prior to the deadline set by the Rules, unless the amicus obtains advance notice from the party that the petition will be filed early.

E. Should the rule address the timing of an amicus filing in opposition to a rehearing petition? If so, how should the deadline be set?

There are three local circuit rules on point and each takes a different approach. I hesitate to recommend nationalizing the deadline for amicus filings in opposition to a rehearing petition. The occasion for such filings is likely to be rare. And the wide divergence among the three local rules on point suggests that the optimal timing for such filings might vary according to a circuit's practices for handling rehearing petitions. The interim discussions did not reveal support for addressing this topic.

F. Should the rule address the timing of an amicus filing – in connection with a petition for rehearing – that supports neither party?

It is unclear how often an amicus will wish to file while a rehearing petition is pending in order to voice its views without supporting either party. If the Committee wishes to address this situation, the choice made by the two local rules on point – namely, applying the same deadline as for amicus filings in support of rehearing – seems sensible.

[6] Perhaps this hypothetical is unrealistic, in the sense that a few days will usually elapse between the petition's filing and the order directing a response.

G. Should the rule address other questions, and if so, should the rule set a mandatory approach or a default approach?

Existing Rule 29's provisions concerning amicus filings in connection with initial merits briefing address a number of topics. *See* Rule 29(a) (general requirement of court leave or party consent, with exception for some governmental amici); 29(b) (content of motion for leave to file); 29(c) (requirements of disclosure and form); 29(g) (oral argument). The topic of oral argument by amici in connection with rehearing does not appear to call for treatment in a national rule; it seems likely that relevant local practices on this point would vary. But it may be useful for the rule to incorporate, as default provisions, some or all of Rules 29(a) – (c).

Admittedly, Mr. Englert's proposal does not suggest that these additional matters should be nationalized for amicus filings in connection with rehearing. But if there is to be a national rule on later amicus filings, it might seem odd for such a rule to discuss the length and timing of filings but not the circumstances under which they are permitted. Moreover, it seems desirable to subject such filings to the disclosure requirements set by Rule 29(c). It may be less urgent to address matters of form than matters of disclosure; but I am guessing that the application of Rule 32's form requirements to amicus filings in connection with rehearing would be relatively uncontroversial.

The national rule could state default rules to make clear whether an amicus must obtain court permission in order to file a brief. One option would be to apply current Rule 29(a)'s approach, 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. Participants in the interim discussions expressed support for applying Rule 29(a)'s approach, based on the expectation that governmental amici would be judicious in their amicus filings.

If the Committee wishes to encompass such topics in a national rule, I suggest that it consider permitting a circuit to opt out of such provisions by local rule or by order in a case. I am cognizant of the Rules Committees' general reluctance to encourage local rulemaking. But in this instance, there may well be reasons for local variation,[7] 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.

[7] For a summary of local variation on the question of the circumstances under which amicus filings at the rehearing-petition stage are permitted, see supra note 2.

H. Where should the amendment be placed?

I propose that the Committee place the new provisions in Rule 29, because I think that it would be most helpful to would-be amici if they could find all of the amicus-specific provisions in one rule. The alternative would be to add new provisions to Rules 35 and 40, but that could cause some redundancy and would, in my view, be somewhat less user-friendly.

The main downside of placing the new provisions in Rule 29 is that this would be most readily accomplished by placing the existing provisions in a new Rule 29(a); that, in turn, would occasion the re-numbering of all the existing portions of Rule 29. However, this would not be as troublesome as other instances where a Rule is re-numbered. There is not a large amount of caselaw on Rule 29, so it is unlikely that re-numbering that Rule's subdivisions would create major problems for researchers.

II. A sketch of a possible rule amendment

Here is a sketch that illustrates a possible rule amendment along the lines suggested in Part I:

Rule 29. Brief of an Amicus Curiae

(a) During Initial Consideration of a Case on the Merits. The following rules govern amicus filings during a court's initial consideration of a case on the merits.

~~**(a)**~~ **(1) When Permitted.** The United States or its officer or agency or a state may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.

~~**(b)**~~ **(2) Motion for Leave to File.** The motion must be accompanied by the proposed brief and state:

~~(1)~~ (A) the movant's interest; and

~~(2)~~ (B) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.

~~**(c)**~~ **(3) Contents and Form.** An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. An amicus brief need not comply with Rule 28, but must include the following:

~~(1)~~ (A) if the amicus curiae is a corporation, a disclosure statement like that required of parties by Rule 26.1;

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

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

~~(4)~~ (D) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;

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

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

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

~~(C)~~ (iii) 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;

~~(6)~~ (F) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; and

~~(7)~~ (G) a certificate of compliance, if required by Rule 32(a)(7).

~~(d)~~ (4) Length. Except by the court's permission, an amicus brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

~~(c)~~ (5) Time for Filing. An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed. A court may grant leave for later filing, specifying the time within which an opposing party may answer.

~~(f)~~ (6) Reply Brief. Except by the court's permission, an amicus curiae may not file a reply brief.

~~(g)~~ (7) **Oral Argument.** An amicus curiae may participate in oral argument only with the court's permission.

(b) During Consideration of Whether to Grant Rehearing. The following rules govern amicus filings during a court's consideration of whether to grant panel rehearing or rehearing en banc, unless the court provides otherwise by local rule or by order in a case.

(1) When permitted; motion for leave; contents; form. [Rules 29(a)(1) – (3) apply.] [An amicus curiae may file a brief only by leave of court. Rules 29(a)(2) – (3) apply.][8]

(2) Length. An amicus brief may be no more than [10] pages[, excluding disclosure statements and material not counted under Rule 32].[9]

(3) Time for Filing. An amicus curiae supporting the petitioner [or supporting neither party] must file its brief, accompanied by a motion for filing [when necessary], no later than [3] [7] days after the petition for rehearing is filed.[10]

Committee Note

Rule 29 is amended to address amicus filings in connection with requests for panel rehearing and rehearing en banc. Existing Rule 29 is renumbered Rule 29(a), and language is added to that subdivision (a) to state that its provisions apply to amicus filings during the court's initial consideration of a case on the merits. New subdivision (b) is added to address amicus filings in connection with a petition for panel rehearing or rehearing en banc. Subdivision (b) sets default rules that apply when a court does not provide otherwise by local rule or by order in a case. A court remains free to adopt different rules governing whether amicus filings are permitted in connection with petitions for rehearing, and governing the procedures when such filings are permitted.

[8] The sketch portrays two alternatives as discussed in Part I.G. Under the first, governmental amici exempted by Rule 29(a) from seeking party consent or court leave would enjoy a similar exemption for filings in connection with rehearing petitions, and any amicus could file if all parties consent. Under the second, court leave is required for all amicus filings at the rehearing stage.

[9] The sketch includes, in the proposed length limit, bracketed language specifying what can be excluded for purposes of determining the amicus brief's length. (Such language seems less necessary for current Rule 29(d); by pegging the amicus brief's limit to the limit for the party's brief, Rule 29(d) can be read to incorporate (mutatis mutandis) the exclusion (for type-volume calculations) set out in Rule 32(a)(7)(B)(ii).) The precise wording of the exclusion might change depending on the Committee's choices in connection with the separate project concerning length limits in the Appellate Rules.

[10] For the reasons stated in Part I.E, the sketch does not address the timing of amicus filings in opposition to a petition for rehearing. If the Committee wished to address this topic, it might consider language such as the following: "An amicus curiae opposing the petitioner must file its brief, accompanied by a motion for filing [when necessary], no later than [the due date for the response] [[3] [7] days after a response to the petition for rehearing is filed]."

III. Conclusion

Providing clarity and nationally uniform ground rules for would-be amici is a worthwhile goal. A FRAP amendment concerning amicus filings in connection with rehearing seems most likely to succeed if it focuses on commonly arising occasions for such filings, and if each circuit retains the ability to opt out of the nationally-set default rules by adopting a local rule or by entering an order in a case.

Encls.

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TAB 4B

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ROBBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER LLP

1801 K STREET, N.W., SUITE 411 L
WASHINGTON, D.C. 20006
PHONE (202) 775-4500
FAX (202) 775-4510
www.robbinsrussell.com

Roy T. Englert, Jr.

(202) 775-4503
renglert@robbinsrussell.com

March 18, 2013

Hon. Steven M. Colloton
Chair, Advisory Committee
on Appellate Rules
United States Circuit Judge
110 East Court Avenue, Suite 461
Des Moines, Iowa 50309

Dear Judge Colloton:

I write to urge the Advisory Committee to consider amending the Federal Rules of Appellate Procedure to address the permissible length and timing of an amicus brief in support of a petition for rehearing and/or rehearing en banc, in Circuits that permit such filings. My suggestion is to leave the question whether to accept such amicus briefs up to each Circuit, but to resolve questions of timing and length explicitly in FRAP. Please allow me briefly to explain the confusion that exists under the current Rules and why I believe removing that uncertainty would be beneficial to the Courts of Appeals and to litigants.

The problem is well illustrated by *Fry* v. *Exelon Corp. Cash Balance Pension Plan*, 576 F.3d 723 (7th Cir. 2009), which was decided shortly after the Appellate Rules Committee's previous consideration of these issues. Appellate Rule 29(d) states, in relevant part, that "[e]xcept by the court's permission, an amicus brief may be no more than one-half of the maximum length authorized by these rules for a party's principal brief." Rule 29(e) states, in relevant part, that "[a]n amicus curiae must file its brief . . . no later than 7 days after the principal brief of the party being supported is filed." In *Fry*, Judge Easterbrook (writing for a unanimous panel) relied on the use of the phrase "principal brief" in subparagraphs (d) and (e) to conclude that the rule does not encompass amicus filings in support of a rehearing "petition." 576 F.3d at 725. Therefore, there is no requirement that an amicus brief be limited to one-half the permissible length of a rehearing petition, but also no 7-day grace period, after the filing of a rehearing petition, within which to file a supporting amicus brief.

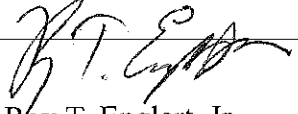
Despite the analysis of *Fry* – analysis that I personally find unassailable – it is not unusual to find that a Clerk's Office or a Local Rule either limits the length of rehearing-stage

amicus briefs to 7-1/2 pages, or authorizes their filing 7 days after the rehearing petition, in apparent reliance on the very same reading of the phrase "principal brief" in Rule 29 that the *Fry* Court rejected. To be certain that an amicus brief will be accepted by both the Clerk's Office and the Court itself, one must limit it to 7-1/2 pages (lest someone construe "principal brief" to include rehearing petitions, making Rule 29(d) applicable) *and* file simultaneously with the rehearing petition (lest someone construe "principal brief" to exclude rehearing petitions, making Rule 29(e) inapplicable). In practice, most amici follow whatever advice they get from the Clerk's Office, running the risk that one or more judges will later disagree, and in practice most judges refrain from second-guessing Clerk's Offices on these questions, so in pragmatic terms the system works reasonably well. Yet it works reasonable well *only* at the expense of accepting uncertainty in reading the Appellate Rules and, if the Seventh Circuit and I are right, at the expense of persistently misreading the Appellate Rules.

When this subject was considered at multiple Advisory Committee meetings several years ago, before *Fry* was decided, it was suggested that the absence of a specific provision regarding amicus briefs in support of rehearing appropriately leaves each Circuit the flexibility to discourage or prohibit such filings. The premise for that assertion, as I understand it, was that amicus briefs in support of rehearing in the Courts of Appeals are analogous to amicus briefs in support of rehearing in the Supreme Court and are therefore of little value. In my view, that analogy is inapt. Rehearing in the Supreme Court occurs once every decade or so – and thus there is little reason to encourage the filing of such petitions, much less amicus briefs in support of them – but rehearing in the Courts of Appeals is relatively common. Every Circuit rehears one or more cases each year, and courts devote significant attention to determining which cases to rehear. Amicus briefs serve an important signaling function about which cases are truly important, just as they do at the certiorari stage in the U.S. Supreme Court. Nevertheless, in deference to individual Circuits' apparently strong desires to chart their own paths with respect to the desirability of amicus briefs, I do not propose a rule that would constrain a court's ultimate decision whether to accept a particular filing. But a provision clearly establishing <u>when</u> such briefs are due (if permitted at all) and <u>how long</u> they ought to be would remove uncertainty; would unify practice across the Circuits; and would prevent determination of important practical questions through Circuit-by-Circuit interpretation of a Rule that is now, at best, ambiguous and, at worst, being systematically misapplied to govern a situation in which it has no applicability.

Thank you for considering this request. Please do not hesitate to let me know if there is any additional information or assistance I might provide.

Respectfully,



Roy T. Englert, Jr.

MEMORANDUM

DATE: September 10, 2013

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 13-AP-B

Roy T. Englert, Jr., has proposed that the Committee consider amending the Appellate Rules "to address the permissible length and timing of an amicus brief in support of a petition for rehearing and/or rehearing en banc, in Circuits that permit such filings."[1] He emphasizes that he does not propose a Rule that would tell courts "*whether* to permit such filings,"[2] but rather a Rule that would "resolve questions of timing and length" in instances where such filings are permitted. Mr. Englert's letter persuasively articulates the case for such amendments; in the interests of brevity, this memo skips over the question of whether to adopt such amendments and instead focuses on how best to do so if the Committee is so inclined.

Part I draws upon existing local circuit provisions concerning amicus filings in connection with rehearing in order to consider the various approaches that a national rule might take. Part II sketches (for discussion purposes) a possible amendment to Appellate Rule 29.

I. Approaches that a national rule might take

Mr. Englert proposes that a national rule address length and timing of amicus filings in instances where they are permitted. Mr. Englert's letter focuses particularly on filings in support of a petition for rehearing, and that context seems likely to be the most common one in which questions about rehearing-related amicus filings might arise. Existing local circuit provisions illustrate that a rule might also address filings in opposition to a rehearing petition and filings after the grant of rehearing.[3] In this memo, I

[1] I enclose Mr. Englert's letter.

[2] As the Committee has previously noted, the circuits take widely divergent approaches to that question. The Fourth Circuit disfavors requests to file an amicus brief for the first time when a rehearing petition is pending, and the D.C. Circuit presumptively bars amicus filings while an en banc rehearing petition is pending. The Fifth and Ninth Circuits bar amicus filings that would cause a judge's disqualification. (So does the Second Circuit, but that provision is not specific to the rehearing context.) The Ninth and Eleventh Circuits have local provisions that permit amicus filings (in connection with rehearing) on terms roughly similar to Appellate Rule 29(a).

[3] For local rules that address filings after the grant of rehearing en banc, see Third Circuit Local Appellate Rule 29.1(a); Ninth Circuit Rule 29-2; Eleventh Circuit Rule 35-9.

will offer suggestions on how the proposed national rule might address filings in opposition to a rehearing petition, but I will not focus on filings after the grant of rehearing because that seems further afield from Mr. Englert's suggestion.

Using local provisions as examples, Part I.A surveys questions about length limits for amicus filings and Part I.B discusses questions about deadlines for such filings. Part I.C briefly notes other issues currently addressed by local rules.

A. Length limits

Appellate Rule 29(d) provides that amicus filings in connection with the merits briefing of an appeal are presumptively limited to half the 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 Tenth Circuit limits amicus filings "at the rehearing stage" to 3,000 words. The Federal Circuit limits such filings to 10 pages. The Ninth Circuit limits amicus filings "while a petition for rehearing is pending" to 15 pages (or 4,200 words or 390 lines); after the grant of en banc rehearing, it limits amicus filings to 25 pages (or 7,000 words or 650 lines). The Eleventh Circuit seems to presumptively give amicus filers the same limits as parties: It limits amicus filings in support of rehearing petitions to 15 pages, and subjects amicus filings after a grant of rehearing en banc to the form requirements (including length limits) applicable to the parties' briefs.

These provisions suggest a few questions for the Committee to consider when drafting a proposed national Rule:

- As to amicus filings in support of a rehearing petition, should the Committee follow Rule 29(d)'s half-length approach, or should it choose a length limit within the range specified by circuits that have local rules on point?
    - For discussion purposes, I will list the possibilities in terms of pages, on the theory that this would fit best with the existing length limit for a party's rehearing petition (which is expressed in pages).[4] As noted above, the half-length approach yields a length of 7 ½ pages, which would be very impractical to enforce; if the Committee wished to approximate that result, I would think that stating a limit of 8 pages would make more sense. It is notable that the four circuits that address the question have settled on a range of 10 to 15 pages;[5] thus, a limit longer than 8 pages might be appropriate.

[4] In connection with Item No. 12-AP-E, the Committee is considering whether to restate in type/volume terms the limits currently stated in pages. The choices the Committee makes in that project will presumably affect the way in which any new length limit for amicus filings is expressed.

[5] *See* Ninth Circuit Rule 29-2(c)(2) (15 pages, or 4,200 words, or 390 lines); Tenth Circuit Rule 29.1 (3,000 words); Eleventh Circuit Rules 35-6 and 40-6 (15 pages); Federal Circuit Rules 35(g) and 40(g) (10 pages).

- In the sketch shown in Part II, I include bracketed alternatives showing 8-, 10-, and 15-page limits.

- Should the proposed rule specify length limits for amicus filings in opposition to a rehearing petition?

  - The Appellate Rules bar the winning party itself from filing a paper in opposition to the rehearing petition unless directed by the court.[6] It is hard to imagine that a court would permit amicus filings in opposition to a rehearing petition in cases where it does not direct the winning party to respond to the petition. So the universe of cases in which questions concerning length limits for such amicus filings would arise seems likely to be considerably smaller than the universe of cases in which questions would arise concerning length limits (or deadlines) for amicus filings in *support* of rehearing. One might argue that any details concerning amicus filings in opposition to a rehearing petition would appropriately be dealt with by order in the case. In such a view, there would not be a pressing need for a national rule concerning amicus *opposition* to rehearing.

  - However, there are a few local circuit rules on point. The Ninth Circuit rule expressly contemplates amicus filings in opposition to a rehearing petition (and sets the same length limits for those filings as for filings in support of the petition);[7] so does the Federal Circuit.[8] The Tenth Circuit presumptively bars amicus filings in opposition to a rehearing petition; but if the court permits such a filing, the Tenth Circuit's length limit is drafted so that it would cover such a filing.[9] The relevant Eleventh Circuit rules do not appear to contemplate amicus filings in opposition to a rehearing petition.[10]

  - The sketch in Part II sets a length limit that would apply to any amicus filing permitted while a rehearing petition is pending, including any filing that the court permitted an amicus to make in opposition to the petition. There does not appear to be any reason to set a different length limit for opposition amicus filings than for amicus filings in support.

B. Timing

Appellate Rule 29(e) currently provides a seven-day stagger for covered amicus filings – that is to say, an amicus files its brief and motion "no later than 7 days after the

[6] See Appellate Rule 35(e); Appellate Rule 40(a)(3).
[7] See Ninth Circuit Rule 29-2(c)(1) & (2).
[8] See Federal Circuit Rules 35(g) & 40(g).
[9] See Tenth Circuit Rule 29.1.
[10] See Eleventh Circuit Rule 35-6 (discussing amicus briefs "in support of a petition for rehearing en banc"); Eleventh Circuit Rule 40-6 (discussing amicus briefs "in support of a petition for panel rehearing").

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.[11] The Appellate Rules provide no deadline for a party's response to a rehearing petition – which is unsurprising given that, as noted above, they presumptively bar such a response.

The Tenth Circuit's rule addresses the timing of amicus briefs in connection with rehearing petitions, but does not address amicus filings *after* the grant of rehearing;[12] the same appears to be true of the Federal Circuit's rules.[13] The Eleventh Circuit rule addresses timing (1) for amicus filings in support of rehearing petitions[14] and (2) for amicus filings in support of either (or neither) party after en banc rehearing is ordered.[15] The Ninth Circuit rule addresses amicus filings in support of either (or neither) side both in connection with a rehearing petition[16] and after the grant of rehearing.[17] The Third Circuit's rule addresses briefing by both new and prior amici in the event that rehearing is ordered, and distinguishes between situations in which the court directs the parties to submit additional briefs and situations in which the court does not do so.[18]

When drafting a proposed national Rule on timing, the Committee may wish to consider the following questions:

- Should the rule address the timing of an amicus filing in support of a rehearing petition?
    - Presumably, if the rule addresses only one timing question, this is the one that it should address. How long a deadline should the rule set for such a filing, and should the deadline be pegged to the due date for the party's petition or to the filing date of the party's petition?
    - Three of the four local circuit rules that address the timing of such filings set the deadline solely by reference to the rehearing petition's *filing* date rather than the petition's *due* date.[19] That choice seems wise; a court faced with a rehearing petition is unlikely to desire to stay its hand to

[11] See Rule 40(a)(1) (presumptive 14-day deadline for panel rehearing petitions; 45-day deadline in civil cases involving specified federal-government parties); Rule 35(c) (deadline for petition for rehearing en banc is that "prescribed by Rule 40 for filing a petition for rehearing").
[12] See Tenth Circuit Rule 29.1.
[13] See Federal Circuit Rule 35(g) (pegging amicus's timing to "the date of filing of the petition or response that the amicus curiae supports"); Federal Circuit Rule 40(g) (same).
[14] See Eleventh Circuit Rules 35-6 and 40-6.
[15] See Eleventh Circuit Rule 35-9.
[16] See Ninth Circuit Rule 29-2(e)(1).
[17] See Ninth Circuit Rule 29-2(e)(2).
[18] See Third Circuit Local Appellate Rule 29.1(a).
[19] See Tenth Circuit Rule 29.1; Eleventh Circuit Rules 35-6 & 40-6; Federal Circuit Rules 35(g) & 40(g). The exception is Ninth Circuit Rule 29-2(e)(1), which sets the amicus' deadline at "10 days after the petition or response of the party the amicus wishes to support is filed or is due."

await amicus filings that lag far behind the losing party's petition.[20] Moreover, it seems advisable to parallel, to the extent possible, the approach taken in Appellate Rule 29 with respect to amicus filings in connection with an appeal's initial briefing.

- All four of the local circuit rules on point stagger the amicus filing, with the stagger ranging from 7 days to 14 days.[21] Arguments in favor of a stagger include the hope that a filing drafted by an amicus who had a chance to review the party's filing will be more succinct and less redundant.

- The rule sketched in Part II adopts a stagger for amicus filings in support of a rehearing petition, and offers two bracketed alternatives showing different lengths for the stagger.

- Should the rule address the timing of an amicus filing in opposition to a rehearing petition? If so, how should the deadline be set?

  - The Tenth Circuit rule directs that an amicus filing in opposition to a rehearing petition may be filed only if the court directs a response to the petition, in which event the amicus' deadline is the same as the party who is directed to respond.[22]

  - The Ninth Circuit sets the amicus' deadline at "10 days after the … response … is filed or is due."[23]

  - The Federal Circuit rules set the amicus' deadline at "14 days [after] the date of filing of the … response."[24]

  - I am hesitant to recommend nationalizing the deadline for amicus filings in opposition to a rehearing petition. The occasion for such filings is likely to be rare. As noted above, it is hard to imagine a court permitting an amicus to file a brief in opposition to a rehearing petition unless the court asks the party who won before the panel to file a response to the petition. Moreover, the wide divergence among the three local rules on point suggests that the optimal timing for such filings might vary according to a circuit's practices for handling rehearing petitions.

[20] Although the distinction might not be great in most cases (given Rule 40(a)(1)'s usual 14-day deadline for rehearing petitions), the difference between due date and filing date could be significant in civil cases where Rule 40(a)(1)'s 45-day deadline applies.
[21] See Ninth Circuit Rule 29-2(e)(1) (10 days); Tenth Circuit Rule 29.1 (7 days); Eleventh Circuit Rules 35-6 & 40-6 (10 days); Federal Circuit Rules 35(g) & 40(g) (14 days).
[22] See Tenth Circuit Rule 29.1.
[23] Ninth Circuit Rule 29-2(e)(1).
[24] Federal Circuit Rules 35(g) & 40(g).

- For illustrational purposes, the sketch in Part II offers bracketed language that would adopt, as the due date for opposition amicus filings, either a staggered deadline or the due date for the response.

- Should the rule address the timing of an amicus filing – in connection with a petition for rehearing – that supports neither party?

  - The Ninth Circuit rule sets the amicus' deadline at "10 days after the petition is filed,"[25] while the Federal Circuit rules set the amicus' deadline at 14 days after the petition is filed.[26]

  - It is unclear to me how often an amicus will wish to file while a rehearing petition is pending in order to voice its views without supporting either party.

  - If the Committee were to wish to address this situation, the choice made by the two local rules on point – namely, applying the same deadline as for amicus filings in support of rehearing – seems sensible. The sketch in Part II offers bracketed language that would accomplish that.

C. Other issues

Local circuit provisions address a few other questions concerning amicus filings in connection with rehearing. These questions include:

- Whether an amicus will be permitted argument time if there is argument after rehearing is granted.[27]

- The amicus's disclosure obligations.[28]

- The color of the amicus brief's cover.[29]

- The number of copies of the brief.[30]

- The content of the motion for leave to file.[31]

- The judges to whom the motion for leave to file will be circulated.[32]

[25] Ninth Circuit Rule 29-2(e)(1).
[26] See Federal Circuit Rules 35(g) & 40(g).
[27] See Third Circuit IOP 2.2.
[28] See Seventh Circuit Rule 35.
[29] See Eleventh Circuit Rules 35-6 & 40-6.
[30] See Ninth Circuit Rule 29-2(d).
[31] See Ninth Circuit Rule 29-2(b).
[32] See Ninth Circuit Rule 29-2(f).

Existing Rule 29's provisions concerning amicus filings in connection with initial merits briefing address a number of these topics. *See* Rule 29(b) (content of motion for leave to file); 29(c) (requirements of disclosure and form); 29(g) (oral argument). The topic of oral argument by amici in connection with rehearing does not appear to call for treatment in a national rule; it seems likely that relevant local practices on this point would vary by circuit. However, as noted below, it may be advisable for the rule to incorporate, as default provisions, some or all of Rules 29(a) – (c).

II. A sketch of a possible rule amendment

Part I demonstrated the range of choices that face the Committee, should it decide to propose a national rule concerning the timing and length of amicus filings in connection with rehearing petitions. I sketch below a possible rule amendment that would address that topic. Obviously, many other choices could be made, but I hope that this will provide a useful basis for discussion.

I propose to place the new provisions in Rule 29, because I think that it would be most helpful to would-be amici if they could find all of the amicus-specific provisions in one rule. The alternative would be to add new provisions to Rules 35 and 40, but that could cause some redundancy and would, in my view, be somewhat less user-friendly. The main downside of placing the new rules in Rule 29 is that this would be most readily accomplished by placing the existing provisions in a new Rule 29(a); that, in turn, would occasion the re-numbering of all the existing portions of Rule 29. However, this would not be as troublesome as other instances where a Rule is re-numbered. There is not a large amount of caselaw on Rule 29, so it is unlikely that re-numbering that Rule's subdivisions would create major problems for researchers.

The sketch includes, in the proposed length limits, bracketed language specifying what can be excluded for purposes of determining the amicus brief's length. (Such language seems less necessary for current Rule 29(d); by pegging the amicus brief's limit to the limit for the party's brief, Rule 29(d) can be read to incorporate (mutatis mutandis) the exclusion (for type-volume calculations) set out in Rule 32(a)(7)(B)(ii).)

The sketch includes provisions presumptively subjecting amicus briefs in connection with rehearing to some or all of the provisions now set forth in Rules 29(a) – (c). Although Mr. Englert's proposal does not suggest that matters of form and disclosure should be nationalized for amicus filings in connection with rehearing, it would seem undesirable to exempt later amicus filings from the disclosure requirements set by Rule 29(c). It may be less urgent to address matters of form than matters of disclosure; but I am guessing that the application of Rule 32's form requirements to amicus filings in connection with rehearing would be relatively uncontroversial. The national rule could also state default rules to make clear whether an amicus must obtain court permission in order to file a brief. In proposed Rule 29(b)(1), I have included two bracketed options. One option would apply current Rule 29(a) (or renumbered Rule 29(a)(1)), 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. The

other option would require all amici to obtain court leave in order to file a brief in connection with a rehearing petition.

The opening language of the proposed Rule 29(b) sketched below would permit a circuit to opt out of any of that Rule's provisions by local rule or by order in a case. I am cognizant 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.

Rule 29. Brief of an Amicus Curiae

(a) During Initial Consideration of a Case on the Merits. The following rules govern amicus filings during a court's initial consideration of a case on the merits.

~~(a)~~ **(1) When Permitted.** The United States or its officer or agency or a state may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.

~~(b)~~ **(2) Motion for Leave to File.** The motion must be accompanied by the proposed brief and state:

~~(1)~~ (A) the movant's interest; and

~~(2)~~ (B) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.

~~(c)~~ **(3) Contents and Form.** An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. An amicus brief need not comply with Rule 28, but must include the following:

~~(1)~~ (A) if the amicus curiae is a corporation, a disclosure statement like that required of parties by Rule 26.1;

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

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

~~(4)~~ (D) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;

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

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

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

~~(C)~~ (iii) 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;

~~(6)~~ (F) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; and

~~(7)~~ (G) a certificate of compliance, if required by Rule 32(a)(7).

~~(d)~~ (4) Length. Except by the court's permission, an amicus brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

~~(e)~~ (5) Time for Filing. An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed. A court may grant leave for later filing, specifying the time within which an opposing party may answer.

~~(f)~~ (6) Reply Brief. Except by the court's permission, an amicus curiae may not file a reply brief.

~~(g)~~ (7) Oral Argument. An amicus curiae may participate in oral argument only with the court's permission.

(b) During Consideration of Whether to Grant Rehearing. The following rules govern amicus filings during a court's consideration of whether to grant panel rehearing or rehearing en banc, unless the court prohibits such filings or provides otherwise by local rule or an order in a case.

(1) When permitted; motion for leave; contents; form. [An amicus curiae may file a brief only by leave of court. Rules 29(a)(2) – (3) apply.] [Rules 29(a)(1) – (3) apply].

(2) Length. An amicus brief may be no more than [8] [10] [15] pages[, excluding disclosure statements and material not counted under Rule 32].

(3) Time for Filing. An amicus curiae supporting the petitioner [or supporting neither party] must file its brief, accompanied by a motion for filing [when necessary], no later than [3] [7] days after the petition for rehearing is filed. [An amicus curiae opposing the petitioner must file its brief, accompanied by a motion for filing [when necessary], no later than [the due date for the response] [[3] [7] days after a response to the petition for rehearing is filed].]

Committee Note

Rule 29 is amended to address amicus filings in connection with requests for panel rehearing and rehearing en banc. Existing Rule 29 is renumbered Rule 29(a), and language is added to that subdivision (a) to state that its provisions apply to amicus filings during the court's initial consideration of a case on the merits. New subdivision (b) is added to address amicus filings in connection with a petition for panel rehearing or rehearing en banc. Subdivision (b) sets default rules that apply when a court does not provide otherwise by local rule or order in a case. A court remains free to adopt different rules governing whether amicus filings are permitted in connection with petitions for rehearing, and governing the procedures when such filings are permitted.

III. Conclusion

Providing clarity and nationally uniform ground rules for would-be amici is a worthwhile goal. A FRAP amendment concerning amicus filings in connection with rehearing seems most likely to succeed if it focuses on commonly arising occasions for such filings and if it addresses only length and timing, and not other matters.

Encl.

Appendix I: Local provisions (other than the Ninth Circuit's)[33]

Circuit	Provisions regarding amicus briefs with respect to rehearing?
First	No local rule or other provision.
Second	No local rule or other provision.
Third	Third Circuit Local Appellate Rule 29.1(a) provides: "In a case ordered for rehearing before the court en banc or before the original panel, if the court permits the parties to file additional briefs, any amicus curiae must file its brief in accordance with Rule 29(e) of the Federal Rules of Appellate Procedure. In a case ordered for rehearing in which no additional briefing is directed, unless the court directs otherwise, any new amicus must file a brief within 28 days after the date of the order granting rehearing, and any party may file a response to such an amicus brief within 21 days after the amicus brief is served. Before completing the preparation of an amicus brief, counsel for an amicus curiae must attempt to ascertain the arguments that will be made in the brief of any party whose position the amicus is supporting, with a view to avoiding any unnecessary repetition or restatement of those arguments in the amicus brief." Third Circuit IOP 2.2 provides: "Determination in Cases En Banc. There is oral argument in an en banc case if it is requested by at least one judge of the en banc court…. Ordinarily, thirty (30) minutes per side will be allocated and an amicus will not argue unless at least four (4) members of the en banc court vote otherwise."
Fourth	No local rule or other provision. The Fourth Circuit stated in 2006 that it would "henceforth ... disfavor[]" requests to file an amicus brief in the first instance at the stage of a request for rehearing: "Federal Rule of Appellate Procedure 29(e) directs the filing of an amicus brief 'no later than 7 days after the principal brief of the party being supported is filed.' Fed. R.App. P. 29(e) (emphasis added). The term 'principal brief' would appear to refer to the lead brief filed by a party in anticipation of argument (either before a panel or the en banc court) and not to something such as a reply brief or petition for rehearing. The language of that rule sets forth no exceptions. While a court is not precluded from granting leave to file an amicus brief in other circumstances, see id. advisory committee's note, waiting until a petition for rehearing has been filed is a disfavored litigation tactic and fails to serve the litigants' interest in having all views considered thoroughly at the initial briefing and argument stage…. See Sup.Ct. R. 44(5) ('The Clerk will not file any brief for an amicus curiae in

[33] In the interests of brevity, I list in this chart only provisions that specifically address amicus filings in connection with panel rehearing or rehearing en banc, and not provisions that address amicus filings more generally.

Circuit	Provisions regarding amicus briefs with respect to rehearing?
	support of, or in opposition to, a petition for rehearing.'); D.C.Cir. R. 35(f) ('No amicus curiae brief in response to or in support of a petition for rehearing en banc will be received by the clerk except by invitation of the court.')." LaRue v. DeWolff, Boberg & Associates, Inc., 458 F.3d 359, 361 (4th Cir. 2006).
Fifth	Fifth Circuit Rule 29.4 states: "After a panel opinion is issued, amicus curiae status will not be permitted if the allowance would result in the disqualification of any member of the panel or of the en banc court."[34]
Sixth	No local rule or other provision.
Seventh	Seventh Circuit Rule 35 provides: "Every petition for rehearing en banc, and every brief of an amicus curiae supporting or opposing a petition for rehearing en banc, must include a statement providing the information required by Fed. R. App. P. 26.1 and Circuit Rule 26.1 as of the date the petition is filed."
Eighth	No local rule or other provision.
Ninth	Ninth Circuit Rule 29-2 provides the most detailed local-rule treatment of the topic in any circuit. Rather than reproducing the Rule in this chart, I reproduce it in Appendix II.
Tenth	Tenth Circuit Rule 29.1 provides: "The court will receive but not file proposed amicus briefs on rehearing. Filing will be considered shortly before the oral argument on rehearing en banc if granted, or before the grant or denial of panel rehearing. Except by the court's permission, an amicus brief filed at the rehearing stage may be no more than 3,000 words in length and shall include a certification of the word count in conformance with Fed. R. App. P. 32(a)(7)(C). Proposed amicus briefs in support of the petition must be tendered within 7 days from the date the rehearing petition is filed. Proposed amicus briefs in opposition to rehearing are not allowed unless the court has directed that a response be filed. See Fed. R. App. P. 40(a)(3). In that event, any proposed amicus brief must be tendered on the due date for the response."
Eleventh	Eleventh Circuit Rule 27-1(d) provides: "Under FRAP 27(c), a single judge may, subject to review by the court, act upon any request for relief that may be sought by motion, except to dismiss or otherwise determine an appeal or other proceeding. Without limiting this authority, a single judge is authorized to act, subject to review by the court, on the following motions: …. (10) to file briefs as amicus curiae prior to issuance of a panel opinion."

[34] The Second Circuit has a somewhat analogous rule. Second Circuit Rule 29.1(a) provides: "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." I omitted that provision from the chart because it does not specifically discuss the context of rehearing.

Circuit	Provisions regarding amicus briefs with respect to rehearing?
	Eleventh Circuit Rule 35-6 provides: "The United States or its officer or agency or a state may file an amicus brief in support of a petition for rehearing en banc without the consent of the parties or leave of court. Any other amicus curiae must request leave of court to file an amicus brief in support of a petition for rehearing en banc. The request must be made by motion accompanied by the proposed brief in conformance with 11th Cir. R. 35-5, except that subsections (f) and (k) may be omitted. The proposed amicus brief must not exceed 15 pages, exclusive of items required by 11th Cir. R. 35-5(a), (b), (c), (d), and (j). The cover must be green. An amicus curiae must file its proposed brief, accompanied by a motion for filing when necessary, no later than 10 days after the petition for rehearing en banc being supported is filed." Eleventh Circuit Rule 35-9 provides: "The United States or its officer or agency or a state may file an en banc amicus brief without the consent of the parties or leave of court. Any other amicus curiae must request leave of court by filing a motion accompanied by the proposed brief in conformance with FRAP 29(b) through (d) and the corresponding circuit rules. An amicus curiae must file its en banc briefs, accompanied by a motion for filing when necessary, no later than the due date of the principal en banc brief of the party being supported. An amicus curiae that does not support either party must file its en banc briefs, accompanied by a motion for filing when necessary, no later than the due date of the appellant's or petitioner's principal en banc brief. An amicus curiae must also comply with 11th Cir. R. 35-8." Eleventh Circuit Rule 40-6 provides: "The United States or its officer or agency or a state may file an amicus brief in support of a petition for panel rehearing without the consent of the parties or leave of court. Any other amicus curiae must request leave of court to file an amicus brief in support of a petition for panel rehearing. The request must be made by motion accompanied by the proposed brief in conformance with FRAP 29(b) and (c) and the corresponding circuit rules. The proposed amicus brief must not exceed 15 pages, exclusive of items that do not count towards page limitations as described in 11th Cir. R. 32-4. The cover must be green. An amicus curiae must file its proposed brief, accompanied by a motion for filing when necessary, no later than 10 days after the petition for panel rehearing being supported is filed."
D.C.	D.C. Circuit Rule 35(f) provides: "No amicus curiae brief in response to or in support of a petition for rehearing en banc will be received by the clerk except by invitation of the court."
Federal	Federal Circuit Rule 35(g) provides: "Except by the court's

Circuit	Provisions regarding amicus briefs with respect to rehearing?
	permission or direction, an amicus curiae brief submitted in connection with a petition for hearing en banc, a petition for rehearing en banc, or a combined petition for panel rehearing and rehearing en banc, must be accompanied by a motion for leave and must not exceed 10 pages. Except by the court's permission or direction, any brief amicus curiae or any motion for leave to file a brief amicus curiae must be filed within 14 days of the date of filing of the petition or response that the amicus curiae supports. If the amicus curiae does not support either party, then the brief or motion for leave to file the brief must be filed within 14 days of the date of filing of the petition." Federal Circuit Rule 40(g) provides: "Except by the court's permission or direction, an amicus curiae brief submitted in connection with a petition for panel rehearing must be accompanied by a motion for leave to file and must not exceed 10 pages. Except by the court's permission or direction, any brief amicus curiae or any motion for leave to file a brief amicus curiae must be filed within 14 days of the date of filing of the petition or response that the amicus curiae supports. If the amicus curiae does not support either party, then the brief or motion for leave to file the brief must be filed within 14 days of the date of filing of the petition." Federal Circuit IOP 14.1(e) provides that after a grant of hearing en banc, "[t]he clerk will enter the order for the court granting the petition for hearing en banc and setting forth the schedule for additional briefing, if any, by the parties and by amici curiae, and for oral argument, and any questions the court may wish the parties and amici to address." Federal Circuit IOP 14.2(f) provides that after a grant of rehearing en banc, "[t]he clerk will enter the order for the court granting the petition for rehearing en banc and setting forth the schedule for additional briefing by the parties and by amici curiae and for additional oral argument, if any, and any questions the court may wish the parties and amici to address." Federal Circuit IOP 14.3(c) provides that after a sua sponte grant of hearing en banc, "[t]he clerk shall provide notice that a majority of the judges in regular service has acted under 28 U.S.C. § 46 and Fed. R. App. P. 35(a) to order the appeal to be heard en banc, and indicate any questions the court may wish the parties and amici to address…. Additional briefing and oral argument will be ordered as appropriate."

Circuit	Provisions regarding amicus briefs with respect to rehearing?
	Federal Circuit IOP 14.4(b) provides that after a sua sponte grant of rehearing en banc, "[t]he clerk shall provide notice that a majority of the judges in regular active service has acted under 28 U.S.C. § 46(c) and Fed. R. App. P. 35(a) to order the appeal to be heard en banc, enter an order for the court vacating the judgment and withdrawing the opinion(s) filed by the panel that heard the appeal, and indicate any questions the court may wish the parties and amici to address…. Additional briefing and oral argument will be ordered as appropriate." The Federal Circuit's Administrative Order Regarding Electronic Case Filing addresses (in ECF-10(B)) the number of paper copies of briefs, including amicus briefs. ECF-10(D) addresses the number of paper copies of filings (including amicus filings) in connection with "Petitions for Rehearing or En Banc Hearing or Rehearing." ECF-10(E) addresses the number of paper copies of filings (including amicus filings) when "an appeal is to be heard or reheard by the court en banc."

Appendix II: Ninth Circuit Rule 29-2.

Ninth Rule 29-2. Brief Amicus Curiae Submitted to Support or Oppose a Petition for Panel or En Banc Rehearing or During the Pendency of Rehearing

(a) When Permitted. An amicus curiae may be permitted to file a brief when the court is considering a petition for panel or en banc rehearing or when the court has granted rehearing. The United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus curiae brief without the consent of the parties or leave of court. Subject to the provisions of subsection (f) of this rule, any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.

(b) Motion for Leave to File. The motion must be accompanied by the proposed brief and include the recitals set forth at FRAP 29(b).

(c) Format/Length.

(1) A brief submitted while a petition for rehearing is pending shall be styled as an amicus curiae brief in support of or in opposition to the petition for rehearing or as not supporting either party. A brief submitted during the pendency of panel or en banc rehearing shall be styled as an amicus curiae brief in support of appellant or appellee or as not supporting either party.

(2) A brief submitted while a petition for rehearing is pending shall not exceed 15 pages unless it complies with the alternative length limits of 4,200 words or 390 lines of monospaced text. Motions for leave to file an oversize brief are disfavored.

(3) Unless otherwise ordered by the court, a brief submitted after the court has voted to rehear a case en banc shall not exceed 25 pages unless it complies with the alternative length limits of 7,000 words or 650 lines of monospaced text. Motions for leave to file an oversize brief are disfavored.

(d) Number of Copies.

(1) If a petition for rehearing en banc has been granted and the brief is not required to be submitted electronically, an original and 20 copies of the brief shall be submitted.

(2) For all other briefs described by this rule that are not required to be submitted electronically, an original shall be submitted.

The Clerk may order the submission of paper copies or additional copies of any brief filed pursuant to this rule.

(e) Time for Filing.

(1) Brief Submitted to Support or Oppose a Petition for Rehearing. An amicus curiae must serve its brief along with any necessary motion no later than 10 days after the petition or response of the party the amicus wishes to support is filed or is due. An amicus brief that does not support either party must be served along with any necessary motion no later than 10 days after the petition is filed. Motions for extensions of time to file an amicus curiae brief submitted under this rule are disfavored.

(2) Briefs Submitted During the Pendency of Rehearing. Unless the court orders otherwise, an amicus curiae supporting the position of the petitioning party or not supporting either party must serve its brief, along with any necessary motion, no later than 21 days after the petition for rehearing is granted. Unless the court orders otherwise, an amicus curiae supporting the position of the responding party must serve its brief, along with any necessary motion, no later than 35 days after the petition for panel or en banc rehearing is granted. Motions for extensions of time to file an amicus curiae brief submitted under this rule are disfavored.

(f) Circulation. Motions for leave to file an amicus curiae brief to support or oppose a petition for panel rehearing are circulated to the panel. Motions for leave to file an amicus curiae brief to support or oppose a petition for en banc rehearing are circulated to all members of the court. Motions for leave to file an amicus curiae brief during the pendency of en banc rehearing are circulated to the en banc court.

(Eff. July 1, 2007. As amended eff. Dec. 1, 2009.)

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 29-2

Circuit Rule 29-2 only concerns amicus curiae briefs submitted to support or oppose a petition for panel or en banc rehearing and amicus curiae briefs submitted during the pendency of rehearing. The court considers the filing of amicus curiae briefs related to petitions for rehearing or en banc review to be appropriate only when the post-disposition deliberations involve novel or particularly complex issues.

The court will ordinarily deny motions and disallow stipulations for leave to file an amicus curiae brief where the filing of the brief would result in the recusal of a member of the en banc court. Any member of the court who would be subject to disqualification in light of the amicus curiae brief may, of course, voluntarily recuse, thereby allowing the filing of the amicus curiae brief.

(Eff. July 1, 2007.)

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TAB 5A

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MEMORANDUM

DATE: April 4, 2014

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Possible amendments relating to electronic filing
(Item Nos. 08-AP-A, 08-AP-C, 11-AP-C, 11-AP-D, and 13-AP-D)

The Committee has long had on its docket a number of proposals that relate to the impact of electronic filing and service. Last year, the Standing Committee constituted a CM/ECF Subcommittee – with Judge Chagares as its Chair and Professor Capra as its Reporter – to consider possible amendments to all five sets of national Rules that would take account of the shift to electronic transmission and storage of documents and information. This memo sets out one action item and two discussion items arising from the Subcommittee's deliberations. It also includes brief notes concerning two other issues.

The Subcommittee has recommended that the Advisory Committees draft amendments to abrogate the "three-day rule" as it applies to electronic service. The Civil Rules Committee has implemented this recommendation by proposing to amend Civil Rule 6, and at its January 2014 meeting the Standing Committee approved that proposal for publication. Part I of this memo recommends that the Appellate Rules Committee propose a corresponding amendment to Appellate Rule 26, and offers drafting alternatives.

The Subcommittee also discussed the possibility of drafting amendments that will adjust the Rules so that they (1) define "information in written form" to include electronic materials and (2) define various actions that can be done with paper documents to include the analogous action performed electronically.[1] Part II of this memo discusses a

[1] In addition, the Subcommittee discussed a distinction between the Appellate Rules' and Bankruptcy Rules' current e-filing provisions and the analogous provisions in the Civil and Criminal Rules. Appellate Rule 25(a)(2)(D) provides:

> 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.

See also Bankruptcy Rule 5005(a)(2). By contrast, the similar provision in Civil Rule 5(d)(3) authorizes local rules that "allow" e-filing. (Admittedly, Civil Rule 5(d)(3) does also state that "[a] local rule may require electronic filing only if reasonable exceptions are allowed."). The Subcommittee and the relevant

preliminary template for such an amendment, and recommends that the Committee discuss how such a template should be tailored if it is to be adopted as part of the Appellate Rules.

Soon after the Committee's spring meeting, the Subcommittee is scheduled to discuss possible rulemaking on the subject of electronic signatures. Part III of this memo notes the pending proposal to amend Bankruptcy Rule 5005 to address electronic signatures in documents filed in bankruptcy proceedings, and considers the extent to which similar issues would be likely to arise in connection with filings in the courts of appeals.

Part IV of the memo discusses an inquiry from John Rabiej that relates to the Appellate Rules' treatment of electronic service. Finally, Part V notes, but does not recommend action on, some suggestions submitted by Judge S. Martin Teel, Jr., concerning Appellate Rules 6(b)(2)(B)(iii) and 3(d)(1).

I. Amending the "three-day rule"

Appellate Rule 26(c) sets out the three-day rule for purposes of deadlines set in the Appellate Rules. It provides:

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

Under this Rule, the three additional days apply not only to service by mail or commercial carrier, but also to electronic service.

Chief Judge Easterbrook has proposed abolishing the three-day rule,[2] and he argues that the three-day rule is particularly incongruous as applied to electronic service. Though Chief Judge Easterbrook's suggestion relates only to the Appellate Rules, the

Advisory Committees are considering whether Civil Rule 5(d)(3) and Criminal Rule 49(e) should be amended to track more closely the approach taken in the Appellate and Bankruptcy Rules.

At present, it does not appear that such changes would directly affect the Appellate Rules. The possibility exists that the Subcommittee might decide, as the project progresses, to recommend more sweeping changes that would affect the Appellate Rules.

[2] Chief Judge Easterbrook favors eliminating the three-day rule entirely, in part because its application interferes with the Rules' preference for setting time periods in increments of seven days. However, during the Appellate Rules Committee's spring 2013 meeting, participants noted the possible need for more time by those who respond to pro se filings. For example, in cases involving the federal government, pro se papers tend to reach the Department of Justice belatedly because all mail bound for the DOJ is screened for security reasons. If the three-day rule were eliminated, it was suggested, the DOJ would move more frequently for extensions of time to respond to pro se filings.

criticism of the three-day rule is relevant, as well, to Civil Rule 6(d),[3] Criminal Rule 45(c),[4] and Bankruptcy Rule 9006(f).[5] For more than a decade, there have been periodic discussions of whether electronic service ought to be excluded from the three-day rule. The CM/ECF Subcommittee continued those discussions last summer, and concluded that the time has come to amend the three-day rule to exclude electronic service.[6]

The Civil Rules Committee has already implemented the Subcommittee recommendation, and the Standing Committee has approved for publication the proposed amendment to Civil Rule 6. I enclose a copy of the Civil Rule 6 proposal.

I recommend that the Appellate Rules Committee proceed with a parallel amendment to Appellate Rule 26. In Part I.A below, I discuss whether the Committee should try to track the language of the three-day rule in the other sets of national Rules, and I argue that there are grounds for using different language (while accomplishing the same goal, namely, the exclusion of electronic service from the three-day rule). Part I.B discusses one additional amendment that seems worthwhile if the Committee is proposing to revise Rule 26(c). Part I.C shows two possible choices for an overall amendment to Rule 26(c); those two drafts reflect the two most plausible alternatives discussed in Part I.A, and also reflect the possible additional amendment discussed in Part I.B. In Part I.D, I briefly discuss a related question currently under discussion among the relevant committees – namely, whether to propose a broader abrogation of the three-day rule.

[3] Civil Rule 6(d) provides: "**Additional Time After Certain Kinds of Service.** When a party may or must act within a specified time after service and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a)." Civil Rule 5(b)(2)(E) authorizes service of a paper by "sending [the paper] by electronic means if the person consented in writing--in which event service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served."

[4] Criminal Rule 45(c) provides: "**Additional Time After Certain Kinds of Service.** Whenever a party must or may act within a specified period after service and service is made in the manner provided under Federal Rule of Civil Procedure 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under subdivision (a)."

[5] Bankruptcy Rule 9006(f) provides: "Additional time after service by mail or under Rule 5(b)(2)(D), (E), or (F) F.R.Civ.P. When there is a right or requirement to act or undertake some proceedings within a prescribed period after service and that service is by mail or under Rule 5(b)(2)(D), (E), or (F) F.R.Civ.P., three days are added after the prescribed period would otherwise expire under Rule 9006(a)."

[6] The reasons given for including electronic service appear less persuasive now than they were a decade ago: Concerns that electronic service may be delayed by technical glitches or that electronically served attachments may arrive in garbled form seem less urgent in districts (or circuits) where electronic service occurs as part of smoothly-running CM/ECF programs. And in districts or circuits where CM/ECF is mandatory for counsel, there would be no need to give counsel an incentive to consent to electronic service (or to avoid giving counsel a disincentive to consent to electronic service) by maintaining the three-day rule for electronic service. There remains a lingering concern that counsel might strategically serve an opponent by electronic means on a Friday night in order to inconvenience the opponent. But a litigant whose opponent uses such a tactic can seek an extension of time to respond. *See* Appellate Rule 26(b) (providing, subject to exceptions that would not be relevant in this context, that "[f]or good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires").

A. Alternative ways to remove electronic service from the three-day rule

At least three drafting possibilities present themselves. I discuss first the most parsimonious approach, and conclude it would not provide the necessary clarity. Next, I compare the two most plausible possibilities -- one that retains the structure of current Rule 26(c), and another that replaces that structure with language that tracks the approach taken Civil Rule 6 and the other sets of national Rules.

One possibility is to simply delete the final sentence of Rule 26(c), thus:

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

This approach would have the virtue of brevity. It would seem to achieve the result that the Committee wishes to accomplish – that is to say, eliminating the three-day rule when service is electronic. But it might leave some readers with questions. Is a paper electronically "delivered" as soon as the paper is uploaded to CM/ECF, or is it "delivered" to a particular lawyer the next time he accesses his email and sees a message notifying him of the filing in CM/ECF? The Appellate Rules do not define "delivery."[7]

A second alternative would be to retain the current text of Rule 26(c) but to delete the "not," thus:

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

This alternative would make clear that the three-day rule does not apply when a paper is served electronically. But it is a somewhat roundabout way of stating when the three-day rule does and does not apply. Using the concept of date-of-delivery to define when the three-day rule applies – and then defining what the date of delivery is for electronic service – might not be ideal because, elsewhere, the Rules address when electronic service is "complete": Rule 25(c)(4) provides in part that "Service by electronic means is complete on transmission, unless the party making service is notified that the paper was not received by the party served." Admittedly, both the current text of Rule 26(c) and the alternative sketched above try to make clear that their definition of electronic "delivery" exists only for purposes of Rule 26(c); but it still seems confusing to have one

[7] On the other hand, as noted in the text, Rule 25(c)(4) does define when "[s]ervice by electronic means is complete."

definition of electronic "delivery" in Rule 26(c) and a different definition of "completion" of electronic service in Rule 25(c)(4).

The third alternative would be to revise Rule 26(c) so that it tracks the structure of the three-day rules in the other national Rules:

> **(c) Additional Time after <u>Certain Kinds of</u> Service.** When a party may or must act within a specified time after service <u>and service is made under Rule 25(c)(1)(B) (mail) or (C) (third-party commercial carrier)</u>, 3 days are added after the period would otherwise expire under Rule 26(a)~~, unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service~~.

At first glance, this option appears to be clearer and simpler. It would also have the advantage of tracking the language used in the other national Rules.[8] Would this mode of delineating the scope of the three-day rule suffer from any ambiguities? It seems to me that the only possible ambiguity might concern the distinction between the methods authorized in Rules 25(c)(1)(A) and 25(c)(1)(C). Rule 25(c)(1)(A) says that the permissible methods of service include "personal, including delivery to a responsible person at the office of counsel." Rule 25(c)(1)(C) lists, as another permissible method, service "by third-party commercial carrier for delivery within 3 days."[9] Would a recipient be in doubt as to which of these methods was employed?[10] It appears that this

[8] Even if the Committee decides not to track the language of the other three-day rules, I recommend revising Rule 26(c)'s subtitle to track those in the Civil and Criminal Rules. Specifying that Rule 26(c) applies only to "Certain Kinds of Service" is more precise. Accordingly, both of the two drafts shown in Part I.C include this revision to the subtitle: "**Additional Time after <u>Certain Kinds of</u> Service**."

[9] The Appellate Rules' authorization of service by third-party commercial carrier is not mirrored in the other sets of Rules. Such service is addressed (for purposes of the Civil Rules) only obliquely, by Civil Rule 5(b)(2)(F), which provides for "delivering [the paper] by any other means that the person consented to in writing – in which event service is complete when the person making service delivers it to the agency designated to make delivery."

[10] Rule 25(d)(1) provides:

> A paper presented for filing 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.

The Rule does not, however, require that the copy that is *served* contain a copy of the proof of service. (Rule 25(d)(3) states that "[p]roof of service may appear on or be affixed to the papers filed.") If the copy served on the litigant includes the proof of service, then that would tell the litigant the "date and manner of service," Rule 25(d)(1)(B)(i); but would that always clarify whether the type of service counts as "personal" or as "third-party commercial carrier"? It *would* ordinarily tell the litigant whether the paper was "delivered on the date of service stated in the proof of service," which is the trigger under Rule 26(c)'s existing three-day rule.

concern may have underpinned the choice of wording for Rule 26(c). The minutes of the July 1995 Standing Committee meeting, at which the Committee gave its final approval to that wording,[11] state in part:

> The public comments [concerning proposed amendments to Rule 25] pointed out that it would be difficult as a practical matter for recipients of documents to distinguish between personal service and delivery by commercial carrier. Thus, [the proposed Rule 25] had been further amended to provide that service may be made by commercial carrier if the carrier is to deliver the paper to the party being served within three days of the carrier's receipt of the paper. Rule 26(c) was also amended to provide the 3-day extension regardless of the method of service, unless the document is delivered to the party on the date of service.[12]

In the light of the possibility that a recipient might have trouble discerning whether it had been served under Rule 25(c)(1)(A) or under Rule 25(c)(1)(C), it seems to me that the second alternative sketched above (deleting "not") may be the best choice. However, it seemed useful to consider, as well, the possibility of revising Rule 26(c) so that it tracks the amended three-day rules in the other sets of Rules. Accordingly, I included both of those options when I circulated draft language during discussions with the Reporters for the other Committees and for the CM/ECF Subcommittee, and I set forth both of those options in Part I.C below.

B. Substituting "being served" for "service"

Last summer, a proposed amendment to Civil Rule 6(d) was published for comment. Only two comments touched briefly on this proposal, and both of those comments were favorable. The proposal is on the Civil Rules Committee's spring agenda for approval as published. I set forth the proposal here, because I think that it would make sense to reflect this proposed change in any proposed amendment to Appellate Rule 26(c). Here is the Civil Rule 6(d) proposal as published:

> **Rule 6. Computing and Extending Time; Time for Motion Papers**
>
> * * * * *
>
> **(d) Additional Time After Certain Kinds of Service.** When a party may or must act within a specified time after ~~service~~ being served and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a).

[11] Appellate Rule 26 has, of course, been amended since 1996. But it was the 1996 amendment that added the "unless" clause; after the 1996 amendment, that clause in Rule 26(c) read: "unless the paper is delivered on the date of service stated in the proof of service."
[12] Minutes of the Standing Committee meeting on July 6-7, 1995.

Committee Note

> What is now Rule 6(d) was amended in 2005 "to remove any doubt as to the method for calculating the time to respond after service by mail, leaving with the clerk of court, electronic means, or by other means consented to by the party served." A potential ambiguity was created by substituting "after service" for the earlier references to acting after service "upon the party" if a paper or notice "is served upon the party" by the specified means. "[A]fter service" could be read to refer not only to a party that has been served but also to a party that has made service. That reading would mean that a party who is allowed a specified time to act after making service can extend the time by choosing one of the means of service specified in the rule, something that was never intended by the original rule or the amendment. Rules setting a time to act after making service include Rules 14(a)(1), 15(a)(1)(A), and 38(b)(1). "[A]fter being served" is substituted for "after service" to dispel any possible misreading.

Appellate Rule 26(c) includes the same "being served" language as Civil Rule 6(d). If no other amendments were contemplated for Appellate Rule 26(c), then I would not propose that the Committee consider amending the Rule merely to change "service" to "being served." Most of the service-as-trigger starting points in the Appellate Rules concern deadlines for action *by the person who is served*.[13] In such instances, the Rule's "after service" language is unproblematic.

Admittedly, Rule 10(b)(3)(C) might be read to involve a deadline for action by the person who does the serving (rather than the person who is served). That Rule discusses what happens if the appellant orders less than the entire transcript and the appellee serves a designation of additional parts to be ordered. Rule 10(b)(3)(C) provides that "unless within 14 days after service of that designation [by the appellee] the appellant has ordered all such parts, and has so notified the appellee, the appellee may within the following 14 days either order the parts or move in the district court for an order requiring the appellant to do so." If the appellant does not order the relevant parts of the record, then under this Rule, it appears that the appellee has (in effect) a 28-day deadline (14 + 14) that commences to run upon service of a document by the appellee. In a situation where the appellee uses a service method of a type (such as mail) that can trigger the three-day rule, the period would actually turn out to be a 31-day period (17 + 14). But I do not think that this would give rise to the sort of gamesmanship that the Civil Rule 6(d) amendment is designed to forestall: It is hard to see how the appellee would gain an unfair advantage if the first 14-day period was counted as a 17-day period.

[13] *See* Appellate Rules 5(b)(2); 6(b)(2)(B)(ii); 10(b)(3)(B); 10(c); 17(a); 19; 24(a)(5); 27(a)(3)(A); 27(a)(4); 28.1(f)(2); 28.1(f)(3); 28.1(f)(4); 30(c)(1); 31(a)(1); and 39(d)(2).

This list does not include Appellate Rule 30(b)(1), because that Rule provides that the appellee's time limit for serving a designation of additional parts of the record is "within 14 days after receiving the [appellant's] designation." In other words, Rule 30(b)(1) sets a time period that starts running after "receipt" rather than "service."

Thus, I do not think that this feature of Rule 10(b)(3)(C) provides a reason to amend Rule 26(c) to replace "service" with "being served."[14]

In light of the above, there might not be adequate reason to amend Appellate Rule 26(c) merely to address this wording issue, because it is difficult to see how the Rule's current use of "after service" would cause problems with the deadlines currently set by the Appellate Rules. On the other hand, it is possible that a deadline adopted in a *future* amendment to the Appellate Rules would run from service of a paper by the person who must comply with the deadline. And, in the meantime, there is some value to ensuring that the three-day rules in each set of Rules employ parallel language to the extent possible. Accordingly, if the Committee moves forward with an amendment of the sort discussed in Part I.A, I recommend also changing "service" to "being served." The sketches in Part I.C reflect this change.

C. Consolidated drafts of two possible alternatives

Here are two sketches that show the top two alternatives discussed in Part I.A, and that also reflect the proposed change discussed in Part I.B.

In both sketches, the proposed Committee Note closely tracks the Committee Note for proposed Civil Rule 6. The only notable difference between the two Notes is that the Civil Rule 6 Committee Note includes a final paragraph discussing consent to service by electronic means. That paragraph reads:

> Eliminating [Civil] Rule 5(b) subparagraph (2)(E) from the modes of service that allow 3 added days means that the 3 added days cannot be retained by consenting to service by electronic means. Consent to electronic service in registering for electronic case filing, for example, does not count as consent to service "by any other means" of delivery under subparagraph (F).

The feature in the Civil Rules that makes this discussion necessary does not have a parallel in the Appellate Rules. Civil Rule 5(b)(2)(F) refers to service accomplished by "delivering [the paper] by any other means that the person consented to in writing – in which event service is complete when the person making service delivers it to the agency designated to make delivery." In contrast, Appellate Rule 25's service-by-consent provision contemplates only one type of consented-to service, namely, electronic service:

[14] Moreover, it is not even clear that such an amendment would remove the possibility that the appellee would receive a 31-day period under Rule 10(b)(3)(C): As noted in the text, the reason that the (effectively) 28-day period could become a 31-day period is that the first 14-day component of that period could become a 17-day component. I think that the same would still be true even if Rule 26(c) were amended to refer to "being served." I say this because the first component of the overall 28-day period (under Rule 10(b)(3)(C)) concerns a period for action *by the appellant*; and since it is service *upon the appellant* that triggers the running of the first 14-day component of the overall 28-day period, service by, e.g., mail would still trigger the three-day rule and transmute that 14-day component into a 17-day component.

Appellate Rule 25(c)(1)(D) authorizes service "by electronic means, if the party being served consents in writing." Accordingly, even in the sketch designed to bring Appellate Rule 26(c) into closer parallel with the other three-day rules, there is no mention of service by consent. That being so, the Committee Note need not address the topic.

1. Option one: Delete "not"

Rule 26. Computing and Extending Time

* * *

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

Committee Note

Rule 26(c) is amended to remove service by electronic means under Rule 25(c)(1)(D) from the modes of service that allow 3 added days to act after being served.

Rule 25(c) was amended in 2002 to provide for service by electronic means. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and in widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns. [If we eliminate consent from Rule 25(c)(1)(D), we can add that here.][15]

[15] Rule 25(c)(1)(D) authorizes service "by electronic means, if the party being served consents in writing." Another question that the CM/ECF Subcommittee is likely to consider is whether to propose eliminating this consent requirement.

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28- day periods that allow "day-of-the-week" counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Rule 26(c) has also been amended to refer to instances when a party "may or must act … after being served" rather than to instances when a party "may or must act … after service." If, in future, an Appellate Rule sets a deadline for a party to act after *that party itself effects service* on another person, this change in language will clarify that Rule 26(c)'s three added days are not accorded to the party who effected service.

2. Option two: Track the other Rules

Rule 26. Computing and Extending Time

* * *

(c) Additional Time after <u>Certain Kinds of</u> Service. When a party may or must act within a specified time after ~~service~~ <u>being served and service is made under Rule 25(c)(1)(B) (mailing) or (C) (third-party commercial carrier)</u>, 3 days are added after the period would otherwise expire under Rule 26(a)~~, unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service~~.

Committee Note

Rule 26(c) is amended to remove service by electronic means under Rule 25(c)(1)(D) from the modes of service that allow 3 added days to act after being served. Rule 26(c) is also revised to track the structure of the analogous provisions in Civil Rule 6(d), Criminal Rule 45(c), and Bankruptcy Rule 9006(f).

Rule 25(c) was amended in 2002 to provide for service by electronic means. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being

served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and in widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns. [If we eliminate consent from Rule 25(c)(1)(D), we can add that here.][16]

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28- day periods that allow "day-of-the-week" counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Rule 26(c) has also been amended to refer to instances when a party "may or must act … after being served" rather than to instances when a party "may or must act … after service." If, in future, an Appellate Rule sets a deadline for a party to act after *that party itself effects service* on another person, this change in language will clarify that Rule 26(c)'s three added days are not accorded to the party who effected service.

[16] Rule 25(c)(1)(D) authorizes service "by electronic means, if the party being served consents in writing." Another question that the CM/ECF Subcommittee is likely to consider is whether to propose eliminating this consent requirement.

D. The possibility of abrogating the three-day rule more broadly

As noted at pages 16-17 of the draft minutes of the Standing Committee's January 2014 meeting, the discussion of the proposal to eliminate electronic service from Civil Rule 6(d)'s three-day rule has led to proposals for more far-reaching change. One such proposal would restrict the three-day rule to service by mail, while a more drastic proposal would eliminate the three-day rule entirely. It would be helpful to discuss these ideas at the Appellate Rules Committee's meeting so that members' perspectives can be shared with the CM/ECF Subcommittee.

The proposal to restrict the three-day rule to service by mail seems less relevant to the Appellate Rules than to other sets of Rules. The reason is that, if Appellate Rule 26(c) is amended to exclude electronic service from the three-day rule, then the only remaining means of service that could trigger the three-day rule would be service by mail or service by third-party commercial carrier (which, except in instances of same-day delivery, would seem to merit the same treatment as service by mail). Such a proposal would be more significant as applied to other sets of Rules. For example, it would exclude from the ambit of Civil Rule 6(d)'s three-day rule instances when service is accomplished by "leaving [the paper] with the court clerk if the person has no known address" (Civil Rule 5(b)(2)(D)) or by "delivering [the paper] by any other means that the person consented to in writing" (Civil Rule 5(b)(2)(F)).

The proposal to eliminate the three-day rule entirely would obviously be a more momentous step. So long as there remain instances when documents are served by mail – and there are many such instances in cases involving pro se litigants – the justification for the three-day rule appears to persist for that method of service. Moreover, Mr. Letter has pointed out that documents mailed in hard copy to the Department of Justice are delayed in transit, as a matter of standard practice, while they undergo a security screening prior to delivery; in those instances, the extra three days are particularly useful.

II. Adjusting rules that were drafted with paper in mind

Apart from the proposed change to the three-day rules, the CM/ECF Subcommittee has started to consider the possibility of changes that would more broadly adapt the Rules to the realities of electronic filing. Such changes will be more challenging to draft than the three-day rule proposal.

Professor Capra has prepared for discussion purposes a draft rule that would provide two definitions. First, it would define references to writings so as to encompass electronically stored information. Second, it would define references to filing, sending, and similar actions so as to encompass instances when those actions are accomplished electronically:

Information in Electronic Form and Action by Electronic Means

> **a) Information in Electronic Form:** In these rules, [unless otherwise provided] a reference to information in written form includes electronically stored information.
>
> **b) Action by Electronic Means:** In these rules, [unless otherwise provided] any action that can or must be completed by filing or sending paper may also be accomplished by electronic means [that are consistent with any technical standards established by the Judicial Conference of the United States].

Adopting the first of these definitions will be unproblematic; refining the second definition is likely to prove somewhat more complicated. For purposes of the Appellate Rules, I think that there should be no problem with a rule that defines "information in written form" to include "electronically stored information."[17] The second part of the proposed rule – setting a default rule that "any action that can or must be completed by filing or sending paper may also be accomplished by electronic means" – might necessitate adjustments to some aspects of the Appellate Rules' treatment of timing. The Appellate Rules currently include nuances concerning both the end point of a time period[18] and the starting point of a time period[19] depending on the manner in which a paper is filed or served. Moreover, just as special considerations might arise concerning electronic service of a summons and complaint, special considerations are likely to arise for electronic filing of the notice of appeal. We may have reached the point where electronic filing will work as a default rule for notices of appeal from the district court, but the same is probably not yet true for notices of appeal from the Tax Court.

III. Signatures on electronic filings

Among the proposed amendments published for comment last summer was a proposal to amend Bankruptcy Rule 5005 to address the question of signatures in electronic filings. The proposal aims to address, among other issues, concerns that have been raised about how to handle documents signed by individual debtors and filed by

[17] Such a definition seems like a broader version of an already-extant provision. Rule 25(a)(2)(D) provides that "[a] paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules." For similar provisions, see Bankruptcy Rule 5005(a)(2); Civil Rule 5(d)(3).

[18] As to compliance with the end point of a time period, see Rules 4(c)(1) and 25(a)(2)(D) (inmate filings); 25(a)(2)(A) (for filings by mail, clerk must receive paper within deadline); 25(a)(2)(B) (filings of brief or appendix by mail or third-party carrier must be mailed or dispatched within deadline); 25(c)(4) (mail / carrier service is complete upon delivery; e-service is complete upon transmission absent notice of failure); 26(a)(4) (definition of "last day" varies by type of filing method).

[19] As to starting points for time periods, see Rules 4(c)(2) and (3) (appeals by other parties after inmate files a notice of appeal); 26(c) (three-day rule applies unless the relevant paper is delivered by same-day, non-electronic means).

their attorneys.[20] I enclose a copy of the proposed amendment as published. Because the CM/ECF Subcommittee will confer this spring about the possibility of adopting such provisions in the other sets of Rules, I summarize the topic here. However, it should be noted that the Bankruptcy Rules Committee's Subcommittee on Technology and Cross Border Insolvency has recommended to the Bankruptcy Rules Committee that it should not proceed further with the proposed amendment. This recommendation is on the agenda for the Bankruptcy Rules Committee's meeting on April 22-23, 2014.

For a document signed by a person who files the document via CM/ECF, the proposed Bankruptcy Rule provides that "[t]he user name and password of an individual who is registered to use the court's electronic filing system serves as that individual's signature on any electronically filed document." For a document signed by a person other than the CM/ECF filer, the proposed rule provides for the filing of an electronic copy of the original signed document, and the rule sets out two alternative approaches for ensuring the reliability of the signature. The first alternative relies on a certification by the filer ("By filing the document and signature page, the registered user certifies that the scanned signature was part of the original document."). The second alternative instead relies on the involvement of a notary ("The document and signature page shall be accompanied by the acknowledgment of a notary public that the scanned signature was part of the original document."). Here is the relevant Subcommittee's summary of the comments received on the published proposal:

> Nineteen comments were submitted on the Rule 5005(a) amendment. Everyone who commented on the alternatives preferred Alternative 1. Most of those comments explained the reasons for the preference without commenting more broadly on the desirability of the overall amendment. Seven comments expressed opposition to adoption of the amendment. Included in that group is the detailed comment submitted by the Deputy Attorney General. Among the reasons for opposition were that current procedures work fine and scanning of signatures would be more complicated, scanned documents will require greater electronic storage capacity, there is or soon will be superior technology that will assure the validity of electronic signatures, and elimination of the retention requirement will make prosecutions and civil enforcement actions for

[20] A March 2013 memo from the Subcommittee on Technology and Cross Border Insolvency to the Bankruptcy Rules Committee summarized the impetus for the proposal:

> This issue of the retention of documents that are filed electronically with the debtor's signature was initially brought to the Advisory Committee by the Forms Modernization Project. It raised the issue in response to concerns expressed by debtors' attorneys about their need to retain petitions, schedules, and other individual-debtor filing documents that will be lengthier in the proposed restyled format. Representatives of the Department of Justice also expressed concerns about the retention of original documents by debtors' attorneys and the lack of uniformity regarding the retention period. The Department made a recommendation to the Next Gen's Additional Stakeholders Functional Requirements Group that documents bearing wet signatures, signed under penalty of perjury, be retained by the clerk of court for five years—the statute of limitations for fraud and perjury proceedings—unless a national rule were adopted declaring that electronic copies of such documents in the court's ECF system constitute legally sufficient best evidence in the absence of an original signed document.

bankruptcy fraud and abuse more difficult. Four of the comments gave suggestions for revising the wording or scope of the amendment.

Despite the fact that, based on the comments received, it appears somewhat unlikely that the Bankruptcy Rules Committee will proceed with this proposal, it seems worthwhile for the Appellate Rules Committee to consider how signatures in electronic documents are handled in the courts of appeals. Currently, the Appellate Rules (like the other relevant sets of national Rules[21]) authorize local rules that permit or require electronic signature: Appellate Rule 25(a)(2)(D) states in part that "[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."[22]

Compared with the need for the proposed amendment to the Bankruptcy Rules (which is, as noted above, debated), there may be even less need for the Appellate Rules to address the particular question of documents signed by a person other than the electronic filer. Many of the signatures contemplated or required by the Appellate Rules or Forms would be provided by the person who files the document.[23] All of the Forms that initiate proceedings in the court of appeals[24] include a signature, but the signature would be provided by the person who files the form[25] – either the attorney for a represented party, or a pro se litigant; the same is true of the Form that certifies compliance with Rule 32(a)'s requirements.[26]

However, there are at least two types of situations in which counsel might electronically file in the court of appeals a document signed by someone else. The first such situation would arise in any instance requiring an affidavit executed by someone

[21] *See* Fed. R. Civ. P. 5(d)(3); Fed. R. Crim. P. 49(e); Fed. R. Bankr. P. 5005(a)(2).
[22] For such local rules, see, e.g,. Second Circuit Local Rule 25.1(e) ("A PDF need not include a manual signature."); Second Circuit Local Rule 25.2(b)(3) (same); Second Circuit Local Rule 25.1(f) ("A Filing User's personal log-in and password constitute the Filing User's signature for any purpose for which a signature is required."); Third Circuit Local Appellate Rule 28.4 ("All briefs must be signed in accordance with the provision of L.A.R. 46.4. Electronic briefs may be signed with either an electronically generated signature or 's/ typed name' in the signature location. Counsel's state Bar number, if any, and address and phone number must be included with the signature."); Third Circuit Local Appellate Rule 46.4 ("All documents, motions and briefs must be signed by an attorney or by a party appearing pro se. Electronically filed documents must be signed with either an electronic signature or 's/typed name.'").
[23] For Rules contemplating a signature that would be provided by the filer, see Rule 10(d) ("In place of the record on appeal as defined in Rule 10(a), the parties may prepare, sign, and submit to the district court a statement of the case showing how the issues presented by the appeal arose and were decided in the district court.") and Rule 32(d) ("Every brief, motion, or other paper filed with the court must be signed by the party filing the paper or, if the party is represented, by one of the party's attorneys.")
[24] *See* Form 1 (notice of appeal from the district court), Form 2 (notice of appeal from the Tax Court), Form 3 (petition for review of agency determination), and Form 5 (notice of appeal from district court or Bankruptcy Appellate Panel).
[25] In addition to the fact that the signer and filer will be the same person, there is also the fact that – at least in the near future – these forms are more likely to be filed in paper than electronically.
[26] *See* Form 6.

other than counsel – such as an affidavit in connection with a motion for a stay[27] or an application to proceed in forma pauperis[28] or an appeal from a detention or release order in a criminal case.[29] The second situation could arise when dismissal of the appeal is sought under Appellate Rule 42. Rules 42(a) and (b) provide for the dismissal of an appeal after the filing of a signed document:

> (a) Dismissal in the District Court. Before an appeal has been docketed by the circuit clerk, the district court may dismiss the appeal on the filing of a stipulation signed by all parties or on the appellant's motion with notice to all parties.
>
> (b) Dismissal in the Court of Appeals. The circuit clerk may dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due….

Rule 42 does not make entirely clear whether the stipulation referred to in Rule 42(a) and the agreement referred to in Rule 42(b) must be signed by the party (rather than the party's lawyer). Local rules addressing this point tend to distinguish between criminal and civil appeals – requiring the defendant's own signature in a criminal appeal but permitting counsel to sign in a civil appeal.[30]

Currently, five circuits have local provisions that specifically address electronic filings containing signatures by persons other than the electronic filer.[31] The appendix to this memo sets forth those provisions. The local rules of the Third, Fourth, and Fifth Circuits include provisions that impose a duty to retain for a set period the original of any signature by a person other than the electronic filer, address the logistics for signatures by multiple parties in electronically-filed documents, and set out a process by which a party or attorney can object to their purported signature in an electronically-filed document.

[27] Rules 8(a)(2)(B)(ii) and 18(a)(2)(B)(ii) provide that a motion for a stay must include "originals or copies of affidavits or other sworn statements supporting facts subject to dispute."
[28] *See* Form 4; Rule 24(a)(1) (motion filed in district court must include "an affidavit that: (A) shows in the detail prescribed by Form 4 … the party's inability to pay or to give security for fees and costs; (B) claims an entitlement to redress; and (C) states the issues that the party intends to present on appeal"); Rule 24(a)(5) (motion filed in court of appeals "must include a copy of the affidavit filed in the district court," and "[i]f no affidavit was filed in the district court, the party must include the affidavit prescribed by Rule 24(a)(1)").
[29] *See* Rule 9(a).
[30] See Second Circuit Local Rule 42.2 ("A stipulation or motion to voluntarily dismiss a counseled defendant's criminal appeal must be accompanied by the defendant's signed statement that (a) counsel has explained the effect of voluntary dismissal of the appeal, (b) the defendant understands counsel's explanation, and (c) the defendant desires to withdraw and voluntarily dismiss the appeal."); Fourth Circuit Rule 42 ("In civil cases, the stipulation of dismissal or motion for voluntary dismissal may be signed by counsel. In criminal cases, however, the agreement or motion must be signed or consented to by the individual party appellant personally or counsel must file a statement setting forth the basis for counsel's understanding that the appellant wishes to dismiss the appeal and the efforts made to obtain the appellant's written consent. Counsel must serve a copy of this statement on appellant.").
[31] The Third, Fourth, Fifth, Sixth, and Ninth Circuits' local rules specifically address such filings. The Tenth Circuit has a rule providing generally that "[a]n electronic signature is an original signature under this rule." Tenth Circuit Rule 46.5(C).

The Sixth and Ninth Circuits have local provisions that more briefly address the means for providing signatures of multiple signatories in electronically filed documents.

IV. Proof of service when service is accomplished through CM/ECF

Last fall, I received an inquiry from John Rabiej that relates to the Appellate Rules' treatment of electronic service. Specifically, Mr. Rabiej asked why the Appellate Rules require proof of service when service is accomplished through CM/ECF:

> FRAP 25(d) requires a proof of service to appear or be affixed to the papers filed. The Notice of Docket Activity generated by CM/ECF constitutes service, but it does not replace the certificate of service. I can see why a certificate of service is required in pro se cases if CM/ECF is not used. But I am having difficulty envisioning why a certificate of service is required when CM/ECF is used. As a practical matter, how is this certificate of service handled? Does a lawyer electronically file a certificate under penalty of perjury stating that the document was transmitted to the court via CM/ECF, which generated a Notice of Docket Activity, which was sent to all parties. That would seem to add nothing to the Notice of Docket Activity, which already indicates who has been served.

Mr. Rabiej's question seems to me to be a good one. My goal here is to briefly note the issue in case the Committee feels that it is worthwhile to investigate further.

Appellate Rule 25(d) provides:

> **(d) Proof of Service**.
>
> (1) A paper presented for filing 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), 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.

Other provisions that require proof of service can be found in Appellate Rules 5(a)(1),[32] 21(a)(1),[33] 21(c),[34] and 39(d)(1),[35] Bankruptcy Rule 8008(d),[36] and Civil Rule 5(d)(1).[37]

It seems to me that Rule 25(d) could be revised so that it no longer requires a proof of service in instances when service is accomplished by means of the "notice of docket activity" generated by CM/ECF. Those instances cover many filings in the courts of appeals. There will continue to be exceptions. An obvious exception will occur when the litigant who is served does not participate in CM/ECF. Another exception will arise

[32] Rule 5(a)(1) provides: "To request permission to appeal when an appeal is within the court of appeals' discretion, a party must file a petition for permission to appeal. The petition must be filed with the circuit clerk with proof of service on all other parties to the district-court action."

[33] Rule 21(a)(1) provides: "A party petitioning for a writ of mandamus or prohibition directed to a court must file a petition with the circuit clerk with proof of service on all parties to the proceeding in the trial court. The party must also provide a copy to the trial-court judge. All parties to the proceeding in the trial court other than the petitioner are respondents for all purposes."

[34] Rule 21(c) provides: "An application for an extraordinary writ other than one provided for in Rule 21(a) must be made by filing a petition with the circuit clerk with proof of service on the respondents. Proceedings on the application must conform, so far as is practicable, to the procedures prescribed in Rule 21(a) and (b)."

[35] Appellate Rule 39(d)(1) provides: "A party who wants costs taxed must--within 14 days after entry of judgment--file with the circuit clerk, with proof of service, an itemized and verified bill of costs."

[36] Bankruptcy Rule 8008(d) provides:

> Papers presented for filing shall contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. The clerk of the district court or the clerk of the bankruptcy appellate panel may permit papers to be filed without acknowledgment or proof of service but shall require the acknowledgment or proof of service to be filed promptly thereafter.

The pending amendments to Part VIII of the Bankruptcy Rules – which are currently on track to take effect in December 2014 – would relocate the relevant provision to a new Rule 8011(d) but would retain the proof-of-service requirement.

[37] Civil Rule 5(d)(1) requires a "certificate of service":

> Any paper after the complaint that is required to be served--together with a certificate of service--must be filed within a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: depositions, interrogatories, requests for documents or tangible things or to permit entry onto land, and requests for admission.

Criminal Rule 49(b) would seem to incorporate the "certificate of service" requirement, because it provides in part that "[s]ervice must be made in the manner provided for a civil action."

in some instances when the litigant who makes service does not participate in CM/ECF.[38] Also, I am guessing that filings (made in the court of appeals) that *initiate* an appellate case in the court of appeals will not work the same way as later filings in that same case. That is to say, at the time that the very first filing in an appellate matter is docketed in the court of appeals, the CM/ECF system may not be set up to generate a notice of docket activity (as a result of that filing) to the other litigants in the case. For that reason, Appellate Rules 5(a)(1) (petitions for permission to appeal), 21(a)(1) (mandamus petitions), and 21(c) (petitions for other extraordinary writs) seem to me to raise distinct issues.

One possibility might be to revise Rule 25(d) along the following lines:

(d) Proof of Service.

(1) ~~A paper presented for filing must contain~~ Proof of service consists of 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), 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.

(4) When service is made under Rules 25(c)(1)(D) and 25(c)(2) by means of a notice of docket activity generated by CM/ECF, no proof of service is required [unless otherwise stated by these Rules]. When service

[38] Even when the litigant whose paper is being served does not participate in CM/ECF, sometimes service will be accomplished electronically by means of the CM/ECF system. As Mr. Gans has mentioned to the Committee, the Eighth Circuit has adopted a special rule allowing prisoners and other pro se litigants to file with the Clerk, who then serves their documents to registered users through CM/ECF.

is made by any other means, the paper presented for filing must contain proof of service.

An additional question might be why Appellate Rule 39(d)(1) (quoted in footnote 35, above) includes a reference to proof of service. Rule 25(d) would seem to apply to any "paper presented for filing" in the court of appeals,[39] rendering Rule 39(d)(1)'s reference to proof of service redundant.[40] It therefore might be useful – if other related amendments are brought forward – to amend Rule 39(d)(1) to delete the reference to proof of service: "A party who wants costs taxed must--within 14 days after entry of judgment – file with the circuit clerk~~, with proof of service,~~ an itemized and verified bill of costs."

V. Judge Teel's suggestions concerning Rules 6(b)(2)(B)(iii) and 3(d)(1)

In comments submitted in connection with the pending amendments to Appellate Rule 6, Judge Teel, a United States Bankruptcy Judge in the District of Columbia, suggested that Rule 6(b)(2)(B)(iii)'s list of the contents of the record on appeal be revised by deleting the Rule's current reference to "a certified copy of the docket entries prepared by the clerk under Rule 3(d)" and inserting "the docket entries maintained by the clerk of the district court or bankruptcy appellate panel." Judge Teel stated that the reference to certification is unnecessary, that the lower-court clerk maintains rather than prepares the docket entries, and that the cross-reference to Appellate Rule 3(d) is superfluous. Turning to Appellate Rule 3(d) itself, Judge Teel also questioned why the lower-court clerk should be required to transmit a copy of the docket entries to the court of appeals now that docket entries are available electronically. The Committee decided to place these comments on the Committee agenda as a new item rather than considering them in the context of the previously-published Rule 6 proposal.

With respect to Rule 6(b)(2)(B)(iii), Judge Teel's comment concerns a feature that is already present in the current version of the Rule. The Committee has not received any reports, to date, that this aspect of the Rule's current wording is causing problems in practice.[41] Although Judge Teel identifies wording that eventually may be worth consideration in the context of the larger project to review the Appellate Rules in light of the shift to electronic filing, it does not seem to me that there is a pressing need to amend that wording. Rule 6(b)(2)(B)(iii)'s statement that the record includes "a certified copy of the docket entries prepared by the clerk under under Rule 3(d)" roughly parallels Appellate Rule 10(a)(3), which states that the record includes "a certified copy of the

[39] As the Committee is aware, the Appellate Rules "govern procedure in the United States courts of appeals," Rule 1(a)(1), whereas when a document is filed in the district court, "the procedure must comply with the practice of the district court," Rule 1(a)(2).

[40] The references in Rules 5 and 21 are also redundant, under the current Rules. But I do not suggest deleting them, because – as noted above – those Rules concern case-initiating filings in the courts of appeals, and the separate requirements of proof of service in Rules 5 and 21 would be useful if Rule 25 were revised as shown in the text.

[41] I take Judge Teel's objection to be more that the wording is conceptually inappropriate; his comment does not report any practical difficulties that his court has encountered under the present Rule.

docket entries prepared by the district clerk." And the reference to a "certified copy of the docket entries" also appears in Appellate Rule 6(b)(2)(C)(ii) and Appellate Rule 11(e)(1). Thus, if the Committee agrees with Judge Teel's suggestion that the "certified copy" language is unnecessary, it might make more sense to hold off on that change and to implement it in the context of a change to all of these Rules.

More broadly, Judge Teel's suggestion seems workable insofar as it would apply to courts where both the lower court and the court of appeals have entirely shifted to electronic transmission of the record. However, the Committee deliberately drafted the proposed amendments to Appellate Rule 6 on the assumption that although the record will increasingly be "made available" electronically it will still, in other instances, be "made available" in paper form instead. Given that fact, I would not suggest adopting Judge Teel's proposed language at this time.

Judge Teel also notes that, with the advent of CM/ECF, there may no longer be a need to retain in Appellate Rule 3(d) the directive to the district clerk to send to the circuit clerk "a copy … of the docket entries – and any later docket entries." This may be true for cases in which the court of appeals is accessing the record electronically, at least as to the provision of the initial set of lower-court docket entries. However, one useful function of Rule 3(d)'s requirement that the district clerk send "any later docket entries" to the circuit clerk is that this helps to ensure that the court of appeals is made aware of lower-court docket activity that post-dates the filing of the notice of appeal. Unless we can be sure that the circuit clerk will be automatically notified by the electronic system about subsequent entries in the lower-court docket, retaining this feature of current Rule 3(d) seems worthwhile.

In sum, Judge Teel's suggestions may eventually warrant the Committee's attention, but it seems to me preferable that the Committee focus at this time on the matters discussed in Parts I through III of this memo, because those matters are the subject of ongoing attention by the other advisory committees and by the CM/ECF Subcommittee.

VI. Conclusion

As noted in Part I of this memo, the elimination of electronic service from the ambit of the three-day rule has long been advocated, and the proposal seems ripe for adoption. The advisability of completely eliminating the three-day rule seems less clear.

The CM/ECF Subcommittee's broader goals are still developing. As discussed in Part II, the Subcommittee's deliberations can usefully be informed by the views of the Appellate Rules Committee concerning the possibility of adopting global definitions that can assure that electronic documents and action by electronic means are encompassed in appropriate ways by the Rules' references to written documents and to actions such as filing or sending. And, as highlighted in Part III, the Subcommittee will also discuss the possibility of rule amendments to address the treatment of signatures in electronic filings.

Encls.

TAB 5B

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Appendix:
Local circuit provisions concerning signatures in electronically-filed documents

Cite	Provision
Third Circuit Local Appellate Rule 113.8	113.8 Retention Requirements Documents that are electronically filed and require original signatures other than that of the Filing User must be maintained in paper form by the Filing User until 2 years after the issuance of the mandate or order closing the case, whichever is later. If counsel withdraws and a new attorney enters an appearance, documents that require original signatures must be transferred to the new attorney of record. On request of the court, the Filing User must provide original documents for review. Source: Model Local Rules Cross references: None Committee Comments: Because electronically filed documents do not include original, handwritten signatures, it is necessary to provide for retention of certain signed documents in paper form in case they are needed as evidence in the future. The Rule addresses the retention requirement for "verified documents" (in which a person verifies, certifies, affirms, or swears under oath or penalty of perjury, e.g., affidavits, stipulations or the Criminal Justice Act forms) bearing original signatures of persons other than the person who files the document electronically.
Third Circuit Local Appellate Rule 113.9	113.9 Signatures (a) The user log-in and password required to submit documents to the electronic filing system serve as the Filing User's signature on all electronic documents filed with the court. They also serve as a signature for purposes of the Federal Rules of Appellate Procedure, the local rules of court, and any other purpose for which a signature is required in connection with proceedings before the court. (b) The name of the Filing User under whose log-in and password the document is submitted must be preceded by an "s/" and typed in the space where the signature would otherwise appear. Alternatively, an electronic signature may be used. (c) No Filing User or other person may knowingly permit or cause to permit a Filing User's log-in and password to be used by anyone other than an authorized agent of the Filing User. Documents requiring signatures of more than one party must be electronically filed either by: (1) submitting a scanned document containing all necessary signatures;

	(2) submitting a statement representing the consent of the other parties on the document; (3) identifying on the document the parties whose signatures are required and submitting a notice of endorsement by the other parties no later than three business days after filing; or (4) in any other manner approved by the court. Electronically represented signatures of all parties and Filing Users as described above are presumed to be valid signatures. If any party, counsel of record, or Filing User objects to the representation of his or her signature on an electronic document as described above, he or she must, within 10 days, file a notice setting forth the basis of the objection. Source: Model Local Rules Cross references: L.A.R. 28 and 46 Committee Comments: An electronic signature or the "s/" preceding a typed name indicates that the electronically filed document was endorsed by that party or Filing User. This Rule does not require a Filing User to personally file his or her own documents. The task of electronic filing may be delegated to an authorized agent, who may use the log-in and password to make the filing. Use of the log-in and password to make the filing constitutes a signature by the Filing User under the Rule, even though the Filing User does not perform the physical act of filing. Issues arise when documents being electronically filed have been signed by persons other than the filer, e.g., stipulations and affidavits. For documents signed by individuals without logins and passwords (non-Filing Users), the Rule provides that the signature must appear as "s/" or as a scanned image. Under L.A.R. Misc. 113.8 above, the Filing User must retain a paper copy with the original signature of any such document filed by the Filing User.
Fourth Circuit Rule 25(a)(8)	(8) Retention Requirements. Documents that are electronically filed and require original signatures other than that of the filing user must be maintained in paper form by the filing user for a period of three years after issuance of the Court's final mandate in the case. On request of the Court, the filing user must provide original documents for review.
Fourth Circuit Rule 25(a)(9)	(9) Signatures. The user log-in and password required to submit documents to the CM/ECF system serve as the filing user's signature on all electronic documents filed with the Court. They also serve as a signature for purposes of the Federal Rules of Appellate Procedure, the Court's local rules, and any other purpose for which a signature is required in connection with proceedings before the Court. The name of the filing user under whose log-in and password the document

	is submitted must be preceded by an "s/" and typed in the space where the signature would otherwise appear. No filing user or other person may knowingly permit or cause to permit a filing user's log-in and password to be used by anyone other than an authorized agent of the filing user. Documents requiring signatures of more than one party must be electronically filed either by: submitting a scanned document containing all necessary signatures; representing the consent of the other parties on the document; identifying on the document the parties whose signatures are required and submitting a notice of endorsement by the other parties no later than three business days after filing; or any other manner approved by the Court. Electronically represented signatures of all parties and filing users as described above are presumed to be valid signatures. If any party, counsel of record, or filing user objects to the representation of his or her signature on an electronic document as described above, he or she must, within 10 days, file a notice setting forth the basis of the objection.
Fifth Circuit Rule 25.2.9	25.2.9 Retention Requirements. The Filing User must maintain in paper form documents filed electronically and requiring original signatures, other than that of the Filing User, for 3 years after the mandate or order closing the case issues. On request of the court, the Filing User must provide original documents for review.
Fifth Circuit Rule 25.2.10	25.2.10 Signatures. The user log-in and password required to submit documents in electronic form serve as the Filing User's signature on all electronic documents filed with the court. They also serve as a signature for purposes of the Fed. R. App. P. 32(d) and 5th Cir. R. 28.5, and any other purpose for which a signature is required in connection with proceedings before the court. The Filing User's name under whose log-in and password the document is submitted must be preceded by an "s/" and be typed in the space where the signature otherwise would appear. No Filing User or other person may knowingly permit or cause to permit a Filing User's log-in and password to be used by anyone other than an authorized agent of the Filing User. Documents which require more than one party's signature must be filed electronically by: submitting a scanned document containing all necessary signatures; showing the consent of the other parties on the document; or any other manner approved by the court. Electronically represented signatures of all parties and Filing Users

	described above are presumed valid. If any party, counsel of record, or Filing User objects to the representation of his or her signature on an electronic document as described above, he or she must file a notice within 10 days setting forth the basis of the objection.
Sixth Circuit Rule 25(d)(2)	(2) Multiple Attorney Signatures. The filer of a document with multiple signatures (such as a stipulation) must file in one of the following forms: (A) Use an "/s/ Attorney Name" signature block for each attorney. By submitting the document, the filer certifies that the other attorneys expressly agreed to the form and substance of the document and authorized the filer to submit it electronically. (B) Submit a scanned document with the signatures.
Ninth Circuit Rule 25-5(f)	**(f)** Signature**.** Electronic filings shall indicate each signatory by using an "s/" in addition to the typed name of counsel or an unrepresented party. Documents filed on behalf of separately represented parties or multiple pro se parties must indicate one signatory by using an "s/" in addition to the typed name and attest that all other parties on whose behalf the filing is submitted concur in the filing's content.
Tenth Circuit Rule 46.5(C)	(C) Electronic Signature**.** An electronic signature is an original signature under this rule.

"3 Days Are Added"

As noted in the introduction, the Appellate, Bankruptcy, and Criminal Rules include provisions parallel to the Civil Rule 6(d) provision that adds 3 days to the time allowed to respond after service by, among others, "electronic means" under Civil Rule 5(b)(2)(E). It has been agreed that the 3-added days provision should be dropped for electronic service. The reasons are stated in the Committee Note that follows the rule text. It also has been agreed that it would be helpful to add parenthetical descriptions to illuminate the nature of the means of service that will continue to trigger the 3 added days.

Rule 6. Computing and Extending Time; Time for Motion Papers

* * *

(d) ADDITIONAL TIME AFTER CERTAIN KINDS OF SERVICE. When a party may or must act within a specified time after being served[1] and service is made under Rule 5(b)(2)(C)(mail), (D)(leaving with the clerk), ~~(E),~~ or (F)(other means consented to),[2] 3 days are added after the period would otherwise expire under Rule 6(a).

Committee Note

Rule 6(d) is amended to remove service by electronic means under Rule 5(b)(2)(E) from the modes of service that allow 3 added days to act after being served.

Rule 5(b)(2) was amended in 2001 to provide for service by electronic means. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially

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[1] This anticipates adoption of the proposed amendment published in August, 2013.

[2] The naked cross-references to Rule 5(b)(2) may seem awkward. The parenthetical descriptions are added to relieve much of the flipping back through the rules. It seems likely that e-service will dominate other modes, but absent some descriptions many anxious readers will track down the cross-references just to make sure e-service is not among the means listed. The risk that brief descriptions may mislead or confuse seems minimal. Anyone who wishes to be sure of what a Rule 5(b)(2) subparagraph says can easily find it.

alleviated by advances in technology and in widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns. [If we eliminate consent from Rule 5(b)(2)(E), we can add that here.]

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day periods that allow "day-of-the-week" counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Eliminating Rule 5(b) subparagraph (2)(E) from the modes of service that allow 3 added days means that the 3 added days cannot be retained by consenting to service by electronic means. Consent to electronic service in registering for electronic case filing, for example, does not count as consent to service "by any other means" of delivery under subparagraph (F).

NOTE CONCERNING PROPOSED AMENDMENT TO RULE 5005(a)

As approved for publication by the Committee on Rules of Practice and Procedure, the preliminary draft of the amendment to Rule 5005(a)(3)(B) includes alternative means of providing assurance that a scanned signature of an individual was actually part of the original document that is filed electronically. Some members of the Committee thought that it would be sufficient for the rule to state that the filing by a registered user of the court's electronic filing system is deemed a certification that the scanned signature was part of the original document. Others preferred that the assurance not be provided by the registered user (typically the lawyer for a debtor), but that certification by a notary public be required. In response to the latter suggestion, some members raised concerns about the practical inconvenience of requiring notarization of petitions and other documents that require the signature of a debtor.

The Committee therefore specifically invites public comment on the alternatives set out on lines 39-47 of the published draft. It is especially interested in comments on the following questions:

(1) Should the proposed amendment to Rule 5005(a) include a means of providing assurance—other than requiring a single filing—that a scanned signature page was actually part of the original document that is being filed?

(2) If so, is one of the listed options preferable?

(3) Is there a better means than the ones listed of providing assurance that the scanned signature page was executed as part of the original document?

Although calling attention to this particular part of the proposed amendment, the Committee looks forward to public comment on all of its aspects.

Rule 5005. Filing, Electronic Signatures, and Transmittal of Papers

(a) FILING and SIGNATURES.

(1) *Place of Filing.*

* * * * *

(2) *Filing by Electronic Means.* A court may by local rule permit or require documents 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 document filed by electronic means in compliance with a local rule constitutes a written paper ~~for the purpose of applying~~ under these rules~~, the Federal Rules of Civil Procedure made applicable by these rules,~~ and § 107 of the Code.

(3) *Signatures on Documents Filed by Electronic Means.*

(A) *The Signature of a Registered User*. The user name and password of an individual who is registered to use the court's electronic filing system serves as that individual's signature on any electronically filed document. The signature may be used with the same force and effect as a written signature under these rules and for any other purpose for which a signature is required in proceedings before the court.

(B) *Signature of Other Individuals*. When an individual other than a registered user of the court's electronic filing system is required to sign a document that is filed electronically, the registered

user shall include in a single filing with the document a scanned or otherwise electronically replicated copy of the document's signature page bearing the individual's original signature. **[Alt. 1: By filing the document and signature page, the registered user certifies that the scanned signature was part of the original document.] [Alt. 2: The document and signature page shall be accompanied by the acknowledgment of a notary public that the scanned signature was part of the original document.]** Once a document has been properly filed under this rule, the original document bearing the individual's original signature need not be retained. The electronic signature may then be used with

the same force and effect as a written signature under these rules and for any other purpose for which a signature is required in proceedings before the court.

* * * * *

Committee Note

The rule is amended to address the treatment of electronic signatures in documents filed in connection with bankruptcy cases, a matter previously addressed only in local bankruptcy rules. New provisions are added that prescribe the circumstances under which electronic signatures may be treated in the same manner as handwritten signatures without the need for anyone to retain paper documents with original signatures. The amended rule supersedes any conflicting local rules.

The title of the rule and subdivision (a) are amended to reflect the rule's expanded scope. The reference to "the Federal Rules of Civil Procedure made applicable by these rules" in subdivision (a)(2) is stricken as unnecessary.

Subdivision (a)(3) is added to address the effect of signatures in documents that are electronically filed. Subparagraph (A) applies to persons who are registered users of a court's electronic filing system. It adopts as the national rule the practice that previously existed in virtually all districts. The user name and password of an individual

who is registered to use the CM/ECF system are treated as that person's signature for all documents that are electronically filed. That signature may then be treated the same as a written signature for purposes of the Bankruptcy Rules and for any other purpose for which a signature is required in court proceedings.

Subparagraph (B) applies to the signatures of persons who are not registered users of the court's electronic filing system. When documents require the signature of a debtor or other individual who is not a registered user of CM/ECF—such as petitions, schedules, and declarations—they may be filed electronically along with a scanned or otherwise electronically replicated image of the signature page bearing the individual's actual signature. Those documents will then be stored electronically by the court, and neither the court nor the filing attorney is required to retain paper copies of the filed documents. This amendment, which changes the practice that previously existed in many districts, was prompted by several concerns: the lack of uniformity of retention periods required by local rules, the burden placed on lawyers and courts to retain a large volume of paper, and potential conflicts of interest imposed on lawyers who were required to retain documents that could be used as evidence against their clients. When scanned signature pages are filed in accordance with this rule, the electronically filed signature may be treated the same as a written signature for purposes of the Bankruptcy Rules and for any other purpose for which a signature is required in court proceedings.

Just as someone may challenge in court proceedings the validity of a handwritten signature, nothing in this rule prevents a challenge to the validity of an electronic signature that is filed in compliance the rule's provisions.

TAB 6

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MEMORANDUM

DATE: April 4, 2014

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 07-AP-E: "Timely" tolling motions and FRAP 4(a)(4)

At the spring 2013 meeting, the Committee expressed interest in considering a possible amendment to Appellate Rule 4(a)(4) to address the lopsided circuit split that 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).

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. 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 Rule 4(a)(4), tolls the time to appeal? The Third, Seventh, Ninth, and Eleventh Circuits have issued post-*Bowles* rulings[1] 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.

I enclose my fall 2013 memo on this topic, which provides the background for the possible amendment. The current memo instead focuses on specific drafting possibilities. Part I presents sketches of a proposal that would implement the majority view concerning the meaning of "timely," while Part II presents a draft that would implement the contrary view.

I. Amending Rule 4(a)(4) to implement the majority view of "timely"

This part of the memo offers three sketches of ways to implement the majority view of "timely": first, a very concise approach to the revision of existing Rule 4(a)(4)(A); second, the addition of a definitional provision in a new Rule 4(a)(4)(C); and third, a redrafting of Rule 4(a)(4)(A) that incorporates language from both of the first two sketches.

[1] Under *Bowles v. Russell*, 551 U.S. 205 (2007), statutory appeal deadlines are jurisdictional, and the "unique circumstances" doctrine is unavailable to excuse noncompliance with such deadlines.

A. The concise approach

The concise approach would simply amend Rule 4(a)(4)(A) as shown below, without adding a new definitional subsection:

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

Possible advantages of this concise approach are its brevity and the fact that it avoids the need to enumerate the situations in which a motion does not count as "timely." If the Committee adopted this approach, the Committee Note, which is readily accessible to all Internet users, could explain that the change to the Rule text was adopted in order to resolve the circuit split concerning the meaning of "timely."

The Note could also explain that "within the time allowed by the Federal Rules of Civil Procedure" encompasses any deadline extension permitted by the Civil Rules. Of the motions listed in Appellate Rule 4(a)(4)(A), only one has a deadline that can be extended by the court in compliance with the Civil Rules. Civil Rule 6(b)(2) forbids court extensions of "the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b)," but does not forbid court extensions of Civil Rule 54(d)(2)(B)(i)'s 14-day deadline for a motion for attorney's fees.

It does not seem to me that any adjustment to the text of the proposed Rule is required in order to address court extensions of Rule 54(d)(2)(B)(i) deadlines. For one thing, "within the time allowed by the Federal Rules of Civil Procedure" logically encompasses such cases. For another, the question of how to treat court-ordered extensions of attorney-fee motion deadlines may arise relatively rarely.[2] However, it could be argued that if the Rule text refers explicitly to permitted court extensions, such a reference might help flag the fact that impermissible extensions do not render a motion timely. To illustrate, suppose that the proposed amendment is redrafted as follows:

> If a party ~~timely~~ files in the district court any of the following motions under the Federal Rules of Civil Procedure within the time allowed by those Rules, including by a court order extending the time if permitted by

[2] A Rule 54(d) motion only qualifies for tolling effect if the district court acts under Rule 58(e) "before a notice of appeal has been filed and become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59." Under the approach taken by a number of courts, the appeal deadline sets an outer limit for action by the court under Rule 58(e). *See Mendes Junior Intern. Co. v. Banco do Brasil, S.A.*, 215 F.3d 306, 313–315 (2d Cir. 2000); *Robinson v. City of Harvey*, 489 F.3d 864, 868–869 (7th Cir. 2007); and *Burnley v. City of San Antonio*, 470 F.3d 189, 199 (5th Cir. 2006). In circuits taking that view, the current framework presumably sets an outer limit of 30 days in most cases (i.e., the time within which a notice of appeal could "be[] filed and become effective") within which the court could act to give the Rule 54(d) motion tolling effect. That being so, there may not be that many instances where the court both extends the deadline for filing a fee motion and also enters a valid Rule 58(e) order designating that fee motion for tolling effect.

those Rules, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

Arguably, including "if permitted by those Rules" in the text of the Rule helps to make clear – by negative implication – that *impermissible* court-ordered extensions do not qualify a motion for tolling effect.

B. The definitional approach

An alternative way to implement the majority view of the meaning of "timely" in Rule 4(a)(4) would be to add a definitional provision that reads:

> (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, for instance:[3]
>
> > (i) a court order that sets a due date that is later than permitted by the Federal Rules of Civil Procedure,[4]
> >
> > (ii) another party's consent or failure to object, or
> >
> > (iii) the court's disposition of the motion.[5]

This sketch places the new provision as a new Rule 4(a)(4)(C), in order to avoid re-numbering any existing provisions. However, in order to help ensure that readers do not overlook the new definition, it might also be wise to add a cross-reference 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

[3] I have tried to list (in subparts (i) – (iii)) each fact pattern that might predictably tempt a litigant to argue that a technically untimely motion provides a ground for tolling appeal time. But out of concern that we might not identify in advance every scenario that might ground a plausible argument for tolling, it was suggested that "for instance" be added to make clear that the list is not exhaustive.

[4] We have discussed a number of possible ways to phrase this subpart. The memo included in the fall 2013 agenda materials referred to "a court order purporting to extend the motion deadline set by the relevant Federal Rule of Civil Procedure." There were, however, questions raised about the use of "purporting." The draft presented to the Standing Committee for its consideration in January 2014 referred to "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." At the meeting, a member suggested this phrase is undesirable and urged the Committee to reword the provision. Another member suggested this language: "a court order that extends the deadline beyond that otherwise permitted by the Federal Rules of Civil Procedure." That is a helpful suggestion, but I question whether it is advisable to say "otherwise permitted": the goal of this provision is to target orders that purport to extend deadlines that the Civil Rules render non-extendable. Saying "*otherwise* permitted" suggests that such court-ordered extensions are permissible, when in fact they are not.

[5] I added this subpart to account for scenarios in which an untimely motion is denied without explicit reliance on untimeliness (i.e., denied without explanation or on its merits).

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:

The draft amendments sketched above would provide clarification; however, compared to the concise option sketched in Part I.A, they would distend Rule 4(a)(4), which is long and intricate already. In addition, they would require readers to move back and forth between Rule 4(a)(4)(A) and a new Rule 4(a)(4)(C). It is worth considering whether the same substance shown in this subpart could instead be incorporated into existing Rule 4(a)(4)(A).

C. The combined approach

Here is a sketch of a revised Rule 4(a)(4)(A) that combines some of the language from each of the sketches in Parts I.A and I.B:

> (A) If a party ~~timely~~ files in the district court any of the following motions under the Federal Rules of Civil Procedure within the time allowed by those Rules, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:
>
> (i) for judgment under Rule 50(b);
>
> (ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;
>
> (iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;
>
> (iv) to alter or amend the judgment under Rule 59;
>
> (v) for a new trial under Rule 59; or
>
> (vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.
>
> If any of the motions listed above is filed outside the time allowed by the Federal Rules of Civil Procedure, the time for filing an appeal is not affected by, for instance:
>
> - a court order that sets a due date that is later than permitted by the Federal Rules of Civil Procedure,
> - another party's consent or failure to object to the motion's untimeliness, or
> - the court's disposition of the untimely motion.

This sketch (which I shall call the "combined sketch") has the advantage of combining the operative language into a single subdivision.

On the other hand, the combined sketch poses some additional drafting challenges. To link the second sentence with the first sentence, we need some shorthand means of referring to the first sentence. "Timely" is no longer available as a shorthand reference because it has been deleted from the first sentence; thus, it is not possible to say, e.g., "a motion made … is not rendered timely by, for instance …." Instead, the combined sketch uses the phrase "the time for filing an appeal is not affected by." Does that phrase make clear the link to the first sentence?

It may be worth considering an alternative version of the combined approach. The first sentence of Rule 4(a)(4)(A) would read as shown above, but the second sentence would read:

> If any of the motions listed above is filed outside the time allowed by the Federal Rules of Civil Procedure, the first sentence of this Rule 4(a)(4)(A) is not rendered applicable by, for instance:
>
> - a court order that sets a due date that is later than permitted by the Federal Rules of Civil Procedure,
>
> - another party's consent or failure to object to the motion's untimeliness, or
>
> - the court's disposition of the motion.

One other distinctive aspect of the combined approach bears mention. Because the combined approach adds a second sentence to Rule 4(a)(4)(A), and because that sentence discusses motions that do *not* qualify for tolling effect, it may be desirable to consider conforming amendments to two or three other Appellate Rules that currently refer to motions described in Rule 4(a)(4)(A).[6]

[6] Both Rule 4(a)(4)(B)(i) and Rule 4(a)(4)(B)(ii) currently refer to "any motion listed in Rule 4(a)(4)(A)." If the Committee adopts the combined approach, I recommend that the Committee consider revising Rules 4(a)(4)(B)(i) and (ii) to refer to "any motion listed in the first sentence of Rule 4(a)(4)(A)."

Rule 10(b)(1) provides that the appellant must either order the transcript or state that none will be ordered "[w]ithin 14 days after filing the notice of appeal or entry of an order disposing of the last timely remaining motion of a type specified in Rule 4(a)(4)(A), whichever is later …." Although confusion over this cross-reference might be less troublesome than confusion over the cross-references in Rules 4(a)(4)(B)(i) and (ii), if the Committee were to propose conforming amendments to the latter Rules, it might also be worthwhile to propose amending Rule 10(b)(1) to refer to "timely … motion[s] of a type specified in the first sentence of Rule 4(a)(4)(A)."

D. A proposed Committee Note

I set forth here a draft Committee Note that could be used, with appropriate adjustments, for any of the possible amendments sketched above:

Committee Note

Clarifying amendments are made to subdivision (a)(4). Former Rule 4(a)(4) provided 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." Where a district court purported to extend the time for making a postjudgment motion beyond the time actually permitted by the Civil Rules, and no party objected to that extension, a question arose whether the motion made within the extended deadline but outside the time actually authorized by the Civil Rules was a "timely" motion that, under subdivision (a)(4), re-started the time to appeal. Responding to a lop-sided circuit split, the amendments adopt the majority approach, under which such a motion does not re-start the appeal time.

[Second paragraph, to accompany the "concise approach":]

[The amended rule's reference to motions filed "within the time allowed by those Rules [i.e., the Federal Rules of Civil Procedure]" encompasses any deadline extension permitted by the Civil Rules. Of the motions listed in Appellate Rule 4(a)(4)(A), only one has a deadline that can be extended by the court in compliance with the Civil Rules. Civil Rule 6(b)(2) forbids court extensions of "the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b)," but does not forbid court extensions of Civil Rule 54(d)(2)(B)(i)'s 14-day deadline for a motion for attorney's fees. A motion made after the time allowed by the Civil Rules will not qualify as a motion that, under Rule 4(a)(4)(A), re-starts the appeal time – and that fact is not altered by, for example, a court order that sets a due date that is later than permitted by the Civil Rules, another party's consent or failure to object to the motion's lateness, or the court's disposition of the motion without explicit reliance on untimeliness (as when the court denies the motion without explanation or on its merits).]

[Alternate second paragraph, to accompany the "definitional approach":]

[Subdivision (a)(4)(A) is amended to refer to new subdivision (a)(4)(C)'s definition of "timely." Subdivision (a)(4)(C) provides that, for purposes of subdivision (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, for instance, a court order that sets a due date that is later than permitted

by the Civil Rules, another party's consent or failure to object to the motion's lateness, or the court's disposition of the motion without explicit reliance on untimeliness (as when the court denies the motion without explanation or on its merits). Subdivision (a)(4)(C)'s reference to motions filed "within the time allowed by the Federal Rules of Civil Procedure" encompasses any deadline extension permitted by the Civil Rules. Of the motions listed in subdivision (a)(4)(A), only one has a deadline that can be extended by the court in compliance with the Civil Rules. Civil Rule 6(b)(2) forbids court extensions of "the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b)," but does not forbid court extensions of Civil Rule 54(d)(2)(B)(i)'s 14-day deadline for a motion for attorney's fees.]

[Alternate second paragraph, to accompany the "combined approach":]

[The amended rule's reference to motions filed "within the time allowed by those Rules [i.e., the Federal Rules of Civil Procedure]" encompasses any deadline extension permitted by the Civil Rules. Of the motions listed in subdivision (a)(4)(A), only one has a deadline that can be extended by the court in compliance with the Civil Rules. Civil Rule 6(b)(2) forbids court extensions of "the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b)," but does not forbid court extensions of Civil Rule 54(d)(2)(B)(i)'s 14-day deadline for a motion for attorney's fees. A new sentence is added to subdivision (a)(4)(A) to underscore that a motion made after the time allowed by the Civil Rules will not qualify as a motion that, under subdivision 4(a)(4)(A), re-starts the appeal time – and that this is true notwithstanding a court order that sets a due date that is later than permitted by the Civil Rules, another party's consent or failure to object to the motion's lateness, or the court's disposition of the motion without explicit reliance on untimeliness (as when the court denies the motion without explanation or on its merits).]

II. Amending Rule 4(a)(4) to implement the contrary view of "timely"

An amendment implementing the contrary view of "timely" might take a number of different forms. It might focus on the existence of purported court permission to file a late motion, or on the opponent's failure to object to the lateness of the motion.[7] Here is a sketch of a possible amendment that focuses on the existence of court permission:[8]

[7] Professor Cooper suggests that it may be advisable to limit such a provision to cases in which the court actually enters an order extending the time to move. It should not suffice, he suggests, "that an untimely motion is denied as untimely, even though no party objected. Nor should it do that an untimely motion is denied without explanation. And probably it should not do that the court considers an untimely motion on the merits, still without objection by any party, and denies it on the merits -- though I am not sure of that."

[8] Because this type of amendment would (in many circuits) expand the set of motions that have tolling effect – and would thus have the effect of preserving rather than cutting off appeal rights – it would seem less necessary to include a cross-reference to the new provision in Rule 4(a)(4)(A).

(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 Federal Rules of Civil Procedure;[9] 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.

This sketch limits the provision's scope to instances when the order purporting to extend the motion time is entered prior to the actual appeal deadline, both because a party's arguable reliance interests are at their highest in those instances[10] and because any attempt to encompass instances when the order is entered after the expiration of the appeal time seems doomed to excessive complexity.[11]

III. Conclusion

[9] Readers might wonder whether it would be useful to augment this subsection to read: "made within the time allowed by the Federal Rules of Civil Procedure**, including by a court order extending the time if permitted by those Rules**…."

The argument for such augmentation would be that the syntax of the sketch shown in the text ("a motion is timely if it is (i) made within the time allowed by the [FRCP], or (ii) made within the time designated for making the motion by a court order, if the court order is entered within [the appeal time limit]") might lead a reader to think that subpart (ii) is the only option for addressing orders extending motion time (because it, unlike subpart (i), explicitly mentions such orders). And mis-read in that way, the rule would exclude attorney-fee motions made within an extended period set by a court order that was entered outside the appeal time limit.

But how often will attorney-fee motions made after the appeal time has run out otherwise qualify for tolling effect? As footnote 2 observes, a Rule 54(d) motion can only qualify for tolling effect if the district court acts under Rule 58(e) "before a notice of appeal has been filed and become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59." Some circuits have concluded that the appeal deadline sets an outer limit on the time for action by the court under Rule 58(e). In circuits that take this view, would there ever be instances when a fee motion's deadline is extended by a court order entered after the appeal time has run out *and* in which the fee motion otherwise qualifies for tolling effect? I would think that such instances would be rare or perhaps nonexistent. Rare, because they would have to be instances in which the court acts within the appeal deadline to order that the fee motion has tolling effect, and then only *later* (in a separate order entered after the appeal deadline ran out) extends the fee motion deadline. And possibly nonexistent, because a court might well conclude that a Rule 58(e) order cannot validly be entered until *after* the fee motion itself has already been made.

[10] If the court order is entered while the party could still file a timely appeal, and the party holds off on filing the notice of appeal in reliance upon the purported extension of the tolling-motion deadline, that seems like the best case for an extended application of Rule 4(a)(4)'s tolling provision. If instead the party has failed to file a timely appeal, and the court enters the order (purporting to extend the tolling-motion deadline) only after the appeal deadline has already run out, it seems less likely that the party relied on the availability of a tolling motion when failing to file its notice of appeal.

[11] The complexity would stem from the need to set an outer bound on the availability of tolling. If the outer bound is not set by limiting the date of entry of the order extending the motion deadline to the initial appeal period, then another bound must be selected. One could, for example, give tolling effect only when the motion's due date is extended by an order entered within a limited period *after* the appeal time expires; or (more restrictively) only when the motion itself is made within a limited period after the appeal time expires. A number of Committee members have concluded that such provisions would be overly complex.

Although it is challenging to draft an amendment to address the circuit split concerning the meaning of "timely" in Rule 4(a)(4), the project is a worthwhile one, because Rule 4's operation ideally should be clear and uniform across the circuits.

Encl.

MEMORANDUM

DATE: September 10, 2013

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 07-AP-E: "Timely" tolling motions and FRAP 4(a)(4)

The Appellate Rules Committee's spring 2013 discussion of *Bowles v. Russell*, 551 U.S. 205 (2007), generated support for considering a possible amendment to address the treatment of tolling motions[1] under Appellate Rule 4(a)(4). Specifically, the Committee expressed interest in whether the developing caselaw concerning the interpretation of the term "timely" in Rule 4(a)(4) may warrant a rulemaking response. Part I of this memo briefly summarizes the relevant circuit splits concerning Rule 4(a)(4). Part II reviews initial choices concerning a possible amendment. Part III sketches drafting alternatives.

I. Circuit splits concerning Rule 4(a)(4)

The idea of the possible amendment arose from the Committee's consideration of two circuit splits that have arisen concerning the treatment of tolling motions under Appellate Rule 4(a)(4). Post-*Bowles* decisions confirm that statutory appeal deadlines are jurisdictional, but that entirely nonstatutory appeal deadlines are instead claim-processing rules. This dichotomy creates complications in instances where a basic appeal deadline is set by statute but the Rules fill in statutory gaps or otherwise elaborate on the statutory framework. For example, 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 – contains no mention of such tolling motions, but the tolling effect of certain postjudgment motions was recognized by caselaw well before the adoption of Section 2107.

A number of circuits have concluded that the Civil Rules' deadlines for post-judgment motions are claim-processing rules rather than jurisdictional requirements.[2]

[1] One can quarrel with the use of the term "tolling," because in many contexts the "tolling" of a period halts the running of the period and then – after the tolling ceases – allows the *remaining* portion of the period to run. The motions discussed in this memo could be said, instead, to "re-start" the appeal time, because the full appeal period begins to run anew after the disposition of the motion. Because the term "tolling motion" is common shorthand for such motions, I use that term here.

[2] *See, e.g.*, *Lizardo v. United States*, 619 F.3d 273, 276 (3d Cir. 2010) ("[Civil] Rule 59(e) is a claim-processing rule, not a jurisdictional rule, so objections based on the timeliness requirement of that rule may be forfeited."); *National Ecological Found. v. Alexander*, 496 F.3d 466, 475 (6th Cir. 2007) (concluding

Under 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 in such an instance, does the motion count as a "timely" one that, under Appellate Rule 4(a)(4), tolls the time to appeal? The Third,[3] Seventh,[4] Ninth,[5] and Eleventh[6] Circuits have issued rulings, since *Bowles*, stating that such a motion does not toll the appeal time. Pre-*Bowles* caselaw from the Second Circuit agrees with this position.[7] However, the Sixth Circuit has held to the contrary,[8] and a decision from the Eighth Circuit also suggests that such a motion would have a tolling effect.[9]

that Civil Rules "6(b) and 59(e) …. are claim-processing rules that provide[] … a forfeitable affirmative defense"); *Blue v. International Bhd. of Elec. Workers Local Union 159*, 676 F.3d 579, 584 (7th Cir. 2012) ("[T]he 28-day limit[s] on filing motions under Rules 50 and 59 are non-jurisdictional procedural rules designed to aid in the orderly transaction of judicial business."); *Dill v. General Am. Life Ins. Co.*, 525 F.3d 612, 618-19 (8th Cir. 2008) (deciding "that Federal Rules of Civil Procedure 6(b)(2) and 50(b) are nonjurisdictional claim-processing rules," but holding that the nonmoving party timely raised an objection to the motion's untimeliness by objecting before the district court decided the motion on the merits); *Art Attacks Ink, LLC v. MGA Entm't Inc.*, 581 F.3d 1138, 1143 (9th Cir. 2009) ("Because Rule 50(b)'s ten-day filing deadline is a non-jurisdictional claim-processing rule, it can be waived or forfeited."); *Advanced Bodycare Solutions, LLC v. Thione Int'l, Inc.*, 615 F.3d 1352, 1360 n.15 (11th Cir. 2010) ("[S]ince [Civil] Rule 6(b) is a claims-processing rule, Thione, in failing to object to the district court's violation of the rule (by extending the time for filing post-trial motions) forfeited its objection to the time extension.").

[3] *See Lizardo*, 619 F.3d at 280 ("[A]n untimely Rule 59(e) motion, even one that was not objected to in the district court, does not toll the time to file a notice of appeal under Rule 4(a)(4)(A).").

[4] *See Blue*, 676 F.3d at 582-84; *Justice v. Town of Cicero*, 682 F.3d 662, 665 (7th Cir. 2012) ("The motion did not extend the time for appeal … , because Fed. R. App. P. 4(a)(4) comes into play only when a Rule 59 motion is timely.").

[5] *See United States v. Comprehensive Drug Testing, Inc.*, 513 F.3d 1085, 1098 (9th Cir. 2008) (holding that motion filed outside 10-day time limit did not toll time to appeal). The court of appeals reheard this case en banc, but adhered to the panel's ruling concerning this timeliness issue. *See United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, 1167 (9th Cir. 2010) (en banc, per curiam opinion) ("The three-judge panel unanimously held that the government's appeal … was untimely…. We agree with the panel and adopt its analysis of the issue….").

[6] *See Advanced Bodycare*, 615 F.3d at 1359 n.15; *Green v. DEA*, 606 F.3d 1296, 1300, 1302 (11th Cir. 2010).

[7] The Second Circuit had ruled, prior to *Bowles*, that a district court's extension of time to move for reconsideration did not render the reconsideration motion (filed outside the then-applicable Rule 59(e) deadline) "timely" for purposes of tolling the time to appeal under Rule 4(a)(4). *See Lichtenberg v. Besicorp Group Inc.*, 204 F.3d 397, 401 (2d Cir. 2000); *see also id*. at 403-04 (holding, over a dissent, that the "unique circumstances" doctrine was inapplicable). The Second Circuit has not cited *Lichtenberg* in a precedential opinion since the Supreme Court decided *Bowles*; however, a nonprecedential opinion applying *Lichtenberg* is the subject of a pending pro se petition for certiorari. *See Gaind v. Cordero*, 515 Fed. Appx. 68, 69 (2d Cir. March 25, 2013), *petition for cert. filed*, Aug. 2, 2013.

I have not attempted a comprehensive search of pre-*Bowles* caselaw; thus, there may be other circuits that addressed this question prior to *Bowles*. I mention the Second Circuit caselaw here only because of the pending certiorari petition.

[8] *See National Ecological Found.*, 496 F.3d at 476 ("[W]here a party forfeits an objection to the untimeliness of a Rule 59(e) motion, that forfeiture makes the motion 'timely' for the purpose of Rule 4(a)(4)(A)(iv)."). Judge Sutton concurred in the judgment in *National Ecological Foundation*. He would have construed the untimely Civil Rule 59(e) motion as a Rule 60(b) motion filed more than 10 days after entry of judgment. Thus construed, the motion would not have had a tolling effect under Appellate Rule 4(a)(4)(A). *See id.* at 481-82 (Sutton, J., concurring in the judgment).

[9] *See Dill*, 525 F.3d at 619 ("Because the district court had not ruled [on the Rule 50(b) motion], we hold that Dill properly and timely raised the untimeliness defense …. As a result, General American's late-filed Rule 50(b) motion did not toll its time for filing its notice of appeal.").

Even if such a motion does not count as a "timely" one within the meaning of Appellate Rule 4(a)(4), is Appellate Rule 4(a)(4)'s timeliness requirement itself merely a claim-processing rule or is it a jurisdictional requirement? The Seventh, Ninth, and Eleventh Circuits have issued decisions indicating that Rule 4(a)(4)'s provisions set jurisdictional requirements;[10] but the D.C. Circuit has held, on the contrary, that Rule 4(a)(4)'s timeliness requirement is a nonjurisdictional claim-processing rule.[11]

II. Initial choices

The circuit splits noted in Part I give rise to two initial questions. Should Rule 4(a)(4) be amended to define the meaning of "timely"? And should the amendment also address the nature of the timeliness requirement?

A. Clarifying the meaning of "timely" in Rule 4(a)(4)

As to the first of these questions, there was support, among participants in the spring 2013 meeting, for clarifying the meaning of "timely" in Rule 4(a)(4). The meaning of this provision, which tolls a jurisdictional appeal period, ideally should be clear and uniform across the circuits. In Part III, I suggest possible alternative amendments to clarify what Rule 4(a)(4) means by "timely."

B. Addressing whether the timeliness requirement is jurisdictional

The answer to the second question seems more complicated. The national Rules promulgated under the Rules Enabling Act[12] do not currently contain any provisions that

[10] *See Blue*, 676 F.3d at 582 (characterizing the question – whether an untimely motion has tolling effect under Rule 4(a)(4) – as "a matter of jurisdictional importance"); *Justice*, 682 F.3d at 663 (stating that the notice of appeal "is timely if [appellant] filed a timely Rule 59 motion, see Fed. R.App. P. 4(a)(4), but otherwise is untimely … and jurisdictionally so"); *Comprehensive Drug Testing*, 513 F.3d at 1101 ("If [Rule] 4(a)(4) is jurisdictional, the government's motion does not qualify for tolling because it was filed outside the time frame specified in that rule…. If [Rule] 4(a)(4) is *non* jurisdictional, satisfaction of that provision (or forfeiture of a claim that the government failed to satisfy it) would not enable us to ignore the jurisdictional 60-day rule of [Rule] 4(a)(1)."); *Advanced Bodycare*, 615 F.3d at 1359-60 n.15 ("[The] Rule 50(b) and Rule 59 motions were untimely and did not toll the time period for appealing …. As Federal Rule of Appellate Procedure 4(a) is a jurisdictional rule, Advanced's appeal … was untimely, and we lack jurisdiction to hear it."); *Green*, 606 F.3d at 1301.

[11] *See Obaydullah v. Obama*, 688 F.3d 784, 788-91 (D.C. Cir. 2012) (per curiam) (adopting parties' view "that FRAP 4(a)(4)(A)'s timeliness requirement is a 'claim-processing rule' subject to waiver"), *cert. denied*, 133 S. Ct. 2855 (2013). For a case that reached a similar conclusion shortly prior to the Court's decision in *Bowles*, see *Wilburn v. Robinson*, 480 F.3d 1140, 1147 (D.C. Cir. 2007) ("Because Robinson failed to timely assert the timeliness defense afforded by Rule 4(a)(4)(A)(vi), we deem Wilburn's Rule 60(b) motion to have tolled the period to appeal the summary judgment order.").

[12] I note that Appendix F to the Rules of the United States Court of Federal Claims includes the following provision: "Jurisdictional Requirements. The court does not have jurisdiction over a partnership action under this Appendix unless the following conditions are satisfied: …." Rules of the United States Court of Federal Claims app. F, Rule 1(c). This provision, which concerns "actions for readjustment of partnership items under Section 6226 of the Internal Revenue Code (Code) and actions for adjustment of partnership items under Code Section 6228," *id*. Rule 1(a), may simply be a restatement of statutory jurisdictional

explicitly address whether a particular requirement set by Rule is jurisdictional.[13] (The caselaw noted in Part I illustrates that Rules barring a court from extending a deadline do not necessarily show that the deadline in question is jurisdictional.[14]) Given that, under *Bowles*, the jurisdictional nature of an appeal deadline stems from its identification as a *statutory* appeal deadline, it would be odd for a Rule to attempt to define away any view that a particular Rule requirement is jurisdictional. However, it would be possible to account for some of the relevant concerns through the definition of "timely" in Rule 4(a)(4) or through a revision to the extension provision in Rule 4(a)(5).[15]

requirements. In any event, the existence of this Rule seems to shed no light on the advisability of adopting a provision in the Appellate Rules that addresses whether an Appellate Rule requirement is jurisdictional.

[13] To assess this question, I searched the "USC" database on Westlaw using the following query: PR,CI,TI(FEDERAL & RULES & PROCEDURE) & TE(JURISDICTION!).

The Civil Rules retain the traditional provision that "These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts." Civil Rule 82. Thus, those Rules explicitly disclaim any effect on subject matter jurisdiction. A similar provision in Appellate Rule 1(b) was deleted in 2002 in recognition of the enactment of statutes authorizing rulemaking to alter appellate jurisdiction. *See* 28 U.S.C. §§ 1292(e), 2072(c).

Appellate Rule 4(b)(5) provides in part: "The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(a), nor does the filing of a motion under 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion." This provision addresses the allocation of jurisdiction between the district court and the court of appeals; it does not address whether noncompliance with a particular Rule requirement poses a jurisdictional problem. Rule 12.1(b) similarly addresses that allocation of jurisdiction between court levels; it provides in part: "Remand After an Indicative Ruling. If the district court states that it would grant the motion or that the motion raises a substantial issue, the court of appeals may remand for further proceedings but retains jurisdiction unless it expressly dismisses the appeal."

[14] Civil Rule 6(b)(2) forbids a district court from extending "the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b)." But, as noted in Part I, courts have concluded that these deadlines, though mandatory, are not jurisdictional.

[15] The 2005 amendments to Criminal Rules 29, 33, 34, and 45 might provide an analogy. The 2005 Committee Note to Criminal Rule 45 states in part:

> Rule 45(b) has been amended to conform to amendments to Rules 29, 33, and 34, which have been amended to remove the requirement that the court must act within the seven-day period specified in each of those rules if it sets another time for filing a motion under those rules.
>
> Currently, Rules 29(c)(1), 33(b)(2), and 34(b) require the defendant to move for relief under those rules within the seven-day periods specified in those rules or within some other time set by the court in an order issued during that same seven-day period. Courts have held that the seven-day rule is jurisdictional. Thus, for example, if a defendant files a request for an extension of time to file a motion for a judgment of acquittal or a motion for new trial within the seven-day period, the court must rule on that motion or request within the same seven-day period. If for some reason the court does not rule on the request for an extension of time within the seven days, the court loses jurisdiction to act on the underlying substantive motion. [Citations omitted.]
>
> Rule 45(b)(2) currently specifies that a court may not extend the time for taking action under Rules 29, 33, or 34, except as provided in those rules.
>
> Assuming that the current provisions in Rules 29, 33, and 34 were intended to promote finality, there is nothing to prevent the court from granting the defendant a significant extension of time, under those rules, as long as it does so within the seven-day

The Appellate Rules do address the related question of when a court may relieve a litigant of the consequences of noncompliance with the Rules. Rule 2 provides: "On its own or a party's motion, a court of appeals may – to expedite its decision or for other good cause – suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b)." Rule 26(b), in turn, provides:

> **Extending Time.** For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court may not extend the time to file:
>
> (1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal; or
>
> (2) a notice of appeal from or a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law.

Rule 4 includes provisions that authorize the district court to extend the time to file notices of appeal in civil and criminal cases,[16] as well as a provision that authorizes the

> period. Thus, the Committee believed that those rules should be amended to be consistent with all of the other timing requirements in the rules, which do not force the court to rule on a motion to extend the time for filing, within a particular period of time or lose jurisdiction to do so. The change to Rule 45(b)(2) is thus a conforming amendment.

[16] As to civil cases, Rule 4(a)(5) provides:

> Motion for Extension of Time.
> (A) The district court may extend the time to file a notice of appeal if:
> (i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and
> (ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.
> (B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.
> (C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.

As to criminal cases, Rule 4(b)(4) provides: "Motion for Extension of Time. Upon a finding of excusable neglect or good cause, the district court may--before or after the time has expired, with or without motion and notice--extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b)."

district court to reopen the time for appeal in a civil case.[17] A number of other provisions in Rule 4 soften the requirements of that Rule in specified circumstances.[18]

If Rule 4(a)(4)'s timeliness requirement is jurisdictional, then the requirement (1) is not waivable, (2) must be raised by the court sua sponte, and (3) cannot be softened by a "unique circumstances" doctrine.[19] Rather than attempting to provide by Rule that Rule 4(a)(4)'s timeliness requirement is nonjurisdictional, the rulemakers could re-define that requirement in a way that achieves some of the same effects. For example, one could revise Rule 4(a)(4) by adding a provision that authorizes a court to excuse compliance with the timeliness requirement in specified circumstances. Such a provision could, for example, define a "timely" tolling motion to include instances in which the district court erroneously grants an extension of time to make a postjudgment motion and a would-be appellant, in reliance upon that grant, fails to file a timely notice of appeal.[20] Alternatively or additionally, the rule could define the set of "timely" motions to include motions made within a time period to which the appellee had consented. I sketch a possible amendment of this sort in Part III.B.

[17] *See* Rule 4(a)(6).

[18] *See* Rules 4(a)(2) (premature notices of appeal), 4(a)(3) (cross-appeals), 4(b)(2) (premature notices of appeal), 4(c) (inmate filings), and 4(d) (notice mistakenly filed in court of appeals).

[19] In *Bowles*, the Court rejected Bowles's attempt to rely on the "unique circumstances" doctrine set forth in *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962), and *Thompson v. INS*, 375 U.S. 384 (1964). The *Bowles* majority characterized this doctrine as moribund, and it "overrule[d] *Harris Truck Lines* and *Thompson* to the extent they purport to authorize an exception to a jurisdictional rule." *Bowles*, 551 U.S. at 214.

Prior to *Bowles*, the argument for applying the unique circumstances doctrine (in the context addressed by this memo) would have been strong given that of the initial trio of Supreme Court cases establishing the doctrine, two involved erroneous district court assurances concerning the timeliness of postjudgment motions that were in fact untimely. In *Thompson v. INS*, post-trial motions were made after the deadlines set by Rules 52 and 59. The notice of appeal was filed within the appeal deadline computed from the denial of the motions but not within the appeal deadline computed from the original judgment. The court of appeals dismissed the appeal as untimely but the Supreme Court reversed, evidently giving weight to the petitioner's argument "that he relied on the Government's failure to raise a claim of untimeliness when the motions were filed and on the District Court's explicit statement that the motion for a new trial was made 'in ample time'; for if any question had been raised about the timeliness of the motions at that juncture, petitioner could have, and presumably would have, filed the appeal within 60 days of the entry of the original judgment, rather than waiting, as he did, until after the trial court had disposed of the post-trial motions." The Court viewed the case as fitting "squarely within the letter and spirit of *Harris*. Here, as there, petitioner did an act which, if properly done, postponed the deadline for the filing of his appeal. Here, as there, the District Court concluded that the act had been properly done. Here, as there, the petitioner relied on the statement of the District Court and filed the appeal within the assumedly new deadline but beyond the old deadline." *Thompson*, 375 U.S. at 386-87.

In *Wolfsohn v Hankin*, 376 U.S. 203 (1964), the district court signed an order purporting to extend the time to move under Rule 59 for rehearing. The appellant moved for rehearing within the extended time but outside the time set by Rule 59. Less than 30 days after the denial of the motion, she filed the notice of appeal. The court of appeals held that the notice did not effect a timely appeal from the judgment. *Wolfsohn v. Hankin*, 321 F.2d 393, 394 (D.C. Cir. 1963). The Supreme Court reversed, citing *Thompson* and *Harris Truck Lines*. *Wolfsohn*, 376 U.S. at 203.

[20] Admittedly, some of those instances could be addressed under current Rule 4(a)(5) – but only if the would-be appellant recognizes her error no later than 30 days after the expiration of the time to appeal. Thus, the question becomes whether a Rule amendment is warranted to address the plight of litigants who fail to recognize the timeliness problem until more than 30 days after the appeal time runs out.

III. Drafting specifics

In this Part, I tentatively set forth illustrative alternatives for an amendment to Rule 4(a)(4). Part III.A presents sketches of a proposal that would implement the majority view concerning the meaning of "timely," while Part III.B presents a draft that would implement the contrary view. In Part III.C, I suggest that the amendment should eschew any attempt to address whether the timeliness requirement is jurisdictional.

The existence of provisions concerning tolling motions in Rules 4(b)(3) (criminal appeals), 6(b)(2)(A)(i) (certain bankruptcy appeals), and 13(a) (appeals from the Tax Court) raises additional questions about any amendment that would address the notion of timely tolling motions for purposes of Rule 4(a)(4). First, should such an amendment be drafted and placed so as to define "timely" for purposes of all four Rules? Second, if the amendment is drafted and placed so as to explicitly modify only Rule 4(a)(4), will it be read to have any implications for the operation of Rules 4(b)(3), 6(b)(2)(A)(i), and 13(a)? In Part III.D, I argue that the amendment should be limited to appeals to which Rule 4(a)(4) applies, and that – thus limited – it should not cause problems with the other tolling rules.

Finally, in Part III.E, I briefly discuss other Rules that use the term "timely" or that dovetail with Rule 4(a)(4), and I conclude that amendments of the type shown in Parts III.A and III.B should not cause any problematic changes in the operation of those other provisions.

A. Amending Rule 4(a)(4) to implement the majority view of "timely"

To implement the majority view of the meaning of "timely" in Rule 4(a)(4), one might add a definitional provision that reads:

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

This sketch places the new provision as a new Rule 4(a)(4)(C), in order to avoid re-numbering any existing provisions. However, in order to help ensure that readers do not overlook the new definition, it might also be wise to add a cross-reference 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:

The draft amendments sketched above would provide clarification; they would also further distend Rule 4(a)(4), which is long and intricate already. An alternative, more parsimonious, approach would simply amend Rule 4(a)(4)(A) as shown below, without adding a new definitional subsection:

> If a party ~~timely~~ files in the district court any of the following motions under the Federal Rules of Civil Procedure within the time limit set by the relevant [rule] [Federal Rule of Civil Procedure], the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

If the Committee adopted this approach, the Committee Note could explain that the change to the Rule text was adopted in order to resolve the circuit split concerning the meaning of "timely."

B. Amending Rule 4(a)(4) to implement the contrary view of "timely"

An amendment implementing the contrary view of "timely" might take a number of different forms. It might focus on the existence of purported court permission to file a late motion, or on the opponent's failure to object to the lateness of the motion.[21] Here is a sketch of one possible amendment that incorporate both those concepts:

> (C) **Timely Defined.** For purposes of Rule 4(a)(4)(A), a motion is timely if it is:
>
> > (i) made within the time limit set[22] by the relevant Federal Rule of Civil Procedure; or
> >
> > (ii) made within a time limit purportedly set by court order[23] for making the motion, so long as no party raised an objection to the motion's timeliness within [30] days after the expiration of the time otherwise set by this Rule 4(a) for filing a notice of appeal.

Because this type of amendment would (in many circuits) expand the set of motions that have tolling effect – and would thus have the effect of preserving rather than cutting off

[21] Professor Cooper suggests that it may be advisable to limit such a provision to cases in which the court actually enters an order extending the time to move. It should not suffice, he suggests, "that an untimely motion is denied as untimely, even though no party objected. Nor should it do that an untimely motion is denied without explanation. And probably it should not do that the court considers an untimely motion on the merits, still without objection by any party, and denies it on the merits -- though I am not sure of that."

[22] Professor Cooper has suggested that it would be better to say "made within the time **authorized** by the relevant Federal Rule of Civil Procedure" because "set" sounds rigid.

[23] Professor Cooper queries whether "purportedly set by court order" is the right wording; "designated by the district court" is a possible alternative.

appeal rights – it would seem less necessary to include a cross-reference to the new provision in Rule 4(a)(4)(A).

I bracketed the number 30 in proposed Rule 4(a)(4)(C)(ii) because it might be advisable to set a slightly shorter time limit than 30 days. The idea would be to set a time limit that would allow a would-be appellant to take note of an objection to the timeliness of the motion, and to move under Rule 4(a)(5) for an extension of time to appeal. Under Rule 4(a)(5)(A)(i), the extension motion must be made "no later than 30 days after the time prescribed by this Rule 4(a) expires."

I should note a problem with this draft:[24] Suppose the court purports to extend the motion deadline by 80 days, and the motion is filed 108 days after entry of the judgment. Suppose further that the judgment winner promptly opposes the motion (on Day 110, let us say) on the ground that it is untimely. Under the language sketched above, the motion would be considered "timely" for Appellate Rule 4(a)(4) purposes, despite the judgment winner's objection to its timeliness, because the judgment winner's objection was raised more than 30 days after the appeal time expired.[25] Perhaps this could be addressed by revising this provision so that it counts only an extension that is granted by an order entered within a limited period after the appeal time expires,[26] or (even more restrictively) so that it counts only instances when the motion itself is made within a limited period after the appeal time expires.[27] Such revisions would address this problem, but would add further complexity to an already intricate rule.

C. Addressing the nature of Rule 4(a)(4)'s timeliness requirement

If the Committee were to adopt an amendment along the lines of the one sketched in Part III.B, it is questionable whether there would be any compelling need to address whether Rule 4(a)(4)(A)'s timeliness requirement is jurisdictional. Admittedly, the type of definition sketched in Part III.B would not entirely eliminate the salience of that question. An instance could arise in which a motion is untimely even under the expanded

[24] I am indebted to Professor Cooper for this point.

[25] By contrast, such a motion would likely be considered *un*timely for the purpose of determining the district court's authority to grant the motion – because the judgment winner's timeliness objection would likely be deemed timely for that purpose. *See, e.g.*, *Dill v. General Am. Life Ins. Co.*, 525 F.3d 612, 618-19 (8th Cir. 2008) (holding that the nonmoving party timely raised an objection to a Rule 50(b) motion's untimeliness by objecting before the district court decided the motion on the merits).

[26] Such a provision might read:

> (ii) made within a time limit purportedly set by court order for making the motion, so long as, within [30] days after the expiration of the time otherwise set by this Rule 4(a) for filing a notice of appeal,
>
> (a) the court order setting the time limit was entered, and
>
> (b) no party raised an objection to the order or to the motion's timeliness.

[27] Such a provision might read:

> (ii) made within a time limit purportedly set by court order for making the motion, so long as, within [30] days after the expiration of the time otherwise set by this Rule 4(a) for filing a notice of appeal,
>
> (a) the motion was made, and
>
> (b) no party raised an objection to the motion's timeliness.

definition sketched in Part III.B, and yet the untimeliness is not raised by the appellee. In that event, the nature of the timeliness requirement would govern whether the court of appeals must raise the timeliness issue on its own. But it is unclear to me why this question would be so troubling that it would merit treatment by Rule amendment – given that the type of amendment sketched in Part III.B would address the situations in which the appellant has a compelling argument that he or she failed to file a timely notice of appeal in reliance on a purported time extension. Moreover, there are other parts of Rule 4(a) that present the same general type of "hybrid" – i.e., a Rule provision, not reflected in Section 2107, that fills a gap in the statutory appeal-deadline scheme.[28] Why address only one such instance and not the others?

By contrast, if the Committee were to adopt an amendment along the lines of the one sketched in Part III.A, then some situations might arise in which an appellant might seek to raise a fairness-based argument for excusing compliance with Rule 4(a)'s timeliness requirement. Suppose the district court purports to grant the appellant's unopposed motion for an extension of time to file a postjudgment motion, and the appellant files a notice of appeal from the underlying judgment six months after entry of that judgment but less than 30 days after entry of the order disposing of the postjudgment motion. Suppose further that the appellee raises no timeliness objection to the appeal. Must the court of appeals raise the timeliness issue sua sponte? If so, can the court of appeals apply the "unique circumstances" doctrine to avoid dismissing the appeal? As noted in Part I, a number of circuits would answer "Yes" to the first question and "No" to the second. The question arises whether it would be possible and desirable to draft a rule amendment that would alter these answers. For the reasons sketched in Part II.B, I tend to think that it would not. If the fairness concerns that would be raised by such an appellant move the Committee, then I think it would be better to address those concerns by modifying the definition of "timely" in Rule 4(a)(4)(A) than to try to address those concerns by defining (in Rule text) whether that timeliness requirement is jurisdictional.

D. Placement of the amendment, and effect on other tolling provisions

The question of the placement of the amendment connects to the question of how the amendment might affect the treatment of tolling motions in criminal, bankruptcy, and tax cases. In Parts III.D.1 – 3, I survey the current treatment of such motions. In Part

[28] Similar issues could arise, for example, with respect to Appellate Rule 4(a)(4)(B)(ii)'s requirement of a new or amended notice of appeal, and with respect to Appellate Rule 4(a)(7)(A)'s definition of the entry of judgment. As to the second of these two examples, Section 2107 does not define the entry of judgment; Civil Rule 58 and Appellate Rule 4(a)(7)(A) fill that gap by, among other things, setting a 150-day cap for instances when a separate document is required but never provided. Addressing the 180-day time limit produced by adding the 30-day appeal time limit to the 150-day cap set by the Rules, the Ninth Circuit held the 180-day limit jurisdictional: "§ 2107(a) and [Rule] 4(a)(1) require that a notice of appeal be filed in a civil case 'within 30 days after the judgment or order appealed from is entered.' …. Because the district court did not enter judgment on the order to compel arbitration, CCI had 180 days to appeal the order. … CCI filed its first notice of appeal of the district court's order compelling arbitration on May 16, 2005, 287 days after the order was entered on August 2, 2004. This is well beyond the 180 days allowed by [Rule] 4(a)(7)(A)(ii). CCI's appeal of the district court's order compelling arbitration is untimely, and we lack jurisdiction to hear the appeal of that issue." *Comedy Club, Inc. v. Improv West Assocs.*, 553 F.3d 1277, 1284 (9th Cir. 2009).

III.D.4, I conclude that the proposed amendment should be placed in Rule 4(a)(4) and that it should be drafted so as to affect only civil appeals in which the timing of any tolling motion is governed by the Civil Rules.

1. Tolling motions in criminal cases

In criminal cases, as in civil cases, certain postjudgment motions toll the time to appeal. Three such types of motions are listed in Rule 4(b)(3)(A):

> If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 14 days after the entry of the order disposing of the last such remaining motion, or within 14 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:
>
> > (i) for judgment of acquittal under Rule 29;
> >
> > (ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 14 days after the entry of the judgment; or
> >
> > (iii) for arrest of judgment under Rule 34.

Apart from the motions listed in Rule 4(b)(3)(A), caselaw provides that reconsideration or rehearing motions that are made within the movant's appeal deadline also have tolling effect.[29]

The Criminal Rules authorize the district court to extend the deadlines for motions under, inter alia, Rules 29, 33, and 34.[30] Accordingly, I would think there is a strong argument that a Rule 29 or Rule 34 motion made within a properly-ordered extension period would count as "timely" for purposes of Rule 4(b)(3)(A). The same type of

[29] *See United States v. Healy*, 376 U.S. 75, 77-78 (1964) (providing, in the context of a direct appeal to the U.S. Supreme Court from a district court, an affirmative answer to the question "whether in a criminal case a timely petition for rehearing by the Government filed within the permissible time for appeal renders the judgment not final for purposes of appeal until the court disposes of the petition"); *United States v. Dieter*, 429 U.S. 6, 8 (1976) (applying *Healy* to an appeal from a district court to a court of appeals); *United States v. Ibarra*, 502 U.S. 1, 6-7 (1991).

[30] Criminal Rule 45(b) provides:

> (1) **In General**. When an act must or may be done within a specified period, the court on its own may extend the time, or for good cause may do so on a party's motion made:
> > (A) before the originally prescribed or previously extended time expires; or
> > (B) after the time expires if the party failed to act because of excusable neglect.
>
> (2) **Exception**. The court may not extend the time to take any action under Rule 35, except as stated in that rule.

argument would apply to Rule 33 new trial motions that are not based on newly discovered evidence.[31]

By contrast, Rule 4(b)(3)(A)(ii) makes clear that a Rule 33 new trial motion based on newly discovered evidence has no tolling effect unless made within 14 days after entry of judgment.[32] If I am correct that "timely" motions include motions (under Rules 29 or 34 or under Rule 33 on grounds other than new evidence) made within a court-extended period, then the result might be that considerably longer time windows might exist for the tolling effect of such motions than for the tolling effect of new-evidence motions under Rule 33. Some might consider this disparity to be unfortunate, given that the 14-day cutoff set in Rule 4(b)(3)(A)(ii) was presumably designed to approximate the typical time limit for making other relevant motions. On the other hand, it should be noted that the time period set by Rule 4(b)(3)(A)(ii) for new-evidence motions to have tolling effect – "no later than 14 days after the entry of the judgment" – will sometimes commence running on a later date than the 14-day periods set by Rules 29, 33, and 34.[33]

An additional question concerns what happens if the district court extends the deadline for a motion under Rules 29, 33, or 34 beyond the date that otherwise would be set by Rule 4(b)(1) for filing a notice of appeal. Distinct concerns would arise if the motion for an extension of time is made after the date on which the appeal time elapsed – and even more acute concerns would arise if the belated extension motion is made more than 30 days after the date on which the appeal time elapsed.[34]

[31] I was only able to find one precedential court of appeals opinion addressing the tolling effect (in a criminal case) of a motion made within a court-extended time period: In *United States v. Owen*, 553 F.3d 161, 165 (2d Cir. 2009), after a February 2005 verdict and a November 2005 judgment of conviction, the defendant filed a pro se motion in December 2005 asserting ineffective assistance of counsel. The district court, without adjudicating that motion, granted defendant's counsel's motion for a new trial based on newly discovered evidence. The court of appeals reversed the new trial grant. Less than 10 days after the entry of the court of appeals' mandate in the district court, the defendant's new counsel filed a notice of appeal from the November 2005 judgment. In January 2009 the court of appeals held that the notice of appeal was not yet effective due to the pendency of the defendant's December 2005 new trial motion. *Id*. at 165. Petitioning for rehearing, the government contended for the first time that the December 2005 new trial motion was untimely. The court of appeals denied the rehearing petition, reasoning that it was possible for the district court to render the new trial motion timely by acting under Criminal Rule 45(b) to extend what was then Rule 33's 7-day motion deadline. *United States v. Owen*, 559 F.3d 82, 84 (2d Cir. 2009).

[32] The Rule's cap on the tolling effect of such motions exists because the time period for making timely Rule 33 motions based on newly-discovered evidence is a long one – currently, three years.

[33] Criminal Rule 29(c)(1) provides: "A defendant may move for a judgment of acquittal, or renew such a motion, within **14 days after a guilty verdict or after the court discharges the jury, whichever is later**." Criminal Rule 33(b)(2) provides: "Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within **14 days after the verdict or finding of guilty**." Rule 34(b) provides: "The defendant must move to arrest judgment within **14 days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere**."

[34] Appellate Rule 4(b)(4) provides: "Upon a finding of excusable neglect or good cause, the district court may – before or after the time has expired, with or without motion and notice – extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b)."

2. Tolling motions in bankruptcy cases

An appeal from the final judgment of a district court exercising original jurisdiction in a bankruptcy case is treated like other civil appeals.[35] Accordingly, Rule 4(a)(4) applies to such appeals.[36] By contrast, appeals from the final judgment of a district court or bankruptcy appellate panel ("BAP") exercising appellate jurisdiction in a bankruptcy case are governed by Rule 6(b), which excludes the application of Rule 4(a)(4). Instead, Rule 6(b)(2)(A)(i) provides:

> If a timely motion for rehearing under Bankruptcy Rule 8015[37] 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.

Bankruptcy Rule 8015 currently provides:

> Unless the district court or the bankruptcy appellate panel by local rule or by court order otherwise provides, a motion for rehearing may be filed within 14 days after entry of the judgment of the district court or the bankruptcy appellate panel. If a timely motion for rehearing is filed, the time for appeal to the court of appeals for all parties shall run from the entry of the order denying rehearing or the entry of subsequent judgment.

If the proposed amendments to the Part VIII Bankruptcy Rules take effect, Rule 8015 will be replaced by Rule 8022, which will read in relevant part: "Unless the time is shortened or extended by order or local rule, any motion for rehearing by the district court or BAP must be filed within 14 days after entry of judgment on appeal." (Current Rule 8015's tolling provision will be deleted as redundant in light of the tolling provision in Appellate Rule 6(b)(2)(A)(i).)

It thus seems that practice under Appellate Rule 6(b) and the relevant Part VIII Bankruptcy Rule is similar to criminal practice, in the sense that the deadline for a tolling motion can validly be extended by court order.

3. Tolling motions in tax cases

Appellate Rule 13 governs appeals from the Tax Court. Rule 13(a)(2) provides: "If, under Tax Court rules, a party makes a timely motion to vacate or revise the Tax Court's decision, the time to file a notice of appeal runs from the entry of the order

[35] *See* Rule 6(a).
[36] Thus, if the Committee is interested in proceeding with an amendment to Rule 4(a)(4), it will be important to consult the Bankruptcy Rules Committee for their views on the proposed amendment.
[37] The reference to Rule 8015 will become a reference to Rule 8022 if the pending amendments to Rule 6 and to the Bankruptcy Part VIII Rules become law.

disposing of the motion or from the entry of a new decision, whichever is later."[38] Tax Court Rule 162 provides: "Any motion to vacate or revise a decision, with or without a new or further trial, shall be filed within 30 days after the decision has been entered, unless the Court shall otherwise permit."

Under these Rules, it seems that – as with practice under the Criminal Rules and the Bankruptcy Part VIII Rules – the deadline for a tolling motion in tax cases can validly be extended by court order.

4. Assessment

The survey of these other tolling provisions leads me to conclude that the proposed amendment should target only the Rule 4(a)(4) tolling mechanism.

This seems particularly clear with respect to the proposal sketched in Part III.A. A major rationale for the majority view of the meaning of "timely" in Rule 4(a)(4) is that the Civil Rules bar extensions of the time to make motions under Civil Rules 50, 52, and 59. As noted in Part II.C, the Criminal Rules take a very different approach, as do the relevant Bankruptcy and Tax Court Rules. Thus, it seems to me that an amendment that adopts the restrictive view of "timely" should be explicitly limited to the context of civil appeals in which the tolling motion is governed by the Civil Rules. I do not think that such an amendment, thus limited, would affect the treatment of tolling motions under Rules 4(b)(3), 6(b)(2)(A)(i), or 13(a). The Committee could add a caveat in the Committee Note to disclaim any intent to affect the operation of those Rules.

I think that the same limitation should apply to an amendment along the lines sketched in Part III.B. Because that amendment is drafted to reflect the court's lack of authority to extend the time limits for postjudgment motions under the Civil Rules, the language of the proposed amendment would not be appropriate for cases governed by the other tolling rules. Here, too, the Committee could use the Committee Note to disclaim any intent to affect those other rules.

E. Effect on the use of "timely" in other parts of the Rules

In addition to Rules 4(b)(3), 6(b)(2)(A)(i), and 13(a), there are a few other Appellate Rules that use the term "timely" or that dovetail with Rule 4(a)(4). For the reasons stated below, I do not think that the proposed amendments sketched in Parts III.A and III.B would cause problems with the functioning of those rules.

1. Rules that dovetail with Rule 4(a)(4)(A)

One use of "timely" occurs in a cross-reference to Rule 4(a)(4)(A): Rule 10(b)(1) provides that the appellant must either order the transcript or state that none will be ordered "[w]ithin 14 days after filing the notice of appeal or entry of an order disposing

[38] Assuming no contrary action by Congress, on December 1, 2013, the pending amendments to Rule 13 will take effect, with the result that Rule 13(a)(2) will become Rule 13(a)(1)(B).

of the last timely remaining motion of a type specified in Rule 4(a)(4)(A), whichever is later …." This cross-reference would still make sense if Rule 4(a)(4) were amended as suggested in either Part III.A or III.B.

The possible amendments to Rule 4(a)(4) sketched in Parts III.A and III.B would affect the operation of Rules 4(a)(4)(B)(i) and 12.1. Under Rule 4(a)(4)(B)(i), the filing of a motion described in Rule 4(a)(4)(A) renders a previously-filed notice of appeal temporarily ineffective until the disposition of the motion. By restricting or expanding the number of instances in which a motion has tolling effect under Rule 4(a)(4)(A), the amendment would restrict or expand the number of cases in which a previously-filed notice of appeal is held in abeyance under Rule 4(a)(4)(B)(i).

Rule 12.1(a) provides: "If a timely motion is made in the district court for relief that it lacks authority to grant because of an appeal that has been docketed and is pending, the movant must promptly notify the circuit clerk if the district court states either that it would grant the motion or that the motion raises a substantial issue." For the reasons just noted, an amendment drafted as shown in Parts III.A or III.B would alter the universe of instances in which Rule 12.1's indicative-ruling procedure would come into play, by altering the number of instances in which a previously-filed notice of appeal is held in abeyance under Rule 4(a)(4)(B)(i).

It is worth considering whether such an amendment would influence courts' analysis of whether a motion is "timely" for purposes of Rule 12.1(a). That question seems most likely to arise if the rulemakers adopt the sort of amendment sketched in Part III.A. Suppose that a notice of appeal is filed on Day 15 after entry of judgment; the district court then purports to extend the time to file a motion for a new trial under Rule 59; and on Day 33, the new trial motion is filed. Suppose further that the judgment winner raises no objection to the timeliness of the new trial motion. The notice of appeal transferred jurisdiction to the court of appeals, and Rule 4(a)(4)(B)(i) did not suspend the effectiveness of the notice of appeal (because this new trial motion would not count as a "motion listed in Rule 4(a)(4)(A)"). The pendency of the appeal deprives the district court of authority to grant the new trial motion. The litigants and the court wish to make use of the indicative-ruling procedure. Is the new trial motion a "timely" one within the meaning of Appellate Rule 12.1(a) and Civil Rule 62.1(a)? Amended language in Rule 4(a)(4)(A) would not directly answer this question. Indeed, one might argue that the definition of "timely" should be different for purposes of the indicative-ruling procedure, because the question in that context is whether the motion is "timely" for purposes of being eligible for consideration *by the district court* – and, as noted in Part I, the developing caselaw views the Rule 59 new trial motion deadline as a waivable claim-processing rule rather than a jurisdictional limit.

2. Other Rules

A number of Rules refer to the "timely" filing of a notice of appeal or a petition for review.[39] A definition of "timely" for purposes of Rule 4(a)(4)'s treatment of tolling

[39] See Rules 3(a)(2); 3(b)(2); 4(a)(3); 4(c)(1); 13(a); and 28(a)(4)(C).

motions seems unlikely to affect the use of "timely" to describe a notice of appeal or petition for review.

The question of timeliness also arises with respect to various filings in the court of appeals. Rules 25(a)(2)(A) – (C) address the "[m]ethod and [t]imeliness" of filings in the court of appeals. Rule 27(b) refers to "[t]imely opposition" to a motion in the court of appeals. Most interestingly, Rules 41(b) and 41(d)(1) refer to a "timely" petition for panel rehearing, for rehearing en banc, or for a stay of mandate.[40]

Petitions for rehearing in the court of appeals might be seen to serve a function analogous to tolling motions in the district court. Supreme Court Rule 13.3 provides:

> The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice). But if a petition for rehearing is timely filed in the lower court by any party, or if the lower court appropriately entertains an untimely petition for rehearing or *sua sponte* considers rehearing, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or, if rehearing is granted, the subsequent entry of judgment.

I do not think that a definition of timeliness for purposes of tolling motions under Rule 4(a)(4)(A) would affect the courts' view of what counts as timely for purposes of Rule 41, let alone what counts as timely for purposes of Supreme Court Rule 13.3. The Appellate Rules explicitly authorize the court of appeals to extend the time to seek rehearing,[41] so a definition of timeliness in Rule 4(a)(4)(A) that is designed to address motions with non-extendable deadlines seems entirely inapposite to the timeliness of petitions for rehearing.

IV. Conclusion

It seems worthwhile to consider the possibility of amending Rule 4(a)(4)(A) to address the circuit split concerning the definition of "timely" as used in that Rule. The Committee will no doubt wish to consider how best to craft that amendment so as to avoid unintended effects on the other tolling provisions in the Appellate Rules.

[40] Rule 41(b) states: "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." Rule 41(d)(1) states: "The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise."

[41] *See* Rule 40(a)(1) (setting time limits – for filing a petition for panel rehearing – of 14 days and 45 days, and providing that the 14-day period can be extended "by order or local rule" and the 45-day period can be extended by "order"); Rule 35(c) ("A petition for a rehearing en banc must be filed within the time prescribed by Rule 40 for filing a petition for rehearing.").

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MEMORANDUM

DATE: September 10, 2013

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item Nos. 08-AP-J, 08-AP-R, and 09-AP-A

Three items on the Committee's study agenda relate to disclosure requirements and Appellate Rule 26.1. Part I suggests removing one of those items from the Committee's agenda and narrowing the scope of the other two items. Part II notes that it could be worthwhile to study the differences between Rule 26.1's requirements and broader local circuit disclosure requirements.

I. Item Nos. 08-AP-J, 08-AP-R, and 09-AP-A

Item No. 08-AP-J – more fully described in the enclosed October 20, 2008 memo – concerned a 2008 suggestion by the Judicial Conference Committee on Codes of Conduct that the Rules Committees consider possible rule amendments having to do with conflict screening. When the Appellate Rules Committee discussed this in fall 2008, it decided to keep the item on its agenda pending further input from the Codes of Conduct Committee and pending further developments with CM/ECF. Neither the Criminal Rules Committee nor the Bankruptcy Rules Committee proceeded with proposals in response to the Codes of Conduct Committee's suggestion,[1] and it does not appear that the Codes of Conduct Committee pursued the matter further. Two of the three aspects of the Codes of Conduct Committee's inquiry focused on criminal and bankruptcy practice, and the Committee's failure to pursue those aspects further with the relevant Advisory Committees suggests that there is no need for the Appellate Rules Committee to consider them either. The other aspect of the Committee's inquiry concerned possible overlaps and distinctions among Appellate Rule 26.1, local circuit provisions, and prompts in the CM/ECF system; it seems to me that this aspect of the inquiry is the only one that might be worth pursuing at this time.

[1] The minutes of the April 2009 meeting of the Criminal Rules Committee state that that Committee decided not to take action on a possible amendment to Criminal Rule 12.4, and that Judge Tallman undertook to so inform the Chair of the Codes of Conduct Committee. The minutes of the March 2009 meeting of the Bankruptcy Rules Committee state that the Committee was "still awaiting renewal or revision of the request" by the Codes of Conduct Committee. The Reporters for those Committees have confirmed that their Committees have not returned to the issue since.

Item Nos. 08-AP-R and 09-AP-A arise from comments submitted on a proposed amendment to Appellate Rule 29(c).[2] In addition to suggesting revisions to the portion of Rule 29(c) that requires corporate would-be amici to submit "a disclosure statement like that required of parties by Rule 26.1," these commentators also suggested revisions to Rule 26.1 itself.

In Item 09-AP-A, the ABA Council of Appellate Lawyers proposed the following:

> The Advisory Committee ... may wish to consider amending Rule 26.1 to apply to any person filing or moving for permission to file a brief as amicus curiae. Otherwise, a judge may consider a motion for permission to file a brief as amicus curiae without being aware of facts that might cause the judge to consider recusal.
>
> If Rule 26.1 is amended to include amici curiae, we suggest revising the proposed subdivision (c)(6) to require inclusion of the "same disclosure statement that is required of parties by Rule 26.1" or, alternatively, the "same disclosure statement that Rule 26.1 requires of parties." The word "like" in the present proposal is ambiguous as to whether some degree of difference may be permissible.

As I noted in the enclosed March 27, 2009 memo,[3] the Council's suggestions appear to proceed from the premise stated in the second quoted paragraph – namely, that the current language of Rule 29(c) could be read to permit "some degree of difference" between the Rule 29(c) corporate-disclosure statement and the Rule 26.1 corporate-disclosure statement. But that concern is somewhat puzzling, because it is difficult to imagine what sort of difference would arise. It seems clear that a corporate amicus would understand that its obligation is to (a) identify any parent corporation and any publicly held corporation that owns 10 % or more of its stock or (b) state there is no such corporation. The Council does not suggest any variations that would be likely to arise under the Rules' current language. Accordingly, the Council's suggested change in language seems unnecessary. I therefore suggest that the Committee consider removing Item 09-AP-A from its agenda.

Item No. 08-AP-R memorializes suggestions made by Chief Judge Easterbrook. He points out that the term "corporation" in Rules 26.1 and 29(c) encompasses entities from which a disclosure is unnecessary because they do not have stock – such as the Catholic Bishop of Chicago. But while the Rule requires such entities to disclose that they have no stock and no parents, that is not necessarily a downside; by requiring that

[2] That amendment, adopting an authorship-and-funding disclosure requirement for most amicus briefs, took effect December 1, 2010.

[3] I have abridged the memo slightly in an effort to avoid redundancy; omissions in the abridged memo are indicated by three asterisks. I have also updated references to a Supreme Court rule and to Appellate Rule 29. However, I did not update the memo's discussion of local circuit rules; that topic is addressed in the enclosed memo by Margaret Zhang.

explicit statement, the Rule makes it easy to tell whether a corporate filer has complied with the disclosure requirement. That is to say, if corporations with no stock were entirely exempt from the disclosure requirement, it might sometimes be difficult to tell whether a corporation omitted a disclosure because it was exempt or whether, instead, it omitted the disclosure erroneously. For that reason, I suggest that the Committee not proceed further with this aspect of Chief Judge Easterbrook's suggestions.

Chief Judge Easterbrook's other critique is that the corporate-disclosure requirements in Rules 26.1 and 29(c) fail to elicit all of the information that would be relevant to a judge in considering whether to recuse.

II. Do Rules 26.1 and 29(c) elicit all the information needed in order to make recusal decisions?

The First, Second, Eighth and Ninth Circuits do not appear to impose any significant additional disclosure requirements beyond those set by Appellate Rule 26.1. The Seventh and Federal Circuits impose a few additional disclosure requirements – for instance, by requiring disclosure of the names of lawyers involved in the case. The D.C., Third, Fourth, Fifth, Sixth, Tenth and Eleventh Circuits impose considerably broader disclosure requirements than Appellate Rule 26.1 – for example, by expanding the range of entities that must provide disclosure and/or the types of disclosures that must be made concerning entities that are not parties to the appeal.

The enclosed memo by my research assistant, Margaret Zhang, collects local circuit disclosure requirements. Ms. Zhang's memo groups those requirements by type and suggests ways in which those requirements might assist judges in making recusal decisions.

It seems worthwhile for the Committee to study whether to enhance the disclosure requirements of Rule 26.1 to include some of the disclosures required by local rules. If the Committee were to identify likely candidates for addition, we could prepare some draft language and consult with the Committee on Codes of Conduct (and with the other Advisory Committees).

Encls.

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MEMORANDUM

DATE: October 20, 2008

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 08-AP-J

This memo describes, for the Committee's preliminary consideration, an inquiry received last spring concerning the Judicial Conference's Mandatory Conflict Screening Policy. As outlined in the enclosed letter from Judge Gordon Quist to Judge Rosenthal, the Judicial Conference Committee on Codes of Conduct has tentatively raised three questions with the Standing Committee. These questions may have implications for practice under Appellate Rule 26.1, which requires certain disclosures designed to help judges determine whether a conflict requires their recusal from hearing an appeal.[1]

The basic principle at issue with respect to each of Judge Quist's questions relates to Canon 3C(1) of the Code of Conduct for United States Judges, which provides in part:

> A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:
>
> ...
>
> (c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding; [or]
>
> (d) the judge or the judge's spouse, or a person related to either within the third degree of relationship, or the spouse of such a person:
>
> ...
>
> (iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding ....

The inquiry by the Committee on Codes of Conduct raises three issues. The first –

[1] In the district courts, corporate disclosures are required in civil cases by Civil Rule 7.1, in criminal cases by Criminal Rule 12.4, and in bankruptcy cases by Bankruptcy Rule 7007.1.

addressed in Part I of this memo – concerns the similarities and differences among the disclosures required by Appellate Rule 26.1, any disclosures required by a local circuit provision, and any information required by the CM/ECF system in the courts of appeals which are currently operational on CM/ECF. Part II of this memo briefly sketches the second and third issues, which appear to fall within the primary jurisdiction of (respectively) the Bankruptcy Rules Committee and the Criminal Rules Committee.

These questions are not yet ripe for full consideration, because the Committee on Codes of Conduct has been asked for additional information concerning some of the questions stated in Judge Quist's letter. A response from the Committee on Codes of Conduct is expected late this year. Nonetheless, if time permits, it could be useful to give the questions preliminary consideration at the November meeting, albeit on the understanding that this Committee will revisit the issue at the Spring 2009 meeting after receiving further information from the Committee on Codes of Conduct.

I. National rules, local rules, and the CM/ECF system

The first question raised in Judge Quist's letter, as it relates to appellate practice, concerns the interaction among Appellate Rule 26.1, any local circuit disclosure requirements, and the requirements imposed by the CM/ECF system in those circuits where CM/ECF is already operational. Appellate Rule 26.1(a) provides that "[a]ny nongovernmental corporate party to a proceeding in a court of appeals must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation."

Any inquiry into the CM/ECF requirements is necessarily somewhat premature, because the courts of appeals are still in the process of completing the transition to CM/ECF. As of September 2008 the Fourth, Sixth, Eighth and Ninth Circuits were accepting CM/ECF filings.[2] It would presumably be useful for the circuits, in consultation with the Administrative Office, to consider the questions raised by Judge Quist as they adopt and refine their CM/ECF systems. Perhaps the CM/ECF system can be tailored to prompt the user to input all of the information required by Appellate Rule 26.1, plus any additional information required by local circuit provisions.

---

[2] See Press Release, Case Management / Electronic Case Files (CM/ECF), June 2008, available at http://www.pacer.psc.uscourts.gov/documents/press.pdf (last visited September 19, 2008) (stating that as of June 2008 the Fourth, Sixth and Eighth Circuits were accepting electronic filings); see also Administrative Order Regarding Electronic Filing in All Ninth Circuit Cases, 8/28/08, available at http://www.ca9.uscourts.gov/ca9/Documents.nsf/ecf-admin-order.pdf (last visited September 26, 2008) (stating that certain types of filings would be accepted via CM/ECF starting in September 2008).

One question raised by Judge Quist's letter relates to possible overlap between the CM/ECF system's requirements and Rule 26.1(c)'s requirements. If the CM/ECF system prompts the party to enter its Rule 26.1 disclosure information the first time that the party logs in to the CM/ECF system for the court of appeals, then perhaps it will someday be redundant to require – as Rule 26.1(c) does – that an original and three copies be filed when the Rule 26.1(a) statement is filed before the principal brief. However, such redundancies could probably be addressed by means of a local rule, since Rule 26.1(c) provides that the court can direct the filing of "a different number [of copies] by local rule." In any event, even if automated prompts by the CM/ECF system render obsolete Rule 26.1's requirement of paper copies of the disclosure, the need for Rule 26.1(b)'s continuing disclosure requirement would persist.

Though the Committee Note to original Rule 26.1 attempted to discourage the adoption of circuit-specific disclosure requirements,[3] local rules on the topic are numerous. As of mid-2008, relevant local provisions included D.C. Circuit Rule 26.1; Third Circuit Local Appellate Rule 26.1.1; Fourth Circuit Rule 5; Fourth Circuit Rule 8; Fourth Circuit Rule 9(a); Fourth Circuit Rule 21(b); Fourth Circuit Rule 26.1; Fourth Circuit Rule 27(c); Fourth Circuit Rule 27(d); Fourth Circuit Form A; Fifth Circuit Rule 26.1.1; Fifth Circuit Rule 28.2.1; Sixth Circuit Rule 26.1; Sixth Circuit Rule 28(e); Sixth Circuit Form 6CA-1; Seventh Circuit Rule 26.1; Eighth Circuit Rule 26.1A; Ninth Circuit Rule 21-3; Eleventh Circuit Rule 5-1; Eleventh Circuit Rule 21-1; Eleventh Circuit Rule 26.1-1; Eleventh Circuit Rule 26.1-2; Eleventh Circuit Rule 26.1-3 & accompanying IOP; Eleventh Circuit Rule 27-1(a)(9); Eleventh Circuit Rule 28-1(b); Eleventh Circuit Rule 29-1; Eleventh Circuit Rule 35-5; IOP foll. Eleventh Circuit Rule 42-4; IOP foll. Eleventh Circuit Rule 47-6; Eleventh Circuit Add. II(a); Federal Circuit Rule 26.1; and Federal Circuit Rule 47.4. At least one circuit has adopted local rules requiring electronic submission of disclosure statements.[4] Once further clarification is received from the Committee on Codes of Conduct concerning the specifics of that Committee's inquiry, it may be fruitful to analyze these local circuit requirements. Such an analysis may help to highlight areas for future Appellate Rules Committee consideration.

---

[3] The 1989 Committee Note to Rule 26.1 observes: "If a Court of Appeals wishes to require additional information, a court is free to do so by local rule. However, the committee requests the courts to consider the desirability of uniformity and the burden that varying circuit rules creates on attorneys who practice in many circuits." It may be the case that the advent of CM/ECF will ease the burden imposed by differing local circuit rules, in the sense that the CM/ECF prompts will alert attorneys to the nature of the particular circuit's disclosure requirements.

[4] See Eleventh Circuit Rule 26.1-2(b) ("On the same day a certificate is served, the party filing it must also complete the court's web-based certificate at www.ca11.uscourts.gov, providing the information required by that form. Pro se parties are not required or authorized to complete the web-based certificate."); Eleventh Circuit Rule 26.1-2(g) ("On the same day an amended certificate is served, that party must also update the web-based certificate to reflect the amendments.").

II. Issues relating to bankruptcy and criminal practice

The second issue raised in Judge Quist's letter concerns bankruptcy practice. The Committee on Codes of Conduct asks whether the Rules adequately address the challenges of conflict screening in bankruptcy proceedings. The letter observes that "the changing status of creditors and other interested parties during the course of a bankruptcy case makes it more difficult to apply an automated conflict screening program to the bankruptcy courts." This observation seems most directly relevant to Bankruptcy Rule 7007.1. It is not immediately apparent that such concerns would affect the conduct of a bankruptcy-related appeal in a way that would require changes to Appellate Rule 26.1. Rule 26.1's disclosure requirement encompasses "[a]ny nongovernmental corporate party to a proceeding in a court of appeals." Upon initial consideration, there does not seem to be any reason to think that this definition would require broadening. However, the Bankruptcy Rules Committee plans to discuss the question of practice under Bankruptcy Rule 7007.1 at its spring 2009 meeting, and Professor Gibson has promised to alert us if the Bankruptcy Rules Committee discerns a reason to consider changes to Appellate Rule 26.1.

The third issue raised in Judge Quist's letter relates to "the need to obtain restitution information related to criminal victims so that judges can consider whether to recuse." The letter questions whether Criminal Rule 12.4 currently requires sufficient disclosure in this respect. This inquiry obviously falls within the primary jurisdiction of the Criminal Rules Committee; when that Committee considers the question, it will be useful to obtain advice concerning the practice in connection with appeals in which restitution is an issue. It appears that in at least some of those appeals Appellate Rule 26.1 would already require the appropriate disclosures.[5] But it would be advisable to obtain the Criminal Rules Committee's input on whether this will always be true. For example, are there any instances in which an appeal to which the victim is not a party might nonetheless implicate the question of restitution? The Criminal Rules Committee's advice on such questions would help to inform this Committee's further deliberations.

Encl.

[5] Thus, if the victim seeking restitution is a nongovernmental corporate party and that victim is a party to the proceeding in the court of appeals, Appellate Rule 26.1(a)'s disclosure requirement would be triggered.

COMMITTEE ON CODES OF CONDUCT
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
UNITED STATES DISTRICT COURT
482 GERALD R. FORD FEDERAL BUILDING
110 MICHIGAN STREET, N.W.
GRAND RAPIDS, MI 49503-2363

JUDGE JANICE ROGERS BROWN
JUDGE KAREN K. BROWN
JUDGE CAMERON McGOWAN CURRIE
JUDGE JAY A. GARCIA-GREGORY
JUDGE ANDREW S. HANEN
JUDGE RICHARD G. KOPF
JUDGE ALAN D. LOURIE
JUDGE JAMES F. McCLURE, JR.
JUDGE M. MARGARET McKEOWN
JUDGE ALAN H. NEVAS
JUDGE RUDOLPH T. RANDA
JUDGE HUGH B. SCOTT
JUDGE RONALD A. WHITE
JUDGE CHARLES R. WILSON

JUDGE GORDON J. QUIST
CHAIRMAN

ROBERT DEYLING
COUNSEL

(202) 502-1100

Tel. (616) 456-2253
Fax (616) 456-2243
Email: quist@miwd.uscourts.gov

May 8, 2008

Honorable Lee H. Rosenthal
Chair
Committee on Rules of Practice and Procedure
United States District Court
11535 Bob Casey United States Courthouse
515 Rusk Street
Houston, TX 77002-2600

Re: Conflict Screening Policy Issues

Dear Judge Rosenthal:

In September 2006, the Judicial Conference adopted the Mandatory Conflict Screening Policy (attached). The Judicial Conference Committee on Codes of Conduct, which recommended the adoption of the conflict screening policy, has identified three issues related to conflict screening that may merit the attention of the Standing Committee on Rules. Briefly, these issues all concern potential amendments to the federal rules of procedure that require the disclosure of corporate parent information, information that judges need in order to make informed determinations concerning recusal.[1]

[1] The federal rules of procedure require the parties to file statements disclosing their corporate parents. *See* Fed. R. Civ. P. 7.1, Fed. R. Crim. P. 12.4, Fed. R. App. P. 26.1; Fed. R. Bank. P. 7007.1

The first issue the Committee has identified concerns the scope of the disclosures, and the method used to file them. The district court version of the Case Management/Electronic Case Files (CM/ECF) system now permits attorneys to enter corporate parent information electronically, and allows the attorneys to label corporations as either a "parent" or "affiliate" when entered into the database. Similar adjustments are planned for the bankruptcy court CM/ECF system. Thus, the CM/ECF system now provides attorneys with an electronic method to enter corporate parent information directly into the system, which will ease the burden on clerks' offices to manually enter the information from the disclosure statements filed by attorneys.

At the same time, however, it seems clear that attorneys may be required to prepare and transmit the same information twice: once when preparing the disclosure statement to be filed with the court, and again when entering the information into the CM/ECF database. In addition, because some courts require the disclosure of *expanded* corporate disclosure information that is not required by the federal rules (i.e., information about the parties' corporate affiliates other than corporate parents), there may be differences between the information required in the disclosure statements and the information that attorneys enter in the electronic system. The Committee has been informed that the Administrative Office is examining additional steps that could be taken to address this issue, but the CM/ECF system does not currently have the capability to extract information from a disclosure statement, add it to the CM/ECF conflict screening database, and use that information to perform conflict screening.

Second, the Committee observes that the changing status of creditors and other interested parties during the course of a bankruptcy proceeding may complicate the implementation of conflict screening software in the bankruptcy courts. In a bankruptcy case there are usually numerous creditors who are not considered parties for recusal purposes but who may become parties during the course of the case. A creditor's status could change, for example, with the filing of an "adversary proceeding." A creditor's status may also change with the filing of a "contested matter" that is also adversarial in nature. Moreover, in bankruptcy cases there may be many "interested parties," such as a potential lender or bidder who may pose a financial conflict for the presiding judge. Once a potential conflict is identified, a judge can determine whether it is necessary to withdraw from the matter or the case. The conflict, however, must first be identified. Thus, the changing status of creditors and other interested parties during the course of a bankruptcy case makes it more difficult to apply an automated conflict screening program to the bankruptcy courts.

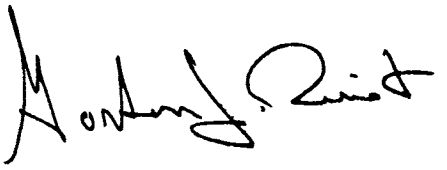
Accordingly, the Committee suggests that the Standing Committee on Rules may wish to consider the special conflict screening issues related to bankruptcy proceedings, especially the potential need for corporate parent information in adversary proceedings and contested matters. I would also note, in this regard, that the Bankruptcy Judges Advisory Group has established a special subcommittee to consider unique issues related to conflict screening for bankruptcy judges.

The third issue the Committee has identified concerns the need to obtain restitution information related to criminal victims so that judges can consider whether to recuse. The Committee has advised that a judge presiding over a criminal case must recuse if the judge has an

interest that could be "substantially affected by the outcome of the proceeding" under Canon 3C(1)(d)(iii) of the Code of Conduct for United States Judges, or if the judge's impartiality might reasonably be questioned under Canon 3C(1). Obtaining appropriate disclosures from the parties to permit judges to fulfill this potential recusal obligation may require an amendment to the Federal Rules of Criminal Procedure, as current Rule 12.4 does not appear to cover disclosure of information related to restitution. *See* Fed. R. Crim.P. 12.4 (Advisory Committee Notes).

Thank you for considering the issues that the Committee has identified concerning the relationship between the federal rules and the judiciary's Mandatory Conflict Screening Policy. If you have any question, please feel free to contact me.

For the Committee,



Gordon J. Quist
Chairman

Encl.

cc: James C. Duff, Director, Administrative Office of the U.S. Courts

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JAMES C. DUFF
Director

WASHINGTON, D.C. 20544

October 19, 2006

MEMORANDUM

To: Chief Judges, United States Courts

From: James C. Duff

RE: NEW POLICY ON AUTOMATED CONFLICT SCREENING
(ACTION REQUESTED)

RESPONSE DUE DATES: November 30, 2006 and January 31, 2007

As you are aware, on September 19, 2006, the Judicial Conference adopted a new policy requiring the use of automated conflict screening software to assist judges in identifying financial conflicts of interest (*see Attachment A*). The mandatory policy requires courts to implement automated conflict screening and requires judges and judicial officers to develop a conflicts list, update it on a regular basis, and use it in automated screening (as a supplement to personal review of cases for conflicts). The judiciary's Case Management/Electronic Case Files (CM/ECF) system contains software for this purpose and is the preferred option.

The policy assigns chief judges and circuit councils specific responsibilities that will require immediate attention. **By November 30, 2006,** each chief judge is required to report to their circuit council the status of automated conflict screening in their court, including the number of judicial officers participating in automated screening, and any other information the circuit council seeks. **By January 31, 2007,** each circuit council is required to report to the Judicial Conference a preliminary plan to implement the policy. Courts not subject to the authority of a circuit council are to assume these responsibilities directly.

The Administrative Office will continue to improve existing CM/ECF conflict screening functionality and will provide training and assistance. In addition, I have assembled a working group of AO staff to support your implementation of this policy. They will be working with judges, court staff, and the Federal Judicial Center to develop

and disseminate guidance and materials for use in carrying out these new responsibilities. In that regard, and as a first step, they have developed a checklist for chief judges to use in preparing the November 30, 2006, report to the circuit councils (*see Attachment B*). In addition, the working group is developing the following materials that will be available in the near future:

- a checklist for circuit councils which will identify tasks that should be considered in implementing the policy;
- a checklist of decisions to be made by judges and clerks' office staff as they implement automated conflicts screening in CM/ECF; and
- an illustrative implementation plan, which circuit councils can use as a model for the preliminary plans to be submitted to the Judicial Conference by January 31, 2007.

If questions arise regarding policy guidance or interpretation, please contact Marilyn Holmes or Robert Deyling, Office of General Counsel, (202) 502-1100; for technical questions about the CM/ECF conflict screening software, please contact Gary Bockweg or Cam McCarthy, Office of Court Administration, (202) 502-2500. Peggy Irving, Chief of the Article III Judges Division, is coordinating AO support on these initiatives and she may be contacted for general information. The respective offices within the AO that support your operations are, of course, also available. These individuals, as well as the other members of the working group, will ensure your concerns are responded to quickly and comprehensively.

Attachments

cc: All United States Judges
Circuit Executives
District Court Executives
Clerks, United States Courts

Judicial Conference Policy on Mandatory Conflict Screening

Approved September 19, 2006

The Judicial Conference recognizes the efforts of the many courts which, with the assistance of the Administrative Office, have instituted automated conflict screening. Based on the proven effectiveness of automated screening and the importance of extending its use to all courts, the Judicial Conference adopts a mandatory conflict screening policy. This policy will be administered and directed by the circuit councils under the authority set forth in 28 U.S.C. 332(d)(1) (or by the individual courts not subject to the authority of a circuit council) and will provide that:

(1) The Administrative Office, in cooperation with the courts[1], shall continue developing, refining and deploying the necessary hardware and software for use in automated conflict screening in the Case Management/Electronic Case Files (CM/ECF) system, shall examine methods to improve the screening (including incorporating more sophisticated matching mechanisms and features available in other software), and shall provide information, training, and assistance to facilitate implementation of and participation in the screening.

(2) Each court shall implement automated conflict screening to identify financial conflicts of interest for judicial officers, and to notify the judicial officer (or designee) when a financial conflict is identified, through the screening component of the CM/ECF system (or other software with comparable function approved by the circuit council). The clerk's office shall administer the screening (including obtaining from the parties and entering upon receipt, or causing the parties to enter and update, if feasible, corporate parent information[2] and other relevant information). The clerk's office shall screen for financial conflicts on a regular schedule, including screening new matters as they are filed, and shall make reports as requested by the chief judge of the court and the respective circuit council. Each clerk's office shall also provide information (including periodic reminders to judicial officers), training, and assistance to facilitate participation in the screening.

(3) In addition to each judicial officer's personal review of cases for conflicts, each judicial officer shall develop a list identifying financial conflicts for use in conflict screening[3], shall review and update the list at regular intervals, and shall employ the list personally or with the assistance of court staff to participate in automated conflict screening.

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[1] This Judicial Conference policy extends to courts of appeals, district courts, the Court of International Trade, the Court of Federal Claims, and bankruptcy courts, and to the judicial officers thereof, but does not extend to the Supreme Court.

[2] *See* Fed. R. App. P. 26.1; Fed. R. Civ. P. 7.1; Fed. R. Crim. P. 12.4; Fed. R. Bankr. P. 7007.

[3] A model form is available for this purpose. *See* Form AO-300.

(4) Each chief judge shall report to the respective circuit council by November 30, 2006, with an initial report on the status of automated financial conflict screening in the court, the number of judicial officers participating in automated conflict screening, and any additional information sought by the circuit council. Each circuit council shall report to the Judicial Conference by January 31, 2007, with a preliminary plan for implementation of the mandatory financial conflict screening program within the circuit, and shall thereafter make such further reports as are required by the Judicial Conference.

(5) Each circuit council shall make all necessary and appropriate orders to implement the foregoing mandatory conflict screening policy within the circuit, taking into account the specific circumstances of that circuit and each judicial officer and court within it, and providing for appropriate exceptions (e.g., a seriously ill judge who is not being assigned cases).

(6) Each court not subject to the authority of a circuit council shall assume the responsibilities described above for circuit councils.

CHECKLIST FOR THE CHIEF JUDGE'S REPORT TO THE CIRCUIT COUNCIL ON AUTOMATED CONFLICT SCREENING
(Due November 30, 2006)

On September 19, 2006, the Judicial Conference adopted a new policy mandating the use of automated conflict screening software to identify financial conflicts of interest for judges. Pursuant to the new policy, each chief judge shall make an initial report to the respective circuit council on the status of automated conflict screening in the court, including the number of judicial officers participating in automated conflict screening and any additional information sought by the circuit council. The report is due to the circuit council by November 30, 2006.

To assist chief judges with this report, the following checklist of information has been compiled for each chief judge.

☐ Determine the number of judges on the court using automated conflict screening.

- How many judges use the CM/ECF conflict screening system?
- How many judges use some other automated conflict screening system? (The circuit council might require a general description of the software to determine whether it is comparable to CM/ECF.)

☐ Is there other information the circuit council has requested from the chief judge? (For example, the circuit council might require the name, title, and location of judges not using automated conflict screening, or require the reasons why judges are not using automated conflict screening.)

☐ Are there any other circumstances unique to this court the circuit council should consider when developing the implementation plan?

☐ Prepare and send the report to the circuit council by November 30, 2006.

MEMORANDUM

DATE: March 27, 2009[1]

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item Nos. 08-AP-R & 09-AP-A

Rule 26.1(a) currently provides that "[a]ny nongovernmental corporate party to a proceeding in a court of appeals must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation."[2] Rule 29(c) currently states that "[i]f an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 26.1." * * *

In the comments submitted on the proposal to amend Appellate Rule 29(c), two commenters – Chief Judge Frank H. Easterbrook and the ABA's Council of Appellate Lawyers – suggest that the Committee should rethink the scope of Appellate Rule 26.1's disclosure requirement. They also suggest that the Committee revise the part of Rule 29(c) that requires amicus briefs filed by a corporation to include "a disclosure statement like that required of parties by Rule 26.1."

This memo discusses those suggestions. Part I briefly reviews the history of Rule 26.1

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[1] *N.B.: This copy of this memo has been lightly edited as of September 10, 2013. To avoid redundancy with other materials in the fall 2013 agenda book, some passages in this memo have been deleted and replaced with asterisks. Discussions of Supreme Court Rule 29.6 (in footnote 3) and of Appellate Rule 29 (in footnote 19) have been updated, as shown by the italicized text in those footnotes. However, Part I.B's discussion of local circuit provisions has not been updated; a discussion of relevant local circuit provisions appears in the separate memo by Margaret Zhang that is also included in the agenda book.*

[2] The rest of Rule 26.1 provides: "(b) Time for Filing; Supplemental Filing. A party must file the Rule 26.1(a) statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents. A party must supplement its statement whenever the information that must be disclosed under Rule 26.1(a) changes.

"(c) Number of Copies. If the Rule 26.1(a) statement is filed before the principal brief, or if a supplemental statement is filed, the party must file an original and 3 copies unless the court requires a different number by local rule or by order in a particular case."

and notes the existence of similar provisions in other sets of rules; Part I also notes that some circuits have local rules that impose broader disclosure requirements than Rule 26.1. Part II discusses the commenters' suggestions. Part III concludes that the topic is a significant one, and also one as to which the input of other committees is important.

I. A brief history of disclosure provisions

The possibility of setting broader disclosure requirements than those imposed by Rule 26.1 is a topic that has been discussed intermittently for some years. The history of Rule 26.1 illustrates that the topic is a contentious one. Rule 26.1 was narrowed during its original drafting and, after adoption, was amended to narrow its scope still further in some respects. The coordinated deliberations among the Advisory Committees which produced the 2002 amendments to the Civil, Criminal and Appellate Rules included an attempt to provide for broader requirements – but that attempt failed, in part because of the mechanism selected to accomplish it. Part I.A. reviews this history. Part I.B. notes the sharp variation among circuits with respect to local disclosure requirements: Some circuits impose significant additional disclosure requirements, while other circuits do not.

A. National rules

The Supreme Court has had a disclosure rule since 1980; the current rule is Supreme Court Rule 29.6.[3] Appellate Rule 26.1 was adopted in 1989 and was significantly amended in

[3] Supreme Court Rule 29.6 states in part: "Every document, except a joint appendix or amicus curiae brief, filed by or on behalf of a nongovernmental corporation shall contain a corporate disclosure statement identifying the parent corporations and listing any publicly held company that owns 10% or more of the corporation's stock. If there is no parent or publicly held company owning 10% or more of the corporation's stock, a notation to this effect shall be included in the document." *[N.B.: Since the time of this memo, Rule 29.6 has been augmented by the addition of the following after the text just quoted: "If a statement has been included in a document filed earlier in the case, reference may be made to the earlier document (except when the earlier statement appeared in a document prepared under Rule 33.2), and only amendments to the statement to make it current need be included in the document being filed. In addition, whenever there is a material change in the identity of the parent corporation or publicly held companies that own 10% or more of the corporation's stock, counsel shall promptly inform the Clerk by letter and include, within that letter, any amendment needed to make the statement current."]*

1998 and 2002. Civil Rule 7.1[4] and Criminal Rule 12.4[5] – both adopted in 2002 – were patterned after Appellate Rule 26.1. Bankruptcy Rule 7007.1[6] – adopted in 2003 – is worded somewhat differently than the Appellate Rule. Appellate Rule 29(c)'s corporate-disclosure requirement was added in 1998; the 1998 Committee Note to Rule 29 does not discuss this change.

A preliminary version of what would become Appellate Rule 26.1 was evidently broader than the version that ultimately took effect in 1989. As the Spring 1988 minutes explain:

> Prior to its last meeting the Committee approved and circulated a draft rule to the circuits. Ten circuits responded to the draft rule. Five circuits approved of the draft, although three circuits suggested amendments. Five circuits disapproved. The principal objection to the circulated draft was the breadth of disclosure required. In light of the response to the circulated draft, the rule approved by the Committee at its last meeting was more narrowly drawn. The Committee decided that the rule it approved represented a minimum requirement which all circuits should meet, and if the circuits want to require additional information they may do so.[7]

The version of Rule 26.1 that took effect in 1989 was broader in some ways than the current Rule. The 1989 version required "a statement identifying all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public." This requirement was altered in 1998; the 1998 amendments introduced language materially similar to the current requirement. The 1998 Committee Note explains:

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[4] Civil Rule 7.1(a) states: "A nongovernmental corporate party must file two copies of a disclosure statement that: (1) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or (2) states that there is no such corporation."

[5] Criminal Rule 12.4(a) states: "(1) Nongovernmental Corporate Party. Any nongovernmental corporate party to a proceeding in a district court must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation. (2) Organizational Victim. If an organization is a victim of the alleged criminal activity, the government must file a statement identifying the victim. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 12.4(a)(1) to the extent it can be obtained through due diligence."

[6] Bankruptcy Rule 7007.1(a) states: "Any corporation that is a party to an adversary proceeding, other than the debtor or a governmental unit, shall file two copies of a statement that identifies any corporation, other than a governmental unit, that directly or indirectly owns 10% or more of any class of the corporation's equity interests, or states that there are no entities to report under this subdivision."

[7] Minutes of the Advisory Committee on Appellate Rules, April 27, 1988, at 2.

The amendment deletes the requirement that a corporate party identify subsidiaries and affiliates that have issued shares to the public. Although several circuit rules require identification of such entities, the Committee believes that such disclosure is unnecessary.

A disclosure statement assists a judge in ascertaining whether or not the judge has an interest that should cause the judge to recuse himself or herself from the case. Given that purpose, disclosure of entities that would not be adversely affected by a decision in the case is unnecessary.

Disclosure of a party's parent corporation is necessary because a judgment against a subsidiary can negatively impact the parent. A judge who owns stock in the parent corporation, therefore, has an interest in litigation involving the subsidiary. The rule requires disclosure of all of a party's parent corporations meaning grandparent and great grandparent corporations as well. For example, if a party is a closely held corporation, the majority shareholder of which is a corporation formed by a publicly traded corporation for the purpose of acquiring and holding the shares of the party, the publicly traded grandparent corporation should be disclosed. Conversely, disclosure of a party's subsidiaries or affiliated corporations is ordinarily unnecessary. For example, if a party is a part owner of a corporation in which a judge owns stock, the possibility is quite remote that the judge might be biased by the fact that the judge and the litigant are co-owners of a corporation.

The amendment, however, adds a requirement that the party lists all its stockholders that are publicly held companies owning 10% or more of the stock of the party. A judgment against a corporate party can adversely affect the value of the company's stock and, therefore, persons owning stock in the party have an interest in the outcome of the litigation. A judge owning stock in a corporate party ordinarily recuses himself or herself. The new requirement takes the analysis one step further and assumes that if a judge owns stock in a publicly held corporation which in turn owns 10% or more of the stock in the party, the judge may have sufficient interest in the litigation to require recusal. The 10% threshold ensures that the corporation in which the judge may own stock is itself sufficiently invested in the party that a judgment adverse to the party could have an adverse impact upon the investing corporation in which the judge may own stock. This requirement is modeled on the Seventh Circuit's disclosure requirement.

In 2002, Rule 26.1(a) was amended "to require that nongovernmental corporate parties who have not been required to file a corporate disclosure statement -- that is, nongovernmental corporate parties who do not have any parent corporations and at least 10% of whose stock is not owned by any publicly held corporation -- inform the court of that fact." 2002 Committee Note to Appellate Rule 26.1(a).

More generally, it is interesting to examine the background to the 2002 Civil, Criminal and Appellate Rules amendments. There was concern that judges needed information to determine whether to recuse themselves in particular cases. The Judicial Conference's Codes of Conduct Committee raised the issue with the Standing Committee, which in turn asked the Advisory Committees to cooperate in developing disclosure provisions for the lower courts. Those efforts produced Civil Rule 7.1, Criminal Rule 12.4, and (in 2003) Bankruptcy Rule 7007.1. The process also involved the cooperation of the Appellate Rules Committee, which considered changes to Appellate Rule 26.1.

In the process that led to the 2002 amendments, participants discussed the possibility of broadening the disclosure requirements to include non-corporate parties. The proposed amendments to Appellate Rule 26.1 that were published for comment included a provision that would have required non-corporate parties to "file a statement that discloses any information that may be publicly designated by the Judicial Conference of the United States."[8] Committee minutes reflect that the Codes of Conduct Committee opposed the adoption of such a provision.[9] A number of public comments also opposed this provision, arguing inter alia that any additional requirements not stated in the Rule would be less accessible to lawyers. The 2002 amendments, as ultimately adopted, do not include that provision.

* * *

B. Local circuit provisions

As the Codes of Conduct Committee's inquiry highlights, consideration of disclosure requirements should also take note of local circuit provisions. The circuits vary widely in their approaches to disclosure.[10]

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[8] The proposal evidently was based on the view that the Judicial Conference was in the best position to determine what, if any, additional requirements to impose, and also on the view that such a provision would provide flexibility.

[9] See Minutes of the Standing Committee on Rules of Practice and Procedure, June 7-8, 2000, at 23 ("Professor Coquillette pointed that there was a fundamental difference of opinion between the Codes of Conduct Committee and the advisory committees. The Codes of Conduct Committee, he said, favored adopting civil and criminal rules that essentially just repeat FED. R. APP. P. 26.1. It contends that the provision allowing the Judicial Conference to require additional information is unnecessary.").

[10] *As explained in footnote 1, the discussion of local circuit provisions has not been updated. For a current discussion of such provisions, please see the memo by Margaret Zhang that is also included in the fall 2013 agenda book.*

The First,[11] Second,[12] Eighth[13] and Ninth[14] Circuits do not appear to impose any significant additional disclosure requirements beyond those set by Appellate Rule 26.1. The Seventh and Federal Circuits impose a few additional disclosure requirements, such as disclosing the names of lawyers involved in the case.[15] The D.C., Third, Fourth, Fifth, Sixth, Tenth and Eleventh Circuits impose much broader disclosure requirements than Appellate Rule 26.1; I will refer to them as the "broad-disclosure circuits."

The broad-disclosure circuits tend to expand the range of entities that must provide disclosure. So, for example, the D.C. Circuit's rule covers "[a] corporation, association, joint venture, partnership, syndicate, or other similar entity appearing as a party or amicus curiae." D.C. Circuit Rule 26.1(a). One portion of the Third Circuit's disclosure rule covers "[e]very party to an appeal." Third Circuit Local Appellate Rule 26.1.1(b). In non-criminal matters, the Fourth Circuit's disclosure requirements cover every "party ... other than the United States or a party proceeding in forma pauperis."[16] Fourth Circuit Rule 26.1(a)(1)(A). In criminal matters, the Fourth Circuit's requirements cover "corporate part[ies]." Fourth Circuit Rule 26.1(a)(1)(B). The Fifth Circuit's "certificate of interested persons" must be furnished for "all private (non-

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[11] I was unable to find a local provision on point in the First Circuit.

[12] I was unable to find a local provision on point in the Second Circuit.

[13] Eighth Circuit Rule 26.1A merely alters the timing and the number of copies for the Appellate Rule 26.1 statement.

[14] Ninth Circuit Rule 21-3 states that Appellate Rule 26.1's requirements apply to petitions for extraordinary writs. (It is unclear why this statement is necessary, since Appellate Rule 26.1(a) itself states that it applies "to a proceeding in the court of appeals" – a phrase that would seem to encompass extraordinary writ proceedings.) Ninth Circuit Rule 28-2.6 requires a statement identifying related cases; but that requirement does not seem directly relevant to the types of disclosure issues discussed here.

[15] Seventh Circuit Rule 26.1(b) provides in part: "The statement must disclose the names of all law firms whose partners or associates have appeared for the party or amicus in the case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court. If any litigant is using a pseudonym, the statement must disclose the litigant's true name." Federal Circuit Rule 47.4 requires disclosure of, inter alia, "[t]he name of the real party in interest if the party named in the caption is not the real party in interest" and "[t]he names of all law firms and the partners and associates that have appeared for the party in the lower tribunal or are expected to appear for the party in this court."

[16] However, the Rule also provides that "a state or local government is not required to file a disclosure statement in a case in which the opposing party is proceeding without counsel." Fourth Circuit Rule 26.1(a)(1).

governmental) parties." Fifth Circuit Rule 28.2.1. The Sixth Circuit's requirement covers "all parties and amici curiae" in non-criminal matters and "all corporate defendants in a criminal case." Sixth Circuit Rule 26.1(a). The Tenth Circuit's "certification of interested parties" must accompany "[e]ach entry of appearance." Tenth Circuit Rule 46.1(D). The Eleventh Circuit requires all parties and amici to file the "certificate of interested parties." Eleventh Circuit Rule 26.1-1.

The broad-disclosure circuits also expand the types of disclosures that must be made concerning entities that are not parties to the appeal. Appellate Rule 26.1 requires identification of "any parent corporation" and "any publicly held corporation that owns 10 % or more" of the disclosing corporation's "stock." The D.C. Circuit builds on this approach but broadens it – for example, by referring to "a 10 % or greater ownership interest (such as stock or partnership shares) in the entity." D.C. Circuit Rule 26.1(a).[17] Some circuits take an even broader approach. The Third Circuit requires disclosure of "every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest." Third Circuit Rule 26.1.1(b). Likewise, in the Fourth Circuit a party must identify "any publicly held corporation, whether or not a party to the present litigation, that has a direct financial interest in the outcome of the litigation by reason of a franchise, lease, other profit sharing agreement, insurance, or indemnity agreement." Fourth Circuit Rule 26.1(a)(2). The Fifth Circuit requires "a complete list of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent corporations, or other legal entities who or which are financially interested in the outcome of the litigation." Fifth Circuit Rule 28.2.1. The Sixth Circuit requires disclosure "[w]henever, by reason of insurance, a franchise agreement, or indemnity agreement, a publicly owned corporation or its affiliate, not a party to the appeal, nor an amicus, has a substantial financial interest in the outcome of litigation." Sixth Circuit Rule 26.1(b)(2). In the Tenth Circuit, "[t]he certificate must list all persons, associations, firms, partnerships, corporations, guarantors, insurers, affiliates, and other legal entities that are financially interested in the outcome of the litigation." Tenth Circuit Rule 46.1(D)(2). And the Eleventh Circuit requires "a complete list of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case or appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party." Eleventh Circuit Rule 26.1-1.

This is only a partial listing of the variations; there are others. For instance, some of the broad-disclosure circuits require each disclosure to encompass all known interests, whether they relate to the entity making the disclosure or to another party. See, e.g., Fifth Circuit Rule 28.2.1(a); Eleventh Circuit Rule 26.1-1. And some of the broad-disclosure circuits include special requirements for bankruptcy appeals, see Third Circuit Rule 26.1.1(c); Eleventh Circuit

[17] Likewise, one subpart of the Sixth Circuit's rule covers corporate parties or amici that are "subsidiar[ies] or affiliate[s] of any publicly owned corporation not named in the appeal." Sixth Circuit Rule 26.1(b)(1).

Rule 26.1-1, or for criminal appeals, see Eleventh Circuit Rule 26.1-1.

II. Suggestions concerning Appellate Rule 26.1 and proposed Appellate Rule 29(c)(6)

Part II.A. of this memo discusses Chief Judge Easterbrook's suggestions. Part II.B. discusses the suggestions by the ABA's Council of Appellate Lawyers.

A. Chief Judge Easterbrook's suggestions

Chief Judge Easterbrook focuses on the use of the term "corporation" in both Rule 26.1 and Rule 29(c). He argues that the term is both over- and under-inclusive.

As to the first of these critiques, Chief Judge Easterbrook states:

> On the one hand, many entities are organized as corporations even though they do not have stock (and hence cannot have "parent" corporations[)]. Many municipalities are corporations. Harvard University is a corporation, as is the Catholic Bishop of Chicago (a corporation sole), but the University of Chicago is organized as a charitable trust rather than as a corporation. There is no need for a special statement of interest from Seattle, Harvard, or a religious prelate.

Presumably, Chief Judge Easterbrook's concern about the Rules' application to municipalities focuses on Rule 29(c). Rule 26.1(a) explicitly limits the disclosure requirement to "nongovernmental" corporate parties. Rule 29(c)'s requirement, however, appears to apply to any "amicus curiae [that] is a corporation." Rule 29(c) does incorporate by reference the substance of Rule 26.1 – "a disclosure statement like that required of parties by Rule 26.1" – so perhaps one can argue that Rule 29(c), too, does not impose a disclosure requirement on municipalities. But such a conclusion would not seem to be compelled by the text of Rule 29(c). So it may be the case that Rule 29(c) requires an amicus that is a municipal corporation to file a disclosure statement. But the only downside, in that event, is that such an amicus must include a statement that there is no parent corporation and no publicly held corporation that owns 10 % or more of its stock. If the Committee wished to eliminate that downside, it could consider amending the relevant language in Rule 29(c) to say "if filed by an amicus curiae that is a nongovernmental corporation, a disclosure statement like that required of parties by Rule 26.1."

Chief Judge Easterbrook is correct to point out that both Rule 26.1(a) and Rule 29(c) require disclosures by a corporation even if the corporation does not have stock. His comment could be taken to suggest that one could exempt corporations that do not have stock from the disclosure obligation without losing any information that would be relevant to a judge's recusal decision. To evaluate this suggestion, it is useful to consider how it would be implemented. Presumably one would implement it by redrafting the rules so as not to cover corporations that do not have stock. But the problem with such a revised rule is that it would create ambiguity when a corporate amicus makes no disclosure. Suppose that Party X, a corporation, includes no

disclosure. The reader may be left to speculate about the reason for the absence of a disclosure – is it (a) because Party X does not have stock, or (b) because Party X overlooked the disclosure requirement? Where Party X is the Catholic Bishop of Chicago, it may be clear that the answer is (a). But without knowing much more about the use of the corporate form in every relevant jurisdiction, it would be difficult to say with confidence that the answer would be equally clear in every other possible instance. The downside of the current language is that some corporate parties will have to include a sentence noting that they have no stock and no parents. But that downside is counter-balanced by the advantage of avoiding ambiguity. I therefore would not suggest changing this aspect of the Rules.

Chief Judge Easterbrook's other critique is that the Rules are under-inclusive because they fail to elicit all information that would be relevant to a judge in considering whether to recuse.[18] As noted in Part I.B., the broad-disclosure circuits agree with Chief Judge Easterbrook and have adopted considerably more expansive local disclosure rules. (Interestingly, the Seventh Circuit does not fall in this category.) There would be advantages to a national rule requiring broader disclosure, to the extent that such a rule helped to elicit more information that assisted in recusal decisions. On the other hand, there would be costs to adopting a broader national requirement; for example, depending on how the requirement was drafted, it could be somewhat burdensome for parties and amici to determine and provide the required disclosure. A full exposition of the relevant considerations lies beyond the scope of this memo.

B. Suggestions by the ABA's Council of Appellate Lawyers

The ABA Council of Appellate Lawyers states:

> The Advisory Committee ... may wish to consider amending Rule 26.1 to apply to any person filing or moving for permission to file a brief as amicus curiae. Otherwise, a judge may consider a motion for permission to file a brief as amicus curiae without being aware of facts that might cause the judge to consider recusal.
>
> If Rule 26.1 is amended to include amici curiae, we suggest revising the proposed subdivision (c)(6) to require inclusion of the "same disclosure statement that is required of parties by Rule 26.1" or, alternatively, the "same disclosure statement that Rule 26.1 requires of parties." The word "like" in the present proposal is ambiguous as to whether some degree of difference may be permissible.

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[18] It appears that Chief Judge Easterbrook has made similar points before. See Report of Advisory Committee on Appellate Rules, May 11, 2001, at 92 (summarizing public comments on proposed amendments to Appellate Rule 26.1 and noting that Judge Easterbrook "strongly supports two aspects of the proposal – extending the disclosure obligation to noncorporate parties and requiring supplementation").

These suggestions appear to proceed from the premise stated in the second quoted paragraph – namely, that the current language of Rule 29(c) could be read to permit "some degree of difference" between the Rule 29(c) corporate-disclosure statement and the Rule 26.1 corporate-disclosure statement. But that concern is somewhat puzzling, because it is difficult to imagine what sort of difference would arise. It seems clear that a corporate amicus would understand that its obligation is to (a) identify any parent corporation and any publicly held corporation that owns 10 % or more of its stock or (b) state there is no such corporation. The Council of Appellate Lawyers does not suggest any variations that would be likely to arise under the Rules' current language. Accordingly, the Council's suggested change in language seems unnecessary.

III. Conclusion

The suggestions raised in Part II warrant the Committee's consideration. Of those suggestions, the most significant is Chief Judge Easterbrook's proposal that the Committee consider broadening the scope of the disclosure requirements.[19] But though that proposal is a thoughtful one, it also raises complex issues.

The history of Appellate Rule 26.1 suggests that, at least in prior years, the interest of some in broadening the disclosure requirement has been counter-balanced by others' preferences for narrowing the requirement. Rule 26.1, as originally adopted, was narrower than the prior version that had been considered by the Committee. The 1998 amendments narrowed Rule 26.1 by deleting the provisions concerning subsidiaries and affiliates (though they also extended the Rule by adding the 10 %-stock-ownership provision). The survey of current local practices suggests that while there could be support for broadening the national rules' disclosure requirements, there also could be opposition.

The current landscape of disclosure requirements highlights the need for consultation with other committees. If the Appellate Rules Committee were to consider proposals to amend Rule 26.1, it would presumably wish to do so in coordination with the Civil, Criminal and Bankruptcy Rules Advisory Committees and also with the Codes of Conduct Committee. The Codes of Conduct Committee has recently raised a number of questions concerning disclosure requirements. The committees' discussion of those questions might also provide a context for seeking input on the issues treated in this memo.

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[19] Chief Judge Easterbrook's concern about the current Rules' *over*breadth is also worth considering. As noted in Part II, the Committee might wish to consider whether that concern could be addressed by amending Rule 29(c)(6) *[as of 2013, the relevant subdivision is Rule 29(c)(1)]* to refer to *nongovernmental* corporations.

MEMORANDUM

DATE: August 15, 2013

TO: Professor Catherine T. Struve

FROM: Margaret Zhang

RE: Disclosure Rules and Judicial Recusals

The Federal Rules of Appellate Procedure require nongovernmental corporate parties and corporate amici to disclose their parent corporations, as well as any publicly held corporations that own 10% or more of their stock. Fed. R. App. P. 26.1; Fed. R. App. P. 29(c)(1). The rules provide minimum disclosure requirements to help judges determine whether they must recuse.[1] Fed. R. App. P. 26.1 advisory committee's note (1989).

However, local rules requiring additional disclosures are numerous.[2] You have asked for a systematic account of the relevant local rules and analysis of whether the local rules assist judges' recusal determinations. This memo classifies local rules' disclosure requirements and shows how the local disclosure rules can help judges determine whether to recuse.

For federal appellate judges, situations compelling recusal are listed in 28 U.S.C. § 47 (2011), 28 U.S.C. § 455 (2011), and Canons 3C and 3D of the Code of Conduct for United States Judges ("Code").[3] In general, judges must recuse when they have actual bias against a party, and

[1] Some give the terms "recusal" and "disqualification" distinct meanings—i.e., a judge recuses when he withdraws sua sponte, but is disqualified when a party's motion triggers withdrawal. *See generally* Charles Gardner Geyh, Fed. Judicial Ctr., Judicial Disqualification: An Analysis of Federal Law 2 (2010).

This memo uses "recusal" and "disqualification" interchangeably, since parties' disclosures could prompt either a judge's recusal sua sponte or disqualification because of a party's motion.

[2] See generally D.C. Cir. R. 26.1; 3d. Cir. L.A.R. 26.1.1; 4th Cir. Loc. R. 26.1; 5th Cir. R. 28.2.1; 6th Cir. R. 26.1; 7th Cir. R. 26.1; 10th Cir. R. 46.1(D); 11th Cir. R. 26.1-1; Fed. Cir. R. 47.4. The local rules cited in this memo are set forth in Appendix A.

[3] These provisions are set forth in Appendix B.

Another recusal statute, 28 U.S.C. § 144 (2011), requires a district court judge to recuse following a party's timely and sufficient affidavit stating that the judge has a personal bias or prejudice. Since 28 U.S.C. § 144 only applies to the district courts, it is not discussed. Similarly, because statutory recusal requirements are inclusive of constitutional recusal requirements, this

also when a reasonable person would question their impartiality.[4] 28 U.S.C. §§ 455(a), 455(b)(1); Code Canon 3C(1). Situations meriting recusal for these reasons are myriad. See, e.g., United States v. Microsoft Corp., 253 F.3d 34, 114–15 (D.C. Cir. 2001) (requiring the judge's recusal due to his improper comments about a pending case). In contrast, 28 U.S.C. § 47, 28 U.S.C. § 455(b), and the other provisions in Canon 3C of the Code describe specific and particular situations when judges must recuse.

Disclosures required by local rules can help judges determine when they must recuse, especially in relation to particular grounds for recusal under 28 U.S.C. § 47, 28 U.S.C. § 455(b), and Canon 3C. Even if disclosures pursuant to local rules do not prompt recusal under these provisions, the disclosures can help judges determine when a reasonable person would question the judges' impartiality under 28 U.S.C. § 455(a). Overall, judges' recusal determinations benefit from disclosures produced by the various local rules.

I. Entities with financial interests in a case's outcome

Beyond disclosure of parent corporations and corporations owning 10% or more of a party's stock, seven circuits require disclosure of other entities with financial interests in a case's outcome. See D.C. Cir. R. 26.1; 3d. Cir. L.A.R. 26.1.1; 4th Cir. Loc. R. 26.1; 5th Cir. R. 28.2.1; 6th Cir. R. 26.1; 10th Cir. R. 46.1(D); 11th Cir. R. 26.1-1. Some circuits' broad rules require disclosure of all financially interested persons, associations, firms, and partnerships. 5th Cir. R. 28.2.1; 10th Cir. R. 46.1(D); 11th Cir. R. 26.1-1. The Eleventh Circuit's rule even requires disclosure of entities that have non-financial interests in a case's outcome.

A judge must recuse when he knows that (1) his minor child residing in his household, (2) his spouse, or (3) the judge himself holds a financial interest in a case.[5] 28 U.S.C. §§ 455(b)(4), 455(d)(4); Code Canons 3C(1)(c), 3C(3)(c). Financial interests requiring recusal can involve non-corporate entities, and even individual persons. The local rules mentioned above require disclosures of just such entities. Therefore, these rules can help judges detect non-corporate financial interests that compel recusal.

Judges must also recuse if they know that a relative within three degrees has a non-financial interest that could be substantially affected by a case's outcome. 28 U.S.C. §§

memo does not discuss recusals required under the Constitution's due process clauses, see, e.g., Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009).

[4] A judge's possible lack of impartiality under 28 U.S.C. § 455(a) can be waived by agreement of the parties. 28 U.S.C. § 455(e). To waive a ground for disqualification under 28 U.S.C. § 455(a), the judge's only ground for disqualification must arise under 28 U.S.C. § 455(a), and the judge must fully disclose the basis for disqualification on the record. Id.

[5] See, e.g., Tramonte v. Chrysler Corp., 136 F.3d 1025, 1030 (5th Cir. 1998) ("[W]here a judge, her spouse, or a minor child residing in her household is a member of a putative class, there exists a 'financial interest' in the case mandating recusal under § 455(b)(4).").

455(b)(4), 455(b)(5)(iii); Code Canons 3C(1)(c), 3C(1)(d)(iii). Thus, because the Eleventh Circuit's rule requires parties to disclose all entities with an interest in the case's outcome, the rule can help circuit judges detect non-financial interests requiring their recusal.

II. Law firms and attorneys

Five circuits require parties to disclose law firms and attorneys affiliated with a case. See 5th Cir. R. 28.2.1; 7th Cir. R. 26.1(b); 10th Cir. R. 46.1(D)(4); 11th Cir. R. 26.1-1; Fed. Cir. R. 47.4(a)(4). While the Fifth Circuit merely requires disclosure of opposing counsel, the other circuits all seek exhaustive lists of interested attorneys. For example, the Tenth Circuit requires disclosure of attorneys who previously represented any party in related proceedings—even if those attorneys will not enter appearances for the appeal at issue.

Two types of mandatory judicial recusals relate to judges' relationships with law firms and attorneys. First, judges must recuse if their former private law firm employment coincided with that law firm's interest in the case at issue. 28 U.S.C. § 455(b)(2); Code Canon 3C(1)(b).[6] Second, a judge must recuse when a lawyer in the case is a family member within three degrees of relationship to the judge, even if the lawyer has not entered an appearance in the case. 28 U.S.C. § 455(b)(5)(ii); Code Canon 3C(1)(d)(ii). Judges can more easily detect these situations if they know all the interested law firms and attorneys in a case. Hence, the five local rules requiring attorney disclosures can help judges determine whether to recuse.[7]

III. Victims in criminal appeals

Both the Third and Eleventh Circuits require parties to disclose the victim(s) in criminal appeals. 3d Cir. L.A.R. 26.1.1(d); 11th Cir. R. 26.1-1. Though the Third Circuit merely requires disclosure of organizational victims, it also requires disclosure of corporate victims' parent corporations, and publicly held corporations that own 10% or more of the victims' stock.

Judges' interests in crime victims can prompt recusal, particularly when restitution is at issue. See, e.g., United States v. Rogers, 119 F.3d 1377, 1384 (9th Cir. 1997) (discussing the possibility of recusal because the judge owned stock in the victim bank but holding that, under the circumstances, recusal was not required). A victim is not a "party" under 28 U.S.C.

[6] See generally Preston v. United States, 923 F.2d 731, 734–35 (9th Cir. 1991) (requiring recusal because a judge's former law firm represented an interested party that, while not named in the suit, was subject to discovery and a potential indemnification claim by a named party).

[7] Under 28 U.S.C. § 455(b)(3) and Canon 3C(1)(e) of the Code, sometimes judges must also recuse when former government employment coincided with the case at issue. However, in these situations, judges must recuse only if they were personally involved with the case—not if former colleagues were involved. Thus, attorney disclosure rules will not generally help judges determine whether to recuse because of former government employment.

§ 455(b)(4), which compels recusal when a judge has a financial interest in a party. Id.[8] However, a judge's interest in a victim could sometimes prompt the judge's recusal. See, e.g., United States v. Lauersen, 348 F.3d 329, 336-37 (2d Cir. 2003) ("[W]e believe that recusal is required only where the extent of the judge's interest in the crime victim is so substantial, or the amount that the victim might recover as restitution is so substantial, that an objective observer would have a reasonable basis to doubt the judge's impartiality."), aff'd on other grounds on reh'g, 362 F.3d 160 (2d Cir. 2004), cert. granted & judgment vacated on other grounds, 543 U.S. 1097 (2005). Thus, the Third and Eleventh Circuits' victim disclosure rules can alert judges to situations in criminal appeals where their interests may compel recusal.

IV. Participants in bankruptcy appeals

The Third and Eleventh Circuits also require additional disclosures from parties in bankruptcy appeals. 3d Cir. L.A.R. 26.1.1(c); 11th Cir. R. 26.1-1. In both circuits, parties must disclose the debtor, the members of the creditors' committee, and other active participants in the case.

In bankruptcy appeals, as in other appeals, judges must recuse for any of the reasons in 28 U.S.C. § 47, 28 U.S.C. § 455, and Canon 3C of the Code. However, bankruptcy recusal determinations are more difficult, since the often-numerous creditors can vary in their level of participation. For this reason, the Judicial Conference Committee on Codes of Conduct advises that not every creditor is a party in a bankruptcy case for recusal purposes. Advisory Opinion No. 100, Identifying Parties in Bankruptcy Cases for Purposes of Disqualification (June 2009). Rather, bankruptcy parties are generally limited to "the debtor; a trustee; parties to an adversary proceeding; and participants in a contested matter." Id. The Third and Eleventh Circuit local rules require disclosure of precisely these entities in bankruptcy appeals. Thus, these rules can help judges determine whether they must recuse due to an interest in a bankruptcy party.

V. Judges' previous participation

The Third Circuit requires parties to give notice if any Third Circuit judge previously participated at any stage of the case. 3d Cir. L.A.R. 26.1.2. Similarly, the Eleventh Circuit requires "a complete list of the trial judge(s) . . . that have an interest in the outcome of a particular case or appeal." 11th Cir. R. 26.1-1.

[8] In 2004, the Crime Victims' Rights Act ("Act") gave victims the right to seek mandamus if a district court denies the victims' rights granted under the Act. 18 U.S.C. § 3771(d)(3) (2012). Interpreting the Act, courts have repeatedly held that victims are not parties in the district court who may directly appeal criminal cases. See, e.g., United States v. Fast, 709 F.3d 712, 715–16 (8th Cir. 2013); United States v. Hunter, 548 F.3d 1308, 1310–11 (10th Cir. 2008). However, for recusal purposes, courts have not yet ruled on whether a victim seeking mandamus under the Act is a "party" in the court of appeals.

Under 28 U.S.C. § 47 and Canon 3C(1)(e) of the Code, judges must recuse when they are assigned to preside over an appeal from the decision of a case or issue they decided in a lower court. Therefore, the Third and Eleventh Circuits' disclosure rules can alert appellate judges to cases compelling recusal under 28 U.S.C. § 47 and Canon 3C(1)(e).

VI. Parties' identities

Two local rules require disclosure of parties' identities when those identities are otherwise unknown to the court. Seventh Circuit Rule 26.1(b) requires that parties using pseudonyms disclose their true names. Federal Circuit Rule 47.4(a)(2) requires disclosure of "the real party in interest if the party named in the caption is not the real party in interest."

28 U.S.C. § 455(b) and Canon 3C of the Code require recusal when a judge has certain relationships with or interests in a party to the proceeding. 28 U.S.C. §§ 455(b)(1), 455(b)(4), 455(b)(5); Code Canons 3C(1)(a), 3C(1)(c), 3C(1)(d). For judges to assess their relationships and interests, they must know the parties' identities. By requiring disclosures of certain parties' otherwise-unknown identities, the Seventh and Federal Circuits' rules facilitate judges' recusal determinations.

VII. Organizations' general nature and purpose

For organizational parties and amici, D.C. Circuit Rule 26.1 requires disclosure of the organization's "general nature and purpose, insofar as relevant to the litigation."

VIII. Corporations' stock symbols

The Eleventh Circuit requires that parties list disclosed corporations with their stock ("ticker") symbols. 11th Cir. R. 26.1-3(c).

In 2006, the Judicial Conference adopted a mandatory conflict screening policy, and the policy required courts to detect judges' financial conflicts of interest using automated software. While parties' Rule 26.1 disclosures may name corporations in many ways (e.g., "Apple Inc." or "Apple, Inc." or merely "Apple"), parties likely cite corporations' stock symbols uniformly. Therefore, requiring stock-symbol disclosures can help automated software effectively detect conflicts of interest that compel a judge's recusal.

IX. Disclosures from non-corporate parties and amici

Nine circuits extend disclosure duties not just to corporate parties and amici, but also to non-corporate parties and amici. The D.C. Circuit requires disclosure statements from all organizational entities. D.C. Cir. R. 26.1(a). The other eight circuits' disclosure requirements

extend—barring a handful of exceptions[9]—to every party in an appeal. 3d. Cir. L.A.R. 26.1.1; 4th Cir. Loc. R. 26.1(a)(1)(A); 5th Cir. R. 28.2.1; 6th Cir. R. 26.1(a); 7th Cir. R. 26.1(a); 10th Cir. R. 46.1(D)(1); 11th Cir. R. 26.1-1; Fed. Cir. R. 26.1.

A judge's non-corporate interests can compel recusal. See, e.g., 28 U.S.C. § 455(d)(4) (stating that financial interests requiring recusal include "a relationship as director, adviser, or other active participant in the affairs of a party"). Thus, both corporate and non-corporate disclosures can help judges determine whether to recuse. For this reason, the nine circuits' generally applicable local rules reduce the chance that judges lack notice of grounds for recusal.

Amicus disclosures similarly help judges determine whether to recuse, since an amicus curiae's participation can also compel a judge's recusal. See generally Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist. No. 1, 839 F.2d 1296, 1301–02 (8th Cir. 1988) (raising question of recusal when a judge's former colleague had appeared for an amicus in a previously related case). In general, a judge's interest in a participating amicus will require the judge's recusal if the case's outcome would substantially affect the interest, or if a reasonable person would question the judge's impartiality. Cf. Judicial Conference Committee on Codes of Conduct, Advisory Op. No. 63, Disqualification Based on Interest in Amicus that is a Corporation (June 2009) ("[I]f an interest in an *amicus* would not be substantially affected by the outcome, and if the judge's impartiality might not otherwise reasonably be questioned, stock ownership in an *amicus* is not *per se* a disqualification."). Amicus disclosures may alert judges to interests in an amicus that require a recusal. Hence, amicus disclosure rules can help judges determine whether to recuse.[10]

X. Judges' questioned impartiality

Even if a case does not require a judge's recusal under 28 U.S.C. § 47, 28 U.S.C. § 455(b), or specific portions of Canon 3C, local disclosure rules can alert judges in cases where the judges' impartiality might reasonably be questioned under 28 U.S.C. § 455(a). For example,

[9] The Fourth, Fifth, Sixth, and Federal Circuits except governmental parties from disclosure requirements. 4th Cir. Loc. R. 26.1(a)(1)(A); 5th Cir. R. 28.2.1; 6th Cir. R. 26.1(a); Fed. Cir. R. 26.1. The Seventh, Tenth, and Federal Circuits require disclosures only from parties with appearing attorneys. 7th Cir. R. 26.1(a); 10th Cir. R. 46.1(D)(1); Fed. Cir. R. 26.1.

Similarly, the Fourth Circuit does not require disclosures from parties proceeding in forma pauperis. 4th Cir. Loc. R. 26.1(a)(1)(A). Nonetheless, the Fourth Circuit's rule requires disclosures from all other non-governmental parties in civil, agency, bankruptcy, and mandamus cases; however, in criminal and post-conviction cases, only corporate parties must file disclosures. 4th Cir. Loc. R. 26.1(a)(1)(B).

[10] Amicus disclosures can also help judges determine whether to grant motions for leave to file amicus briefs. For example, in the Second Circuit, judges "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." 2d Cir. R. 29.1(a).

United States v. Anderson involved an attorney who recently testified against the presiding judge; the judge was required to recuse. 160 F.3d 231, 234 (5th Cir. 1998). Recusal was required not by 28 U.S.C. § 455(b), but by his questioned impartiality under 28 U.S.C. § 455(a). Id. In cases like Anderson, local rules requiring attorney disclosures can help judges detect grounds for recusal under 28 U.S.C. § 455(a). Likewise, since grounds for recusal under 28 U.S.C. § 455(a) are myriad, the other local disclosure rules can also help judges determine when their questioned impartiality under 28 U.S.C. § 455(a) compels recusal.

In sum, the various local disclosure rules can each help judges determine whether they must recuse from hearing an appeal.[11]

[11] Further empirical study may be desired. To decide whether a disclosure requirement should generalize nationally, it may be helpful to know how well the requirement detects grounds for recusal, and how well it reduces the number of motions for recusal and failure-to-recuse complaints under the Judicial Conduct and Disability Act. Similarly, it may be helpful to examine how disclosure requirements interact with parties' CM/ECF filing requirements.

APPENDIX A
LOCAL DISCLOSURE RULES

D.C. Circuit Rule 26.1

Disclosure Statement

(a) A corporation, association, joint venture, partnership, syndicate, or other similar entity appearing as a party or amicus curiae in any proceeding must file a disclosure statement, at the time specified in FRAP 26.1; Circuit Rules 5, 8, 12, 15, 18, 21, 27, and 35(c); or as otherwise ordered by the court, identifying all parent companies and any publicly-held company that has a 10% or greater ownership interest (such as stock or partnership shares) in the entity. A revised corporate disclosure statement must be filed any time there is a change in corporate ownership interests that would affect the disclosures required by this rule. For the purposes of this rule, "parent companies" include all companies controlling the specified entity directly, or indirectly through intermediaries.

(b) The statement must identify the represented entity's general nature and purpose, insofar as relevant to the litigation. If the entity is an unincorporated entity whose members have no ownership interests, the statement must include the names of any members of the entity that have issued shares or debt securities to the public. No such listing need be made, however, of the names of members of a trade association or professional association. For purposes of this rule, a "trade association" is a continuing association of numerous organizations or individuals operated for the purpose of promoting the general commercial, professional, legislative, or other interests of the membership.

Second Circuit Local Rule 29.1(a)

Leave to File

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.

Third Circuit Local Appellate Rule 26.1.1

Disclosure of Corporate Affiliations and Financial Interest

(a) Promptly after the notice of appeal is filed, each corporation that is a party to an appeal, whether in a civil, bankruptcy, or criminal case, must file a corporate affiliate/financial interest disclosure statement on a form provided by the clerk that identifies every publicly owned corporation with which it is affiliated but which is not named in the appeal. The form must be completed whether or not the corporation has anything to report.

(b) Every party to an appeal must identify on the disclosure statement required by FRAP 26.1 every publicly owned corporation not a party to the appeal, if any, that

has a financial interest in the outcome of the litigation and the nature of that interest. The form must be completed only if a party has something to report under this section.

(c) In all bankruptcy appeals, counsel for the debtor or trustee of the bankruptcy estate must promptly file with the clerk a list identifying (1) the debtor, if not named in the caption, (2) the members of the creditors' committees or the top 20 unsecured creditors, and (3) any entity not named in the caption which is an active participant in the proceeding. If the debtor or trustee of the bankruptcy estate is not a party, the appellant must file this list with the clerk.

(d) In criminal appeals, the government must file a disclosure statement if an organization is a victim of the crime. If the organizational victim is a corporation, the statement must also identify any parent corporation and any publicly held corporation that owns 10% or more of its stock to the extent it can be obtained through due diligence. The government may seek to be relieved from the requirements of this rule by filing a motion demonstrating that compliance is impossible.

Third Circuit Local Appellate Rule 26.1.2

Notice of Possible Judicial Disqualification

(a) If any judge of this court participated at any stage of the case, in the trial court or in related state court proceedings, appellant, promptly after filing the notice of appeal, must separately file with the clerk a notice of the name of the judge and the other action, and must send a copy of such notice to appellee's counsel. Appellee has a corresponding responsibility to so notify the clerk if, for any reason, appellant fails to comply with this rule fully and accurately.

(b) A party seeking disqualification of a judge for any other reason must file a motion, which must comply with FRAP 27 and L.A.R. 27.

Fourth Circuit Local Rule 26.1

Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation

(a) Disclosure Requirements Applicable to Parties, Including Intervenors.

(1) Who Must File.

(A) Civil, Agency, Bankruptcy, and Mandamus Cases. A party in a civil, agency, bankruptcy, or mandamus case, other than the United States or a party proceeding in forma pauperis, must file a disclosure statement, except that a state or local government is not required to file a disclosure

statement in a case in which the opposing party is proceeding without counsel.

(B) Criminal and Post-Conviction Cases. A corporate party in a criminal or postconviction case must file a disclosure statement.

(2) Information to Be Disclosed by Parties, Including Intervenors.

(A) Information Required by FRAP 26.1. A party must identify any parent corporation and any publicly held corporation that owns 10% or more of the party's stock, or state that there is no such corporation.

(B) Information About Other Financial Interests. A party must identify any publicly held corporation, whether or not a party to the present litigation, that has a direct financial interest in the outcome of the litigation by reason of a franchise, lease, other profit sharing agreement, insurance, or indemnity agreement, or state that there is no such corporation.

(C) Information About Other Publicly Held Legal Entities. Whenever required by FRAP 26.1 or this rule to disclose information about a corporation that has issued shares to the public, a party shall also disclose information about similarly situated master limited partnerships, real estate investment trusts, or other legal entities whose shares are publicly held or traded, or state that there are no such entities.

(D) Information About Trade Association Members. A party trade association must identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member.

(b) Disclosure Requirements Applicable to Corporate Amicus Curiae.

(1) Who Must File. If an amicus curiae is a corporation, the amicus curiae brief must include a disclosure statement.

(2) Information to Be Disclosed by Corporate Amicus Curiae. A corporate amicus curiae must disclose the same information that sections (a)(2)(A), (B) & (C) require parties to disclose.

(c) Form. The disclosure statement shall be on a form provided by the clerk. A negative statement is required if a filer has no disclosures to make.

(d) Time of Filing. A party's disclosure statement must be filed within 14 days of docketing of the appeal, unless earlier pleadings are submitted for the Court's consideration, in which case the disclosure statement shall be filed at that time.

(e) Amendment. Filers are required to amend their disclosure statements when necessary to maintain their current accuracy.

Fifth Circuit Rule 28.2.1

Certificate of Interested Persons

The certificate of interested persons required by this rule is broader in scope than the corporate disclosure statement contemplated in FED. R. APP. P. 26.1. The certificate of interested persons provides the court with additional information concerning parties whose participation in a case may raise a recusal issue. A separate corporate disclosure statement is not required. Counsel and unrepresented parties will furnish a certificate for all private (non-governmental) parties, both appellants and appellees, which must be incorporated on the first page of each brief before the table of contents or index, and which must certify a complete list of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent corporations, or other legal entities who or which are financially interested in the outcome of the litigation. If a large group of persons or firms can be specified by a generic description, individual listing is not necessary. Each certificate must also list the names of opposing law firms and/or counsel in the case. The certificate must include all information called for by FED. R. APP. P. 26.1(a). Counsel and unrepresented parties must supplement their certificates of interested persons whenever the information that must be disclosed changes.

(a) Each certificate must list all persons known to counsel to be interested, on all sides of the case, whether or not represented by counsel furnishing the certificate. Counsel has the burden to ascertain and certify the true facts to the court.

(b) The certificate must be in the following form:

(1) Number and Style of Case;

(2) The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal. (Here list names of all such persons and entities and identify their connection and interest.)

_____

Attorney of record for_____

Sixth Circuit Rule 26.1

Corporate Disclosure Statement

(a) Parties Required to Make Disclosure. With the exception of the United States government or agencies thereof or a state government or agencies or political subdivisions thereof, all parties and amici curiae to a civil or bankruptcy case, agency review proceeding, or original proceedings, and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is required except in the case of individual criminal defendants.

(b) Financial Interest to Be Disclosed.

(1) Whenever a corporation that is a party to an appeal, or which appears as amicus curiae, is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation that is a party or amicus shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the parent corporation or affiliate and the relationship between it and the corporation that is a party or amicus to the appeal. A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it controls, is controlled by, or is under common control with a publicly owned corporation.

(2) Whenever, by reason of insurance, a franchise agreement, or indemnity agreement, a publicly owned corporation or its affiliate, not a party to the appeal, nor an amicus, has a substantial financial interest in the outcome of litigation, counsel for the party or amicus whose interest is aligned with that of the publicly owned corporation or its affiliate shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the publicly owned corporation and the nature of its or its affiliate's substantial financial interest in the outcome of the litigation.

(c) Form and Time of Disclosure. The disclosure statement shall be made on a form provided by the clerk and filed with the brief of a party or amicus or upon filing a motion, response, petition, or answer in this court, whichever first occurs.

Seventh Circuit Rule 26.1

Disclosure Statement

(a) Who Must File. Every attorney for a non-governmental party or amicus curiae, and every private attorney representing a governmental party, must file a statement under this rule. A party or amicus required to file a corporate disclosure statement under Fed. R. App. P. 26.1 may combine the information required by subsection (b) of this rule with the statement required by the national rule.

(b) Contents of Statement. The statement must disclose the names of all law firms whose partners or associates have appeared for the party or amicus in the case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court. If any litigant is using a pseudonym, the statement must disclose the litigant's true name. A disclosure required by the preceding sentence will be kept under seal.

(c) Time for Filing. The statement under this rule and Fed. R. App. P. 26.1 must be filed no later than 21 days after docketing the appeal, with a party's first motion or response to an adversary's motion, or when directed by the court, whichever time is earliest. A disclosure statement also must accompany any petition for permission to appeal under Fed. R. App. P. 5 and must be included with each party's brief. See Fed. R. App. P. 28(a)(1), (b).

(d) Duty to Update. Counsel must file updated disclosure statements under this rule and Fed. R. App. P. 26.1 within 14 days of any change in the information required to be disclosed.

Tenth Circuit Rule 46.1(D)

Certification of Interested Parties

(1) Certificate. Each entry of appearance must be accompanied by a certificate listing the names of all interested parties not in the caption of the notice of appeal so that the judges may evaluate possible disqualification or recusal.

(2) List. The certificate must list all persons, associations, firms, partnerships, corporations, guarantors, insurers, affiliates, and other legal entities that are financially interested in the outcome of the litigation. For corporations, see Fed. R. App. P. 26.1.

(3) Generic description. An individual listing is not necessary if a large group of persons or firms can be specified by a generic description.

(4) Attorneys. Attorneys not entering an appearance in this court must be listed if they have appeared for any party in a proceeding sought to be reviewed, or in related proceedings that preceded the original action being pursued in this court.

(5) No additional parties. If there are no additional parties, entities, or attorneys in any of these categories not previously reported to the court, a report to that effect also is required.

(6) Obligation to amend. The certificate must be kept current.

Eleventh Circuit Rule 26.1-1

Certificate of Interested Persons and Corporate Disclosure Statement: Contents

A certificate shall be furnished by appellants, appellees, intervenors and amicus curiae, including governmental parties, which contains a complete list of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case or appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party. In criminal and criminal-related appeals, the certificate shall also disclose the identity of the victim(s). In bankruptcy appeals, the certificate shall also identify the debtor, the members of the creditor's committee, any entity which is an active participant in the proceedings, and other entities whose stock or equity value may be substantially affected by the outcome of the proceedings.

The certificate contained in the first brief filed must include a complete list of all persons and entities known to that party to have an interest in the outcome of the particular case or appeal. The certificate contained in the second and all subsequent briefs filed must include only persons and entities omitted from the certificate contained in the first brief filed and in any other brief that has been filed. Counsel who believe that the certificate contained in the first brief filed and in any other brief that has been filed is complete may simply certify to that effect.

The certificate contained in each motion or petition filed must include a complete list of all persons and entities known to that party to have an interest in the outcome of the particular case or appeal. The certificate contained in a response or answer to a motion or petition, or a reply to a response, must include only persons and entities that were omitted from the certificate contained in the motion or petition. Counsel who believe that the certificate contained in the motion or petition is complete may simply certify to that effect.

In a petition for en banc consideration, the petitioner's certificate shall also compile and include a complete list of all persons and entities listed on all certificates filed in the appeal prior to the date of filing of the petition for en banc consideration. If the court grants en banc rehearing, the requirements set forth in the second paragraph of this rule also apply to en banc briefs.

Eleventh Circuit Rule 26.1-3

Certificate of Interested Persons and Corporate Disclosure Statement: Format

(a) The certificate described in 11th Cir. R. 26.1-1 must immediately follow the cover page within a brief, and must precede the text in a petition, answer, motion or response.

(b) The certificate must list persons (last name first) and entities in alphabetical order, have only one column, and be double-spaced.

(c) A corporate entity must be identified by its full corporate name as registered with a secretary of state's office and, if its stock is publicly listed, its stock ("ticker") symbol must be provided after the corporate name.

(d) At the top of each page the court of appeals docket number and short style must be noted (name of first-listed plaintiff or petitioner v. name of first-listed defendant or respondent). Each page of the certificate must be separately sequentially numbered to indicate the total number of pages comprising the certificate (e.g., C-1 of 3, C-2 of 3, C-3 of 3). These pages do not count against any page limitations imposed on the papers filed.

Federal Circuit Rule 47.4

Certificate of Interest

(a) Purpose; Contents. To determine whether recusal by a judge is necessary or appropriate, an attorney – except an attorney for the United States – for each party, including a party seeking or permitted to intervene, and for each amicus curiae, must file a certificate of interest. The certificate of interest must be filed within 14 days of the date of docketing of the appeal or petition, except that for an intervenor or amicus curiae, the certificate of interest must be filed with the motion and with the brief. A certificate of interest must be in the form set forth in the appendix to these rules, and must contain the information below in the order listed. Negative responses, if applicable, are required as to each item on the form.

(1) The full name of every party or amicus represented in the case by the attorney.

(2) The name of the real party in interest if the party named in the caption is not the real party in interest.

(3) The corporate disclosure statement prescribed in Federal Rule of Appellate Procedure 26.1.

(4) The names of all law firms and the partners and associates that have appeared for the party in the lower tribunal or are expected to appear for the party in this court.

(b) Filing. The certificate must be filed with the entry of appearance. The certificate – first filed – must also be filed with each motion, petition, or response thereto, and in each principal brief and brief amicus curiae.

(c) Changes. If any of the information required in Federal Circuit Rule 47.4(a) changes after the certificate is filed and before the mandate has issued, the party must file an amended certificate within 7 days of the change.

APPENDIX B
GROUNDS FOR RECUSAL

28 U.S.C. § 47 (2011)

Disqualification of Trial Judge to Hear Appeal

No judge shall hear or determine an appeal from the decision of a case or issue tried by him.

28 U.S.C. § 455 (2011)

Disqualification of Justice, Judge, or Magistrate Judge

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) “proceeding” includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) “fiduciary” includes such relationships as executor, administrator, trustee, and
guardian;

(4) “financial interest” means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a “financial interest” in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a “financial interest” in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a “financial interest” in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a “financial interest” in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

Code of Conduct for United States Judges

. . .

Canon 3: A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently

The duties of judicial office take precedence over all other activities. In performing the duties prescribed by law, the judge should adhere to the following standards:

. . .

C. Disqualification

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:

(a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or lawyer has been a material witness;

(c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding;

(d) the judge or the judge's spouse, or a person related to either within the third degree of relationship, or the spouse of such a person is:

(i) a party to the proceeding, or an officer, director, or trustee of a party;

(ii) acting as a lawyer in the proceeding;

(iii) known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; or

(iv) to the judge's knowledge likely to be a material witness in the proceeding;

(e) the judge has served in governmental employment and in that capacity participated as a judge (in a previous judicial position), counsel, advisor, or material witness concerning the proceeding or has expressed an opinion concerning the merits of the particular case in controversy.

(2) A judge should keep informed about the judge's personal and fiduciary financial interests and make a reasonable effort to keep informed about the personal financial interests of the judge's spouse and minor children residing in the judge's household.

(3) For the purposes of this section:

(a) the degree of relationship is calculated according to the civil law system; the following relatives are within the third degree of relationship: parent, child, grandparent, grandchild, great grandparent, great grandchild, sister, brother, aunt, uncle, niece, and nephew; the listed relatives include whole and half blood relatives and most step relatives;

(b) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(c) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) the proprietary interest of a policyholder in a mutual insurance company, or a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities;

(d) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation.

(4) Notwithstanding the preceding provisions of this Canon, if a judge would be disqualified because of a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the judge (or the judge's spouse or minor child) divests the interest that provides the grounds for disqualification.

D. Remittal of Disqualification. Instead of withdrawing from the proceeding, a judge disqualified by Canon 3C(1) may, except in the circumstances specifically set out in subsections (a) through (e), disclose on the record the basis of disqualification. The judge may participate in the proceeding if, after that disclosure, the parties and their lawyers have an opportunity to confer outside the presence of the judge, all agree in writing or on the record that the judge should not be disqualified, and the judge is then willing to participate. The agreement should be incorporated in the record of the proceeding.

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TAB 8

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MEMORANDUM

DATE: September 20, 2013

TO: Judge Steven M. Colloton
Professor Catherine T. Struve

CC: Judge Jeffrey S. Sutton

FROM: Andrea L. Kuperman

SUBJECT: Immediate Appealability of Prejudgment Orders

The Appellate Rules Committee is considering whether to undertake a project that would address the appealability of prejudgment orders. The issue arises from the Supreme 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.[1] At this preliminary stage, the Committee is interested in determining whether it would be useful and practical to undertake a large project that might specify by rule the universe of interlocutory orders that should be appealable, or whether it would be more 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*.[2]

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[1] Under 28 U.S.C. § 2072(c), the Supreme Court is granted the power to prescribe rules of practice and procedure that "define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title." Section 1291 of Title 28 provides that courts of appeals have jurisdiction over all final decisions of the district courts. So far the only exercise of this rulemaking power has been to authorize permissive interlocutory appeals of a district court order granting or denying class action certification. *See* THOMAS E. BAKER, A PRIMER ON THE JURISDICTION OF THE U.S. COURTS OF APPEALS 52 (Fed. Jud. Ctr. 2009). Notably, "[t]he congressional delegation is a jurisdictional ratchet, a one-way device: judicial rulemaking can be used only to expand appellate jurisdiction and not to contract appellate jurisdiction that is otherwise granted by statute." *Id.*

[2] It is worth noting that even a more narrow approach will take a good bit of refining to determine the appropriate scope. For example, if the Committee decides to address privilege, it will have to decide

To aid in its examination of this issue, the Committee asked me to do some initial research on the state of the law on the appealability of prejudgment orders. Specifically, I have been asked to research the state of the law and identify groups: (1) categories of claims that are appealable under current Supreme Court decisional law; (2) categories of claims that have divided the lower courts; and (3) categories of claims that have been rejected by Supreme Court, but may warrant consideration in rulemaking.

I. Overview

It has proven quite difficult to pin down all the issues and matters that might fall into each of these categories, and there are thousands of cases, articles, and lengthy treatises devoted to this topic.[3] In an effort to be able to give the Committee something to discuss for its Fall 2013 meeting, Professor Struve and I discussed coming up with an outline of topics and a list of resources that can be used for the Committee's initial discussion of this topic. An initial outline follows below, and a bibliography of resources is attached. I have not yet researched the individual topics; nor is this

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whether to address all privilege, some privileges and not others, only attorney-client privilege, attorney-client privilege only when the lower court finds that there was privilege but that it was waived, etc. As another example, if the Committee decides to address official immunity appeals, it may want to consider whether to address other types of immunity appeals and the scope of such appeals.

[3] For example, *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), the case primarily known for setting out the "collateral order doctrine" that allows for immediate appeal of orders before final judgment when certain criteria are met, has been cited over 14,000 times, including almost 6,000 cases and over 1,000 law review articles. "'Under *Cohen*,' . . . 'an order is appealable if it (1) conclusively determines the disputed question; (2) resolves an important issue completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from a final judgment.'" *Mohawk*, 558 U.S. at 105.

As another example, the Federal Practice and Procedure treatise has three full volumes devoted to jurisdiction in the courts of appeals, the majority of which is devoted to the final judgment rule and interlocutory appeals. The volumes span hundreds of pages with many more footnotes. Nearly every footnote contains its own potential issue or issues related to finality, the collateral order doctrine, and/or interlocutory appeals.

an exhaustive list of all of the issues the Committee may want to consider in this area. Rather, I have come up with a list of topics and issues that the Committee may wish to examine as it goes forward, as a starting point for discussion.[4] Depending on the type of project with which the Committee decides to proceed, further research will be needed into individual topics and issues, and if a broader project is undertaken, further research to uncover additional topics, issues, and resources will certainly be needed. This is meant as an overview of some potential issues, to give the Committee a taste of the types of matters that might fall within a project on appellate jurisdiction over prejudgment orders. It is hoped that what follows is at least helpful for starting the discussion on these issues as the Committee determines the scope of any potential project in this area.

One conclusion I have reached in my initial research is that just identifying the areas that are problematic will be an enormous undertaking. It would be a very large task to establish categories of interlocutory orders that are always appealable, never appealable, and sometimes appealable because there is great variety in what the lower courts do. Further, it might be quite difficult to come up with bright-line rules. *See Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153 (1964) ("And our cases long have recognized that whether a ruling is 'final' within the meaning of § 1291 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and that it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the 'twilight zone' of finality."). Thus, what follows is an outline

[4] I also have not thoroughly examined all of the cases and resources in the attached bibliography. Rather, these are resources I have come across in my initial research that will likely prove useful for further examination if the Committee decides to proceed with a more in-depth analysis of these issues.

of some issues that may be worth considering.[5]

II. Categories of Orders that the Supreme Court has Recognized as Appealable

The following categories of pretrial orders have been recognized by the Supreme Court at some point as subject to immediate appeal, usually under the collateral order doctrine.

- Order denying reduction of bail.
  - *See Stack v. Boyle*, 342 U.S. 1 (1951).
  - *See also* 15A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, AND EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3911.3, at 397 (2d ed. 1992) [hereinafter W&M[6]].
  - *See also* GREGORY A. CASTANIAS & ROBERT H. KLONOFF, FEDERAL APPELLATE PRACTICE AND PROCEDURE IN A NUTSHELL 85 (2008) [hereinafter NUTSHELL].
- Order denying motion to dismiss an indictment on double jeopardy grounds.
  - *See Abney v. United States*, 431 U.S. 651 (1977) (former jeopardy appeal allowed under collateral order doctrine).
  - *See also Richardson v. United States*, 468 U.S. 317 (1984) (claim that second trial after acquittal on one count of federal narcotics violations and after mistrial was declared on remaining counts because jury was unable to agree was barred on double jeopardy grounds because the Government failed to introduce legally sufficient evidence to go to the jury at the first trial raised a colorable double jeopardy claim appealable as a final judgment).
  - *See also* W&M § 3911, at 340.
  - *See also* NUTSHELL at 87.
  - *See also* THOMAS E. BAKER, A PRIMER ON THE JURISDICTION OF THE U.S. COURTS OF APPEALS 75 (Fed. Jud. Ctr. 2009) [hereinafter FJC].
- Order denying motions to dismiss an indictment on Speech or Debate Clause grounds.
  - *See Helstoski v. Meanor*, 442 U.S. 500 (1979);
  - *See also Flanagan v. United States*, 465 U.S. 259 (1984).
- Order requiring criminal defendant to receive medication involuntarily in order to render him competent to stand trial.
  - *See Sell v. United States*, 539 U.S. 166 (2003).
- Order denying absolute immunity.
  - *See Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

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[5] The categories and issues described below have been collected from reviewing a variety of books, treatises, law review articles, and case summaries. Where applicable, I have noted the source or sources discussing these topics, so that they can be consulted as needed later, depending on the scope of the project that the Committee decides on.

[6] Subsequent references are to Volume 15A unless otherwise indicated.

- *See also Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (noting, without disapproval, that senior aides and advisors to the President of the United States took immediate appeal of order denying absolute immunity defenses pursuant to collateral order doctrine).
- *See also* W&M § 3911, at 341, 343–45 (addressing appealability of pretrial orders denying absolute and qualified immunity).
- *See also* NUTSHELL at 86–87.

- Order holding that Petition Clause of the First Amendment does not provide absolute immunity from liability for libel.
  - *See McDonald v. Smith*, 472 U.S. 479 (1985).
- Order denying qualified immunity.
  - *See Mitchell v. Forsyth*, 472 U.S. 511 (1985).
  - See also *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (order denying qualified immunity can fall within the collateral order doctrine, so long as the order turns on an issue of law).
  - *See also Behrens v. Pelletier*, 516 U.S. 299 (1996) (defendant's immediate appeal of an unfavorable qualified-immunity ruling on his motion to dismiss did not deprive the court of appeals of jurisdiction over a second appeal based on qualified immunity following denial of summary judgment).
  - *But see Johnson v. Jones*, 515 U.S. 304 (1995) (defendant entitled to invoke qualified immunity may not appeal district court's summary judgment order that determines whether pretrial record sets forth a genuine issue of fact for trial).
  - *See also* W&M § 3911, at 346.
- Order denying request to require posting of security.
  - *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).
  - *See also* NUTSHELL at 84.
- Order vacating attachment of vessel in admiralty.
  - *See Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A.*, 339 U.S. 684 (1950).[7]
- Order imposing notice costs in class action.
  - *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).
  - *See also* W&M § 3911, at 338.
  - *See also* W&M § 3911.3, at 397 (comparing different courts of appeals' approaches to appealability of class action notice issues).
- Order granting motions to abstain and stay the federal litigation pending similar state litigation.
  - *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996) (order remanding case to state court based on *Burford* abstention was immediately appealable).
  - *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 8–13

[7] The *Swift* Court noted that the situation would be different in the case of an order upholding an attachment, in which case the rights of the parties are protected while the litigation on the main claim proceeds.

(1983) (order staying federal court action pending resolution of state court action was immediately appealable).

- Order remanding to Secretary of Health and Human Services a case challenging Secretary's decision denying disability benefits and which effectively invalidated Secretary's regulations.
  - *See Sullivan v. Finkelstein*, 496 U.S. 617 (1990).
- Order denying a state's claim to 11th Amendment immunity.
  - *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993).
  - *See also Tennessee v. Lane*, 541 U.S. 509 (2004).
  - *See also Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).
  - *See also* NUTSHELL at 87.
- Order rejecting the Attorney General's certification that a federal employee named as a defendant in a state court action was acting within the scope of employment and refusing to substitute the United States as a defendant in the removed action.
  - *See Osborn v. Haley*, 127 S. Ct. 881 (2007).
- Order preventing putative intervenor from becoming a party in any respect.
  - *See Brotherhood of R.R. Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519 (1947).
- Order allocating expense of identification of class members, for purpose of sending individual notice.
  - *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978).
- State court order authorizing a temporary injunction, where the controversy was beyond the state court's power and instead within the exclusive domain of the National Labor Relations Board.
  - *See Local No. 438 Constr. & Gen. Laborers' Union, AFL-CIO v. Curry*, 371 U.S. 542 (1963).
- State court denial of a stay of injunction.
  - *See Nat'l Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43 (1977) (per curiam).
- Order denying leave to proceed *in forma pauperis*.
  - *Roberts v. United States Dist. Ct.*, 339 U.S. 844 (1950) (per curiam).
  - *See* W&M § 3911, at 336–37.
  - *See also* NUTSHELL at 85.
- Order dismissing a False Claims Act action over the United States' objection.
  - *See United States ex rel. Eisenstein v. City of N.Y.*, 556 U.S. 928 (2009).
- Order deciding controversy as to whether Jones Act supplied exclusive remedy for damages for death of seaman aboard vessel docked in Ohio and whether there could be a recovery for benefit of brother and sisters of deceased whose mother was living.
  - *See Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964).
- State court judgment setting aside lease and awarding execution, relief assertedly within the exclusive power of the Federal Communications Commission, appealable even though accounting still remained to be done in state court.
  - *See Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945).

- Order denying motion to quash subpoena duces tecum directing a witness to appear before a grand jury.
  - *See Cobbledick v. United States*, 309 U.S. 323 (1940).

III. Categories of Orders that Have Divided the Lower Courts

The following are some examples of categories of orders that have caused controversy in the courts of appeals. This area could be greatly expanded upon with further research. For now, given limited time, I have included some examples discussed in some of the treatises and law review articles, but there are surely many more to be discovered.

- Whether the press gets an appeal or mandamus to challenge closure orders and gag orders.
  - *See* FJC at 82.
  - *See United States v. McVeigh*, 119 F.3d 806, 810 (10th Cir. 1997) (describing circuit split on applicability of collateral order doctrine vs. mandamus to orders denying the press access to documents or proceedings).
  - *See also* FJC at 82 (noting that media appeals of closure orders and gag orders are usually brought by mandamus and that "[b]ecause the substantive rights involved are so important and well-established, and because these mandamuses are so commonplace, these challenges to nonparty orders arguably are a candidate for rule-making recognition as a new category of entitled appeal").
- Application of *Abney v. United States*, 431 U.S. 651 (1977), which addressed collateral order doctrine's applicability to claims of former jeopardy.
  - *See San Filippo v. United States Trust Co. of N.Y.*, 470 U.S. 1035 (1985) (dissent from denial of certiorari notes confusion in the lower courts).
- Order denying a civil rights plaintiff's motion for appointment of counsel.
  - *See Welch v. Smith*, 484 U.S. 903 (1987) (White, J., dissenting) (dissenting from denial of certiorari and noting circuit split).
  - *See also* W&M § 3911.3, at 409–10 (describing various approaches and possible circuit split on appealability of orders refusing to appoint counsel for an indigent litigant).
- A variety of issues regarding qualified immunity orders.
  - For example, confusion in appellate courts has resulted from the statement in *Mitchell v. Forsyth* that denial of qualified immunity is appealable "to the extent that it turns on an issue of law." Some appellate courts have thus avoided fact-bound appeals. *See* W&M § 3911, at 346. The *Mitchell* Court left open whether appeal can be taken if the defendant must bear the burden of trial on a claim for injunctive or declaratory relief growing out of the same facts.
- Orders denying class status if the putative class member is willing to waive his or her individual claims (effectively creating a final judgment).

- *See* NUTSHELL at 99–100.

IV. Categories of Orders that Have Been Rejected by the Supreme Court

The following categories of pretrial orders have been recognized by the Supreme Court at some point as not subject to immediate appeal.

- Order denying attorney-client privilege.
  - *See Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100 (2009).
  - *See also* NUTSHELL at 85, 87 (but case law likely out of date after *Mohawk*).
  - There are a number of cases that have used mandamus to review orders requiring disclosure of documents for which privilege or work product is asserted. *See* 16 W&M § 3935.3, at 710–14 nn.6, 7.
- Order determining that action may not go forward as a class action.[8]
  - *See Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978).
  - *See also* W&M § 3911, at 340.
  - *See also* NUTSHELL at 88.
  - *See also* FED. R. CIV. P. 23(f) ("A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.").
- Order refusing to disqualify opposing counsel in a civil case.
  - *See Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981).
  - *See also Flanagan v. United States*, 465 U.S. 259 (1984) (same for order disqualifying criminal defense attorney).
  - *See also* W&M § 3911, at 341, 343.
- Order disqualifying counsel in a civil case.
  - *See Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985).
  - *See also* NUTSHELL at 88 (citing *Cole v. U.S. Dist. Ct. for Dist. of Idaho*, 366 F.3d 813, 817 (9th Cir. 2004), as holding that order disqualifying counsel because of a conflict of interest is not immediately appealable).
- Order denying motion to abstain and stay federal litigation pending similar state litigation.
  - *See Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988).

[8] A bar organization recently submitted a comment to the Civil Rules Committee suggesting that the committee consider rule amendments to provide a right to interlocutory appeal of decisions to certify, modify, or decertify a class. *See* LAWYERS FOR CIVIL JUSTICE, FEDERATION OF DEFENSE & CORPORATE COUNSEL, DRI - THE VOICE OF THE DEFENSE BAR, AND INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL, COMMENT: TO RESTORE A RELATIONSHIP BETWEEN CLASSES AND THEIR ACTIONS: A CALL FOR MEANINGFUL REFORM OF RULE 23 (Aug. 9, 2013) (on file with the Rules Committee Support Office).

- Order denying motion to dismiss made on the ground that an extradited person was immune from civil process.
  - *See Van Cauwenberghe v. Biard*, 486 U.S. 517 (1988).
- Order denying motion to dismiss on ground of forum non conveniens.
  - *See Van Cauwenberghe*, 486 U.S. 517 (1988).
  - *See also* NUTSHELL at 88.
- Order refusing to apply Federal Tort Claims Act's judgment bar.
  - *See Will v. Hallock*, 546 U.S. 345 (2006).
- Order vacating dismissal predicated on the parties' settlement agreement.
  - *See Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863 (1994).
  - *See also* NUTSHELL at 87–88.
- Order denying defendant's motion to dismiss a damages action on the basis of a contractual forum-selection clause.
  - *See Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495 (1989).
  - *See also* NUTSHELL at 88.
- Order imposing sanctions on attorney for discovery abuses under Rule 37.
  - *See Cunningham v. Hamilton Cty.*, 527 U.S. 198 (1999).
  - *See also* NUTSHELL at 88.
- Order denying dismissal of murder indictment on grounds of denial of speedy trial.
  - *See United States v. MacDonald*, 435 U.S. 850 (1978).
  - *See also* FJC at 75.
- Order granting permissive intervention but denying intervention as of right.
  - *See Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370 (1987).
- Order denying motion to dismiss grand jury indictment for alleged violation of rule prohibiting public disclosure by Government attorneys of matters occurring before the grand jury.
  - *See Midland Asphalt Corp. v. United States*, 489 U.S. 794 (1989).
- Order denying summary judgment for county commission where commission argued that sheriff who led raids at issue was not a policy maker for the county.
  - *See Swint v. Chambers Cty. Comm'n*, 514 U.S. 35 (1995).
- Order denying motion to dismiss based on prosecutorial vindictiveness.
  - *See United States v. Hollywood Motor Car Co.*, 458 U.S. 263 (1982).
- Order denying relief to sitting federal judge on claim of vindictive or selective prosecution.
  - *See Claiborne v. United States*, 465 U.S. 1305 (1984) (denial of certiorari).
- Order dismissing first indictment after a second indictment had been obtained.
  - *See Parr v. United States*, 351 U.S. 513 (1956).
- Order denying criminal defendant's motion to dismiss based on alleged unconstitutionality of statute providing for appointment of an independent counsel to investigate alleged impropriety of Government officials.
  - *See Deaver v. United States*, 483 U.S. 1301 (1987).
- Order denying pre-indictment motion to suppress evidence.
  - *See Di Bella v. United States*, 369 U.S. 121 (1962).
- Order granting motion to suppress before trial in a criminal case, regardless of whether

the effect of suppressing evidence would be to force dismissal of indictment for lack of evidence.
    - *See Carroll v. United States*, 354 U.S. 394 (1957).
    - *See also* FJC at 75 (Orders in criminal cases "dealing with the suppression of evidence or the return of property are subject to a 'confusing web of decisions'" on appealability.).
- FTC's issuance of a complaint.
    - *FTC v. Standard Oil Co. of Calif.*, 449 U.S. 232 (1980).

V. Other Issues the Committee May Wish to Consider

In reviewing the treatises and other literature on this issue, I came across a variety of different issues that the Committee may wish to consider but that did not fit neatly into the previously mentioned categories. As with the above lists, this is not intended to be an exhaustive list of potential issues, but I thought including issues as I came across them in the initial research might be helpful for the Committee's preliminary deliberations.

- Magistrate judges' ability to certify judgment for appeal under § 1292(b).
    - *See* W&M § 3901.1, at 48.
- Ability of appellate court to review district court's nonfinal appellate decision on magistrate judges' decisions, or before there has been any district court judgment at all.
    - *See* W&M § 3901.1, at 50.
- The extent to which orders involving nonparties or parties in roles subordinate to the main litigation—such as orders imposing sanctions on counsel or limiting media access to court proceedings—may be appealable.
    - *See* W&M § 3911.3, at 414–16.
    - *See also* W&M § 3911, at 367.
- Extraordinary writs are often used to allow interlocutory review of agency actions.
    - *See* FJC at 91–92.
- The proper formulation of the collateral order doctrine. Most courts cite a three-part test – the order must conclusively determine the disputed question, resolve an important question completely separate from the merits, and be effectively unreviewable on appeal from final judgment. Judge Posner observed that this test is redundant, incomplete, and unclear. The First Circuit has a 4-part formula – separability, finality, urgency, and importance.
    - *See* W&M § 3911, at 351–52.
- When to require that there be an important and unsettled question of law for collateral appeal. Usually no important question is required for absolute immunity, qualified immunity, double jeopardy. A number of courts of appeals have stated this requirement, despite lack of clear foundation in Supreme Court opinions.

- *See* W&M § 3911.5, at 430–32; W&M § 3911, at 335.
- *See also* NUTSHELL at 85–86 (some courts have included this fourth requirement, but most have limited it to the three *Cohen* factors).

- Whether and how time limits of Rule 4 apply to collateral order appeals.
  - *See* W&M § 3911, at 357.
- Whether the time to appeal a collateral order starts to run before entry of a formal judgment under Civil Rule 58. Courts have held that it does.
  - *See* W&M § 3911, at 357–58.
- Whether the time to appeal a collateral order can be suspended by a motion to reconsider. The Sixth Circuit has suggested that Rule 4(a)(4), suspending time to appeal by motions under Civil Rules 50(b), 52(b), or 59(e), applies.
  - *See* W&M § 3911, at 358–59 (suggesting that an appellant should be permitted to suspend appeal time by a motion for reconsideration filed within 10 days of the order, either by reading Civil Rule 59(e) this way or by reading Appellate Rule 4 that way).
- The scope of appeal from a properly appealable collateral order, *i.e.*, whether it includes other non-collateral matters.
  - *See* W&M § 3911.2, at 393–95 (noting significant disagreement on the scope of immunity appeals; also noting that a flexible approach as to the scope of collateral order appeals has been used and it would be difficult to come up with a clear rule).
- Accounting for the fact that appeal is not automatically available simply because effective review cannot be had on appeal from a final judgment. Some matters are left to district court discretion, without review.
  - *See* W&M § 3911.3, at 404–05.
  - *See* W&M § 3911.3, at 406–12 for some examples of orders held to not be immediately appealable despite the potential lack of effective post-judgment appeal, including: order denying intervention as of right but permitting limited permissive intervention; order dismissing criminal indictment in favor of indictment in another division, resulting in trial in an inconvenient forum (could not be appealed even though final judgment appeal would not effectively remedy the right to be tried in a convenient forum); order denying claims of lack of subject matter jurisdiction, personal jurisdiction, primary jurisdiction in an administrative agency, or forum non conveniens; order denying claim of denial of right to speedy trial; order denying interest of representative plaintiffs in pursuing a class action; orders denying or granting disqualification of opposing counsel; order refusing to appoint counsel for an indigent litigant; orders affecting the ability to pay counsel; a variety of orders likely to impact results of class actions, including orders refusing to approve proposed settlements.
- Appealability of "death knell" orders – those that end the litigation as a practical matter, although there is no final judgment.
  - *See* W&M § 3912 (describing examples, including interlocutory rulings on injunctive relief and denials of class certification (previous circuit split, now resolved by Supreme Court in denying such appeals as a matter of right (*see* NUTSHELL at 101)); noting that only the core of the death knell doctrine remains

– those cases where there is as a practical matter nothing left to be done in the district court).

- Application of pragmatic finality – a balancing approach to finality that considers whether the costs of piecemeal appeals are outweighed by denying justice by delay.
  - *See* W&M § 3913 (noting that some courts have approved of it, without much expansion).
- Potential rule amendments' interaction with statutory bases for interlocutory appeal.
  - *See* NUTSHELL at 89–97.
  - Appeals from imposition of injunctions.
    - *See* 28 U.S.C. § 1292(a)(1).
    - Preliminary injunctions are generally appealable, while temporary restraining orders are not. *See* FJC at 54.
  - Appeals from appointment of a receiver.
    - *See* 28 U.S.C. § 1292(a)(2).
  - Appeals from decrees "determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed."
    - *See* 28 U.S.C. § 1292(a)(3).
  - Classified Information Procedures Act.
  - Federal Arbitration Act. Orders stopping arbitration are appealable; orders allowing arbitration are not.
  - 28 U.S.C. § 1292(b) – allowing immediate appeal of interlocutory orders with permission of the district and appellate court.
  - Statutory bases for interlocutory appeal in criminal matters.
    - Orders requiring pretrial detention or imposing conditions on release are governed by the Bail Reform Act of 1984, 18 U.S.C. §§ 3141, 3142, 3143–45, which mirrors the collateral order doctrine.
      - *See* FJC at 74.
    - *See* FJC at 78 (Appeals from a release or detention order, or from an order denying revocation or amendment of such an order may be permissible if they satisfy 28 U.S.C. § 1291 finality, if brought by an accused, or the restrictions on government appeals, if brought by the prosecution. An appeal by the Government must not unduly postpone the proceeding so long as to violate the defendant's constitutional and statutory right to a speedy trial.).
- Interlocutory appeals in criminal matters.
  - *See* FJC at 75 (noting that there are "appealability precedents governing various and sundry pretrial orders, including but not limited to the following kinds of pretrial matters: the preliminary hearing; determinations of competence to stand trial; determinations whether to try the defendant as an adult or a juvenile; transferring or removing or remanding; extradition; the disposition of property; the denial of a defendant's motion to dismiss; the granting of the government's motion to dismiss without prejudice; pleadings; appointment and appearance of counsel; disqualification of the judge; discovery; access to trial; and contempt").
  - 18 U.S.C. § 3731 authorizes appeals by the prosecution from: (1) a final order dismissing an indictment or information or granting a new trial after verdict or

judgment on any one or more counts, unless the Double Jeopardy Clause prohibits further prosecution; (2) an interlocutory order suppressing or excluding evidence or requiring the return of property; and (3) an interlocutory order granting the release of the defendant, before or after conviction or denying the government's motion to revoke or to modify the conditions of release.

- Writs of mandamus as another means of interlocutory appeal.[9]
  - *See* NUTSHELL at 97.
- Whether to address pendant appellate jurisdiction.
  - See 16 W&M § 3937.
- Additional categories of interlocutory appeal that the Committee might want to consider providing for or prohibiting:
  - Orders denying immunity under the Foreign Sovereign Immunities Act.
    - *See Fed. Ins. Co. v. Richard I. Rubin & Co., Inc.*, 12 F.3d 1270 (3d Cir. 1993) (within collateral order doctrine).
    - *See* NUTSHELL at 87.
  - Orders refusing to dismiss an indictment for grand jury irregularity unrelated to the substance of the prosecution.
    - *See* W&M § 3911.2, at 382 (citing *United States v. Benjamin*, 812 F.2d 548 (9th Cir. 1987), as holding such an order is collateral and appealable).
    - *See also* FJC at 74 (noting that some orders relating to grand jury proceedings are deemed final and some are not).
  - Orders requiring that plaintiffs preferring to remain pseudonymous identify themselves.
    - *See* W&M § 3911.2, at 383 (citing *Doe v. Stegall*, 653 F.2d 180 (5th Cir. 1981), and *Southern Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707 (5th Cir. 1979), as allowing immediate appeal).
  - Orders granting disqualification of trial judge.
    - *See* W&M § 3911.2, at 383 (citing *In re Cement Antitrust Litig.*, 673 F.2d 1020 (9th Cir. 1981) (order was collateral but could not be appealed because other requirements of collateral order doctrine not satisfied)).
  - Orders denying substitution of parties.
    - *See* W&M § 3911.2, at 383 (citing *In re Covington Grain Co.*, 638 F.2d 1357 (5th Cir. 1981), as allowing immediate appeal).
  - Orders involving privacy or secrecy and orders barring media or others from obtaining information about ongoing proceedings.
    - *See* W&M § 3911.3, at 398–99.
  - Orders involving the supposed right not to be subject to the burdens of trial, such as official immunity or double jeopardy claim, or the right of a plaintiff to take a

[9] One possible avenue of further research might be finding out how mandamus is used to address review of certain areas of interlocutory orders, such as privilege rulings. If it can be determined that mandamus is rarely sought on a particular type of ruling, or that mandamus is effectively addressing problematic orders on particular types of claims, the Committee may conclude that rulemaking is unnecessary.

voluntary dismissal with prejudice.

- *See* W&M § 3911.3, at 402.
- *See also* W&M § 3911.4, at 424–26 (collateral order appeal not automatically available to review a number of matters that could be described as intended to protect against the burdens of trial – *e.g.*, orders denying motion to dismiss for failure to state a claim, orders denying summary judgment, orders granting or denying a stay in favor of proceedings in a different court, orders refusing to dismiss in deference to an injunction barring litigation against a company placed in receivership by a state court, rejection of an argument that repetitious litigation is barred by res judicata, or rejection of a speedy trial claim).

- Orders granting recusal of trial judge.
  - *See* W&M § 3911.3, at 405.
- Orders involving jurisdictional decisions, including personal jurisdiction, whether the limits of Article III are satisfied, improper refusal to remand to state court, and limits arising from special statutory schemes.
  - *See* W&M § 3911.4, at 423 (generally not immediately appealable).
  - *See also* NUTSHELL at 108–09 (remand orders generally not immediately appealable).
- Orders granting or denying arbitration.
  - *See* W&M § 3911.4, at 426–27 (noting that arbitration's purpose is to avoid litigation in court, but requests for collateral order appeals are frequently denied).
- Orders granting or denying security pending trial.
  - *See* W&M § 3911.4, at 429 (noting that orders granting security are usually denied interlocutory appeal, while orders denying security are usually allowed to be appealed, and that it is unclear why one form of hardship is favored over the other).
- Orders denying an attorney's motion to withdraw.
  - *See* NUTSHELL at 87 (citing *Whiting v. Lacara*, 187 F.3d 317 (2d Cir. 1999), and *Fid. Nat'l Title Ins. Co. of NY v. Intercounty Nat'l Title Ins. Co.*, 310 F.3d 537 (7th Cir. 2002), as cases finding such orders within collateral order doctrine).
- Orders requiring the posting of security for the release of an impounded ship.
  - *See* NUTSHELL at 88 (citing *Seguros Banvenez S.A. v. S/S Oliver Drescher*, 715 F.2d 54 (2d Cir. 1983), as holding such orders not immediately appealable).
- Orders appointing guardian ad litem for an ERISA plan.
  - *See* NUTSHELL at 88 (citing *In re Pressman-Gutman Co., Inc.*, 459 F.3d 383 (3d Cir. 2006), as holding such orders not immediately appealable).
- Orders denying a so-called *Rooker-Feldman* defense (*i.e.*, that the Supreme Court is the only federal court that can review a state court judgment).
  - *See* NUTSHELL at 88 (citing *Bryant v. Sylvester*, 57 F.3d 308 (3d Cir. 1995), *vacated and remanded*, 516 U.S. 1105 (1996), as holding such orders not

immediately appealable).

- Discovery orders.
  - *See* NUTSHELL at 88–89 (generally not immediately appealable, but there are some exceptions; noting that whether trial court abused its discretion in denying reimbursement of costs to several nonparty witnesses who produced substantial discovery under subpoena has been held immediately appealable (citing *United States v. Columbia Broad. Sys., Inc.*, 666 F.2d 364 (9th Cir. 1982))).
- Criminal pretrial orders on procedures to be followed at trial.
  - *See* FJC at 75 (generally not appealable).
- Evidentiary rulings.
  - *See* FJC at 75 (generally not appealable in civil or criminal cases).
- Orders on rights provided for in the Crime Victims' Rights Act of 2004.
  - Mandamus allowed for crime victims if the rights provided for in the Crime Victims' Rights Act of 2004 are violated. *See* FJC at 82–83.

VI. Conclusion

Getting a full grasp on the state of the law on interlocutory appeals and collateral orders is quite a challenge, given that the issue has been raised in so many different contexts, involving nearly every type of pretrial order. This outline is meant to provide a sampling of some of the issues that the Committee may wish to consider in deciding the scope of a potential project on appellate jurisdiction over interlocutory orders. Further and more focused research will likely be needed once the Committee decides on the scope of the project. Should the Committee decide to do a comprehensive project, further research will be needed to identify circuit splits and areas that have caused problems in interlocutory appeals. If the Committee decides to focus on just a few areas, more in-depth research will be needed to discover how the courts and commentators have treated issues within those areas.

Resources on Appealability of Pretrial Orders

CASES

Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100 (2009) (addressing appealability of orders denying claims of privilege).

United States ex rel. Eisenstein v. City of N.Y., 556 U.S. 928 (2009) (noting that under the collateral order doctrine, the United States can appeal the dismissal of a False Claims Act action over its objection).

Ashcroft v. Iqbal, 556 U.S. 662 (2009) (order denying qualified immunity can fall within the collateral order doctrine, so long as the order turns on an issue of law).

Osborn v. Haley, 549 U.S. 225 (2007) (district court order rejecting the Attorney General's certification that federal employee named as defendant in state court action was acting within scope of his employment, and refusing to substitute the United States as defendant, was reviewable under collateral order doctrine).

Will v. Hallock, 546 U.S. 345 (2006) (extensively discussing collateral order doctrine and holding that an order rejecting the judgment bar of the Federal Tort Claims Act as a defense to the instant action was not immediately appealable under the collateral order doctrine).

Tennessee v. Lane, 541 U.S. 509 (2004) (recognizing applicability of collateral order doctrine to denial of a claim to Eleventh Amendment immunity).

Sell v. United States, 539 U.S. 166 (2003) (order requiring criminal defendant to involuntarily receive medication in order to render him competent to stand trial immediately appealable as a collateral order).

Cunningham v. Hamilton Cty., 527 U.S. 198 (1999) (order imposing sanctions on attorney for her discovery abuses, not on contempt theory but solely pursuant to the Federal Rules of Civil Procedure, not immediately appealable).

Johnson v. Fankell, 520 U.S. 911 (1997) (noting that some state courts have picked different categories of cases to fall within their own collateral order doctrines).

United States v. McVeigh, 119 F.3d 806, 810 (10th Cir. 1997) (describing circuit split on applicability of collateral order doctrine vs. mandamus to orders denying the press access to documents or proceedings).

Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996) (order remanding case to state court based on *Burford* abstention was immediately appealable).

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) (recognizing that collateral order

doctrine allows immediate appeal of order denying claim of Eleventh Amendment immunity).

Behrens v. Pelletier, 516 U.S. 299 (1996) (denial of summary judgment on grounds of qualified immunity was appealable final judgment even if other claims remained for trial).

Johnson v. Jones, 515 U.S. 304 (1995) (district court's determination that summary judgment record in qualified immunity case raised genuine issue of fact was not immediately appealable).

Swint v. Chambers Cty. Comm'n, 514 U.S. 35 (1995) (order denying county commission's request for summary judgment based on the fact that the sheriff who authorized the raids at issue was not a policymaker for the county did not fall within collateral order doctrine, and there is no pendant party appellate jurisdiction).

Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863 (1994) (refusal to enforce settlement agreement claimed to shelter party from suit altogether did not supply basis for immediate appeal under collateral order doctrine; detailed examination of collateral order doctrine).

Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993) (order denying State's Eleventh Amendment immunity claim is immediately appealable under the collateral order doctrine).

Sullivan v. Finkelstein, 496 U.S. 617 (1990) (order remanding case challenging decision of Secretary of Health and Human Services that denied disability benefit effectively invalidated Secretary's regulations and was immediately appealable as a final decision; concurrence thought it was not a final decision but that immediate appeal was authorized under the collateral order doctrine).

Lauro Lines S.R.L. v. Chasser, 490 U.S. 495 (1989) (order denying motion to dismiss damages action on basis of contractual forum selection clause was not immediately appealable under the collateral order doctrine).

Midland Asphalt Corp. v. United States, 489 U.S. 794 (1989) (order denying motion to dismiss grand jury indictment for alleged violation of rule prohibiting public disclosure by Government attorneys on matters occurring before the grand jury not immediately appealable under the collateral order doctrine).

Van Cauwenberghe v. Biard, 486 U.S. 517 (1988) (refusal to dismiss for forum non conveniens does not fall within the collateral order doctrine; order denying motion to dismiss made on the ground that an extradited person was immune from civil process not immediately appealable).

Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988) (district court order denying motion to stay or dismiss action when similar suit is pending in state court was not immediately appealable under collateral order doctrine)..

Welch v. Smith, 484 U.S. 903 (1987) (White, J., dissenting) (dissenting from denial of certiorari and noting circuit split about whether an order denying a civil rights plaintiff's motion for appointment of counsel is immediately appealable).

Deaver v. United States, 483 U.S. 1301 (1987) (denial of criminal defendant's motion to dismiss based on alleged unconstitutionality of statute providing for appointment of an independent counsel to investigate alleged impropriety of Government officials did not fall within the collateral order doctrine).

Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370 (1987) (order granting permissive intervention but denying intervention as of right was not immediately appealable)

Mitchell v. Forsyth, 472 U.S. 511 (1985) (rejection of a claim to qualified immunity is immediately appealable under the collateral order doctrine).

McDonald v. Smith, 472 U.S. 479 (1985) (recognizing, without disapproval, that appellate court accepted jurisdiction based on a "serious and unsettled question" concerning absolute immunity, specifically, whether the Petition Clause of the First Amendment provides absolute immunity from liability for libel).

Richardson-Merrell, Inc. v. Koller, 472 U.S. 424 (1985) (order disqualifying counsel in civil cases was not a collateral order subject to immediate appeal).

San Filippo v. United States Trust Co. of N.Y., 470 U.S. 1035 (1985) (White, J., dissenting) (noting confusion in lower courts over application of Supreme Court's holding in *Abney v. United States*, 431 U.S. 651, which held that appellate courts may exercise jurisdiction under the collateral order doctrine over an appeal from a pretrial order denying motion to dismiss an indictment on double jeopardy grounds).

Richardson v. United States, 468 U.S. 317 (1984) (claim that second trial after acquittal of one count of federal narcotics violations and after mistrial was declared on remaining counts because jury was unable to agree was barred on double jeopardy grounds because the Government failed to introduce legally sufficient evidence to go to the jury at the first trial raised a double jeopardy claim appealable as a final judgment).

Claiborne v. United States, 465 U.S. 1305 (1984) (order denying relief to sitting federal judge on claim of vindictive or selective prosecution not immediately appealable under collateral order doctrine).

Flanagan v. United States, 465 U.S. 259 (1984) (order denying request to disqualify counsel in civil case not immediately appealable under the collateral order doctrine).

Moses H. Cone Mem. Hosp. v. Mercury Construction Corp., 460 U.S. 1 (1983) (order staying federal court action pending resolution of state court action was immediately appealable).

United States v. Hollywood Motor Car Co., 458 U.S. 263 (1982) (order denying motion to dismiss based on prosecutorial vindictiveness not appealable before trial)

Harlow v. Fitzgerald, 457 U.S. 800 (1982) (noting, without disapproval, that senior aides and advisors to the President of the United States took immediate appeal of order denying absolute immunity defenses pursuant to collateral order doctrine).

Nixon v. Fitzgerald, 457 U.S. 731 (1982) (order rejecting absolute immunity is immediately appealable under the collateral order doctrine)..

Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981) (orders denying motions to disqualify opposing party's counsel in civil cases are not appealable before final judgment in underlying litigation).

FTC v. Standard Oil Co. of Calif., 449 U.S. 232 (1980) (FTC's issuance of a complaint was not a collateral order subject to appellate review before the conclusion of the administrative adjudication).

Boeing Co. v. Van Gemert, 444 U.S. 472 (1979) (appellate court assumed jurisdiction over challenge to portion of district court's judgment providing for attorney's fees to be collected out of the full judgment fund, not just the portion claimed by class members, but dissent argued that the attorney's fees portion of the litigation was ongoing and appeal was not appropriate even under the collateral order doctrine).

Helstoski v. Meanor, 442 U.S. 500 (1979) (direct appeal available for refusal to dismiss an indictment challenged under the Speech and Debate clause).

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) (order denying class action status is not immediately appealable; "death knell" doctrine does not support appellate jurisdiction of a prejudgment order denying class certification).

Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978) (order allocating expense of identification of class members, for purpose of sending individual notice, was appealable under the collateral order doctrine).

United States v. MacDonald, 435 U.S. 850 (1978) (defendant may not, before trial, appeal a district court's order denying his motion to dismiss an indictment because of an alleged

violation of his Sixth Amendment right to a speedy trial).

Nat'l Socialist Party of Am. v. Village of Skokie, 432 U.S. 43 (1977) (per curiam) (order by state supreme court that denied a stay of an injunction entered by lower court was appealable as a final judgment under the collateral order doctrine).

Abney v. United States, 431 U.S. 651 (1977) (addressing collateral order doctrine's applicability to claims of former jeopardy).

Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) (district court's order resolving notice problems in a class action constituted a final decision under the collateral order doctrine).

Gillespie v. United States Steel Corp., 379 U.S. 148 (1964) (appealability of order striking portions of complaint was a close question, but court of appeals did not choose wrongly in deciding to determine on the merits the controversy as to whether Jones Act supplied exclusive remedy for damages for death of seaman aboard vessel docked in Ohio and whether there could be a recovery for benefit of brother and sisters of deceased whose mother was living).

Local No. 438 Constr. & Gen. Laborers' Union, AFL-CIO v. Curry, 371 U.S. 542 (1963) (state court order authorizing a temporary injunction was immediately appealable where the controversy was beyond the state court's power and instead within the exclusive domain of the National Labor Relations Board).

Di Bella v. United States, 369 U.S. 121 (1962) (order denying pre-indictment motion to suppress evidence not immediately appealable).

Carroll v. United States, 354 U.S. 394 (1957) (order granting motion to suppress before trial in a criminal case was not appealable by the government as a final decision, regardless of whether the effect of suppressing evidence would be to force dismissal of indictment for lack of evidence).

Parr v. United States, 351 U.S. 513 (1956) (order dismissing first indictment after a second indictment had been obtained was not appealable).

Stack v. Boyle, 342 U.S. 1 (1951) (order denying motion to reduce bail appealable before trial).

Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A., 339 U.S. 684 (1950) (order vacating foreign attachment of a vessel immediately appealable under collateral order doctrine).

Roberts v. U.S. Dist. Ct., 339 U.S. 844 (1950) (per curiam) (denial of leave to proceed in forma pauperis is an immediately appealable order).

Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) (recognizing the collateral order doctrine; order denying request for posting of security was immediately appealable).

Brotherhood of R.R. Trainmen v. Baltimore & Ohio R. Co., 331 U.S. 519 (1947) (order preventing putative intervenor from becoming a party in any respect subject to immediate review).

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945) (state court judgment setting aside lease and awarding execution, relief assertedly within the exclusive power of the Federal Communications Commission, was appealable even though accounting still remained to be done in state court).

Cobbledick v. United States, 309 U.S. 323 (1940) (order denying motions to quash subpoenas duces tecum directing a witness to appear before a grand jury was immediately reviewable).

STATUTES AND RULES

28 U.S.C. § 1291 (granting appellate jurisdiction over final decisions of the district courts).

28 U.S.C. § 1292(a) (granting appellate jurisdiction over interlocutory orders involving injunctions, receiverships, and orders determining rights and liabilities of parties to admiralty cases in which appeals from final decrees are allowed).

28 U.S.C. § 1292(b) (allowing district court to certify nonfinal orders for immediate appeal).

28 U.S.C. § 2072(c) (granting rulemaking authority to define when a ruling of a district court is final for purposes of appeal under § 1291).

18 U.S.C. §§ 3141–45 (Bail Reform Act of 1984).

18 U.S.C. § 3731 (addressing appeals by the prosecution in criminal matters).

18 U.S.C. App. 3 §§ 1–16 (Classified Information Procedures Act).

9 U.S.C. §§ 1–14 (Federal Arbitration Act).

FED. R. CIV. P. 23(f) (authorizing courts of appeals to permit appeal from an order granting or denying class-action certification).

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Kristin B. Gerdy, *"Important" and "Irreversible" but Maybe Not "Unreviewable": The Dilemma of Protecting Defendants' Rights Through the Collateral Order Doctrine*, 38 U.S.F. L. REV. 213 (2004).

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Aaron R. Petty, *The Hidden Harmony of Appellate Jurisdiction*, 62 S.C. L. REV. 353 (2010).

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Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in*

Multidistrict Litigation, 79 FORDHAM L. REV. 1643 (2011).

Edward Reines & Nathan Greenblatt, *Interlocutory Appeals of Claim Construction in the Patent Reform Act of 2009, Part II*, 2010 PATENTLY O-PAT. L.J. 7 (2010).

Cassandra Burke Robertson, *Appellate Review of Discovery Orders in Federal Court: A Suggested Approach for Handling Privilege Claims*, 81 WASH. L. REV. 733 (2006).

Bradley Scott Shannon, *Why Denials of Summary Judgment Should be Appealable*, 80 TENN. L. REV. 45 (2012).

Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165 (1990).

Joan Steinman, *The Scope of Appellate Jurisdiction: Pendant Appellate Jurisdiction Before and After* Swint, 49 HASTINGS L.J. 1337 (1998).

Matthew O. Wagner, *Fixing* Perlman*: How the Misapplication of a 100-Year-Old Doctrine Threatens to Undermine* Mohawk Industries, Inc. v. Carpenter, 79 U. CIN. L. REV. 1631 (2011).

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TAB 9A

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MEMORANDUM

DATE: September 10, 2013

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 12-AP-F

This item concerns proposed Appellate Rules amendments relating to class-action-objector appeals.[1] In this memo, I do not attempt an exhaustive review of the relevant issues. For in-depth treatment of particular facets of the problem, I commend to the Committee the articles by Professor Fitzpatrick[2] and by Judge Smith and Professor Lopatka.[3] Instead, I sketch here a schematic overview of portions of the problem.

The basic conundrum is this: District judges lack full information about the fairness of proposed class-action settlements, and the named parties – who have reached agreement on the settlement – will not always provide full information. Other sources are needed. Class members who object to the proposed settlement can usefully inform the district court's assessment of the settlement, and can also perform a useful function by renewing their objections on appeal. But not all objections have merit, either as complaints about what the objector will receive under the settlement or as complaints about what other class members will receive. Some objectors and their counsel pursue meritless objections mainly or solely to obtain a monetary payment (from the named parties and/or their counsel) in exchange for dropping the objection.

At the district-court level, the Civil Rules attempt to encourage input by class members and attempt to ensure that meritorious objections will receive due attention from the court. Settlement of a class action requires court approval.[4] Class members must receive reasonable notice of the proposed settlement,[5] and the court "may approve [the settlement] only after a hearing and on finding that it is fair, reasonable, and adequate."[6] Rule 23(e)(5) authorizes objections by any member of the class, and

[1] The docket number for this item refers specifically to the proposal submitted to the Committee by Professors Brian Fitzpatrick, Alan Morrison, and Brian Wolfman. However, the Committee has expanded the scope of the project to include possible alternatives as well.
[2] Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 Vand. L. Rev. 1623 (2009).
[3] John E. Lopatka & D. Brooks Smith, *Class Action Professional Objectors: What To Do About Them?*, 39 Fla. St. U. L. Rev. 865 (2012).
[4] Civil Rule 23(e) provides: "The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval."
[5] *See* Civil Rule 23(e)(1).
[6] Civil Rule 23(e)(2).

provides that "the objection may be withdrawn only with the court's approval." Though these rules cannot deter objectors from interposing objections for the purpose of extracting a side payment, Rule 23(e)(5)'s requirement of court approval for objection withdrawal is designed to prevent the extraction of side payments while the case is in the trial court. Valid objections might lead the district court to require modifications in the proposed settlement. Let us suppose that many meritorious objections are satisfactorily addressed by the district court, but that at least a small number of such objections are erroneously rejected by the district court. Let us further suppose (for the sake of simplicity) that all non-meritorious objections are rejected by the district court.

The district court's rejection of the objections creates an opportunity for the objector to appeal from the judgment that approves the settlement. Under *Devlin v. Scardelletti*, 536 U.S. 1 (2002), "nonnamed class members … who have objected in a timely manner to approval of the settlement at the fairness hearing have the power to bring an appeal without first intervening."[7] *Devlin* itself involved a class certified under Civil Rule 23(b)(1), and the Court noted the relevance of this fact to the question of Devlin's right to appeal: "Particularly in light of the fact that petitioner had no ability to opt out of the settlement … appealing the approval of the settlement is petitioner's only means of protecting himself from being bound by a disposition of his rights he finds unacceptable and that a reviewing court might find legally inadequate."[8] However, the *Devlin* Court summed up its holding in terms that were not limited to non-opt-out classes,[9] and at least four circuits have applied *Devlin* to opt-out class actions.[10] Let us therefore suppose that even if the district court provides class members with a further

[7] *Devlin*, 536 U.S. at 14.
[8] *Id*. at 10-11.
[9] *See supra* text accompanying footnote 7.
[10] *See* Churchill Village, L.L.C. v. Gen. Elec., 361 F.3d 566, 572 (9th Cir. 2004) (reasoning that opting out was not a realistic possibility "[b]ecause each objector's claim is too small to justify individual litigation," and concluding for that reason that "[b]y terminating all class actions relating to the dishwasher recall, the settlement will effectively bind the objectors"); Fidel v. Farley, 534 F.3d 508, 513 (6th Cir. 2008) (following *Churchill Village* and reasoning that "[t]he reality of class action litigation—wherein each class member is generally entitled to only a small damages claim—necessitates the application of *Devlin* to Rule 23(b)(3) class actions"); Nat'l Ass'n of Chain Drug Stores v. New England Carpenters Health Benefits Fund, 582 F.3d 30, 39-40 (1st Cir. 2009) (in a case involving a class "certified both as a mandatory class and one permitting opt-out rights," concluding that "*Devlin* … is about party status and one who could cease to be a party is still a party until opting out"); In re Integra Realty Resources, Inc., 354 F.3d 1246, 1257-58 (10th Cir. 2004) (holding in the context of a defendant class settlement with an opt-out opportunity that "*Devlin* applies to opt-out class settlements"). *See also, e.g.*, Joan Steinman, *Irregulars: The Appellate Rights of Persons Who Are Not Full-Fledged Parties*, 39 Ga. L. Rev. 411, 455 (2005) (arguing that "the better policy would be *not* to view the decision to forego an opportunity to opt out as a waiver of the right to appeal a settlement approval over one's objections"). *But see* In re Gen. Am. Life Ins. Co. Sales Practices Litig., 302 F.3d 799, 800 (8th Cir. 2002) ("Because the Court relied upon the mandatory character of the class action, we question whether *Devlin*'s holding applies to opt-out class actions certified under Rule 23(b)(3)."). *Cf*. Ballard v. Advance Am., 349 Ark. 545, 549, 79 S.W.3d 835, 837 (Ark. 2002) (reaching result contrary to *Devlin* with respect to attempted appeal from class settlement approved under state class-action rule, and relying in part on the fact that "appellants had the ability to opt out and instead elected to object to the settlement and risk being bound by it, if approved by the court over their objections").

opportunity to opt out after the terms of the settlement are established,[11] an objector whose objection was rejected by the district court can appeal from the judgment approving the settlement.

Marie Leary's preliminary research indicates that – in the universe of cases that she analyzed prior to the Committee's spring 2013 meeting – all objector appeals were voluntarily dismissed prior to resolution on the merits, and many of those appeals were voluntarily dismissed before the appellant had filed a merits brief.[12] Docket research does not make clear the reason for these dismissals, but anecdotal evidence indicates that when an objector voluntarily dismisses an appeal, the dismissal often comes in exchange for a monetary payment. Professor Fitzpatrick reported to the Committee that he has heard informally from class-action lawyers of payments that range from $ 50,000 to $ 1 million per objector. These data suggest two problems: First, by filing appeals, objectors may be extracting large payments from named parties and/or their counsel, in amounts not commensurate with the merits of their objections or, indeed, what they would receive if their objections were vindicated on appeal. Second, to the extent that some of the appeals do have merit, the objectors' dropping of their appeals in exchange for personal payments deprives the court of appeals of the opportunity to review challenges that should be found meritorious and should benefit other class members.

Why are the named parties and their counsel willing to pay an objector to drop even a non-meritorious appeal? The reason is that, in practice, the pendency of the appeal delays the implementation of the settlement. One might initially wonder why this should be so, as a legal matter: outside the context of class actions, an appeal from a final judgment does not automatically stay the judgment. The answer appears to be that, typically, the class settlement agreement itself provides that the settlement does not become final until the disposition of any appeal from the order approving the settlement.[13] That is hardly surprising. Defendants who wish to achieve global (or even partial) peace through a settlement will not wish to pay out monies (either to class members or to class counsel) until any appellate challenges to the settlement have been resolved, if only because an appellate challenge, if successful, might make the settlement no longer worthwhile and thus lead defendants (or others) to withdraw their consent. Thus, an appeal typically delays both payment of attorney fees to class counsel and

[11] Civil Rule 23(e)(4) provides: "If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so."

[12] This is not always the case. For example, Professor Marcus has pointed out that the Supreme Court's decisions in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp*., 527 U.S. 815 (1999), were both the result of objector appeals.

[13] *See* Lopatka & Smith, *supra* note 3, at 916 ("[T]he delay in execution of a judgment approving a class settlement does not arise because of entry of a judicial stay. After all, the defendants have agreed to their liability under the settlement. Rather, the delay during the pendency of the appeal arises because of the terms of the settlement."). *See, e.g.*, In re Cardizem CD Antitrust Litig., 391 F.3d 812, 818 (6th Cir. 2004) ("[T]he pursuit of [appellant's] objections has the practical effect of prejudicing the other injured parties by increasing transaction costs and delaying disbursement of settlement funds."); Vaughn v. Am. Honda Motor Co., Inc., 507 F.3d 295, 299 (5th Cir. 2007) (describing a class action settlement that "does not become effective, by its terms, until any appeals are concluded").

payment of settlement funds to class members. The hardship that this imposes gives the objector leverage to extract a payment in exchange for dropping the appeal.

What can be done to address these two problems (extortionate, non-meritorious appeals, and the dropping of valid appeals)? And can measures that address those problems do so without deterring meritorious appeals? In the Committee's inquiries thus far, each potential option on which we have focused appears to pose difficulties. In this memo, I will group those options in four categories,[14] which I will call the "Objector-Exclusion Approach," the "Settlement-Implementation Approach," the "Appeal-Hurdle Approach," and the "Dismissal-Hurdle Approach." The Objector-Exclusion Approach is simple and appropriate, but likely to be of limited usefulness. The Settlement-Implementation Approach can be (in fact, is being) employed without any rule changes, but is hardly a complete solution. The Appeal-Hurdle Approach runs the risk of chilling meritorious appeals and – in one of its forms – would likely require legislative action. And the Dismissal-Hurdle Approach may overstep the limits set by mootness doctrine.

I. The Objector-Exclusion Approach

Only a person bound by a class action judgment may appeal that judgment under *Devlin*. Suppose that an objector cavils, at the settlement stage, on the ground that he and others similarly situated ought not to be lumped into the class. Suppose that the district court agrees, and that the district court therefore redefines the class to exclude a subset of persons that includes the objector. So long as the redefined class meets the requirements of Rule 23, this approach validly excludes the objector (and anyone who resembles him in the relevant ways) from the ambit of the class. Because the objector will not be bound by the judgment, it would seem that *Devlin* would ordinarily provide him with no basis for taking an appeal.[15] However, I speculate that the universe of cases in which this approach solves the problem will be relatively limited. Many instances will remain in which the class cannot usefully be redefined to exclude the objector and those similarly situated to the objector.

Some commentators might be tempted to argue that *Devlin* itself should be narrowed to those instances in which the objector lacks the ability to opt out of the class. If the objector has the ability to exclude *himself* from the class, this argument would assert, then he should not be heard to complain – by means of an appeal – if he decides to

[14] This list does not, of course, exhaust the possibilities. Professor Lopatka and Judge Smith discuss others as well. *See* Lopatka & Smith, *supra* note 3, at 890-903 (discussing the possibilities of limiting *Devlin* to non-opt-out actions; requiring intervention as a prerequisite to appeal; imposing sanctions on objectors; and expediting appeals).

[15] *Cf.* AAL High Yield Bond Fund v. Deloitte & Touche LLP, 361 F.3d 1305, 1309-10 & n.6 (11th Cir. 2004) (holding that *Devlin* did not provide a right to appeal to persons who merely "claim[ed] they fit the class definition until it was redrafted to exclude them at the time of class certification and settlement"). The *AAL High Yield Bond* court stated that the would-be appellants would not have met the requirements for intervention as of right, and left open the possibility that the analysis might differ if they had met those requirements. It concluded: "The Objectors do not seek to protect their own property, their allotment from an award or settlement, or any other cognizable legal right or interest. They are simply potential plaintiffs who have yet to litigate any claims." *Id.* at 1310-11.

stay in the class and be bound by the judgment. However, as I noted above, the weight of authority appears to be heading in the opposite direction; four circuits, thus far, have applied *Devlin* to opt-out actions, while I found only one circuit and a state high court that took a contrary view.[16] It seems to me that the developing majority view is sound. In a negative-value class action,[17] opting out is not a realistic possibility; class members will obtain relief as part of a class or not at all. Moreover, concluding that an opt-out opportunity removes an objector's right to appeal the class-settlement approval would foreclose objectors in opt-out class actions from bringing valid objections to the attention of the appellate court. Unless we are willing to assume that district courts always take proper account of all valid objections, closing off an objector's chance to appeal seems undesirable.

II. The Settlement-Implementation Approach

As noted above, the feature that gives objectors leverage to extract payments in exchange for dropping appeals is that – as a practical matter – the pendency of the appeal delays the implementation of the settlement. Because that delay arises from the terms of the settlement itself – rather than from a nonwaivable legal requirement – it is possible to imagine a settlement that provides for full or partial implementation of the settlement notwithstanding the pendency of an appeal.

There would seem to be two main reasons why a defendant would be reluctant to implement the settlement until all appellate challenges have been adjudicated. If the appeal results in the invalidation of the settlement, the defendant may want its money back. One risk is payment risk: The recipients may have spent the money in the meantime. That risk, presumably, could be insured against. The other risk is administrative cost: As to the class members, both paying out the money and recovering the money will impose very large administrative costs. Those administrative costs, as well as the self-interest of class counsel, might explain why the main observed settlement-implementation measure to date is the "quick-pay provision," which focuses on up-front partial payment of class counsel fees (rather than up-front distributions to class members). Professor Fitzpatrick has explained that a "quick-pay provision" in a settlement entitles class counsel to receive their fees upon settlement approval despite the pendency of an appeal (but subject to the return of the fees if the order is reversed on appeal). He reports that quick-pay provisions can immunize class counsel against pressure to pay off objector-appellants, but also that defendants are reluctant to agree to such provisions unless they receive security that assures the repayment of the fees if the judgment is reversed on appeal.

Apart from a quick-pay provision, one could imagine a settlement provision that presumptively defined the "final settlement date" as occurring only after resolution of all appeals, but that permitted the named parties to move the final settlement date earlier by

[16] *See supra* note 10.
[17] This term denotes a class action in which no class member's claim is large enough to warrant individual litigation.

later agreement.[18] With such a provision in the settlement agreement, the named parties could commence settlement implementation despite a pending appeal. If all the named parties and their counsel were confident that the appeal lacked merit, one might expect them to take advantage of such a provision (if present) and commence settlement implementation notwithstanding the objector's appeal. That would deprive the objector of most of her leverage, because the only cost that the objector could threaten to impose would be the cost of defending the settlement on appeal – not a negligible cost, to be sure, but significantly less than the objector could impose by delaying settlement implementation. Why would the named parties not employ this strategy? If we are not seeing the use of this strategy, perhaps that is because some uncertainty exists as to the merits of the objector's appeal. After all, if the named parties were sure the appeal would be rejected, there would seem to be no downside to calling the objector's bluff, litigating the appeal, and implementing the settlement in the meantime.

In some recent cases, class counsel have proposed a creative but (in my view) dubious alternative strategy that appears to be designed to achieve settlement implementation notwithstanding the pendency of an objector appeal. In *Hitch Enterprises, Inc. v. Cimarex Energy Co.*, No. 5:11-cv-00013-W (W.D. Okla.), after an objector challenged the amount of attorney fees (to be paid to class counsel) and incentive payments (to be awarded to the class representatives), the class representatives moved "to sever the approximately $25 claim of the lone Objector Katherine Riesen Lathrop from the $16.4 million Settlement Fund for the benefit of the 29,689 member Settlement Class, or, in the alternative, to require a $3.1 million appeal bond for delay damages, increased costs of administration, and costs of appellate briefing, if she files an appeal from the final judgment in this case."[19] The motion papers proposed that

[18] The Amended Settlement Agreement and Release in *Fraley v. Facebook, Inc.*, provides an example. Under the Agreement,

> The term "Final Settlement Date" means two Court days after the Final Order and Judgment become "final." For the purposes of this Section 1.13, "final" means (a) if no appeal from the Final Order and Judgment is filed, the expiration of the time for the filing or noticing of any appeal from the Final Order and Judgment; (b) if an appeal from the Final Order and Judgment is filed, the date on which all appeals therefrom, including but not limited to petitions for rehearing or reargument, petitions for rehearing en banc, and petitions for certiorari or any other form of review, have been finally disposed of in a manner that affirms the Final Order and Judgment; or (c) if the Class Counsel and Facebook's Counsel agree in writing, "Final Settlement Date" can occur on any other agreed upon date.

Amended Settlement Agreement and Release ¶ 1.13, *Fraley v. Facebook, Inc.*, Doc. 235-1, Case No. CV-11-01726 RS (N.D. Cal.). The settlement agreement sets the timing of settlement implementation by reference to the Final Settlement Date. *See, e.g., id.* ¶ 2.3(d) ("The Net Settlement Fund shall be distributed to Authorized Claimants between thirty (30) and forty-five (45) calendar days after the Final Settlement Date."). (The *Fraley* documents are available at http://www.fraleyfacebooksettlement.com/court .)

I do not attempt, for purposes of this memo, to determine whether there would ever be reasons for a district court to refuse to approve a settlement provision that provided for pre-appeal-resolution implementation of the settlement. (Might there, in some instances, be a legitimate concern that an unrecoverable payout to class members might, de facto, prejudice any right to fair treatment that an objector establishes on appeal, whether through a revised settlement or otherwise?)

[19] Plaintiff Class's Motion to Sever Objector's Claim, or Alternatively, Require an Appeal Bond and Brief in Support at 1, Hitch Enter., Inc. v. Cimarex Energy Co., No. 5:11-cv-00013-W (W.D. Okla. Apr. 11, 2013), ECF No. 136.

> The Court may sever Objector's claims from the remaining Settlement Class Members under Rule 54(b), and enter a final judgment for the other 29,688 non-objecting Settlement Class Members. Objector may then separately appeal the Court's ruling on her attorneys' fee and incentive award determination (and/or Class Counsel could simply choose to confess judgment for the entire amount of Objector's claim).[20]

The court never ruled on this proposal in *Hitch Enterprises*, because the objector subsequently obtained the court's approval to withdraw her objections.[21] But a similar strategy appears to have gained the court's approval in another case, *Chieftain Royalty Co. v. QEP Energy Co.*, No. 5:11-cv-00212-R (W.D.Okla.). In *Chieftain Royalty*, the district court's order granting final approval of the class settlement concluded as follows:

> 29. There is no reason for delay in the entry of this Final Approval Order and immediate entry by the Clerk of the Court is directed pursuant to Federal Rule of Civil Procedure 54(b).
>
> 30. Further, to the extent any objector attempts to file an appeal as to this Order, such objection shall be severed for purposes of appeal and an appropriate cash bond shall be posted, pursuant to paragraphs 10.1 and 10.2 of the Stipulation, to which there were no objections.[22]

A motion subsequently filed by counsel for the named parties indicates that they understood this order as a mechanism for preventing any objector appeal from holding up the settlement implementation.[23] But the mechanism was never tested: The court denied the motion as unripe (because the objector had not filed a notice of appeal),[24] and no notice of appeal had been filed when I looked at the docket on August 25, 2013.

This strategy seems to me to misconstrue the purpose of Civil Rule 54(b). As the Committee knows, the purpose of Civil Rule 54(b) is to permit an immediate appeal of an order disposing of fewer than all claims or parties in a complex case. No such exigency presents itself in the class-settlement context; in that context, the order approving the class settlement disposes of all claims by and against all parties,[25] so there is no need to

[20] *Id*. at 8.
[21] *See* Hitch Enter., Inc. v. Cimarex Energy Co., No. 5:11-cv-00013-W (W.D. Okla. Apr. 22, 2013), ECF Nos. 139 & 140.
[22] Order Granting Final Approval of Class Action Settlement, Form and Manner of Notice, and Plan of Allocation at 37, Chieftain Royalty Co. v. QEP Energy Co., No. 5:11-cv-00212-R (W.D. Okla. May 31, 2013), ECF No. 183.
[23] *See* Motion to (1) Effectuate Severed Objection of Objector Crain in New Case File, and (2) Require Objector Crain to Show Cause for Staying Distribution to Other Class Members Pending Appeal, Chieftain Royalty Co. v. QEP Energy Co., No. 5:11-cv-00212-R (W.D. Okla. Aug. 2, 2013), ECF No. 199.
[24] *See* Order Denying Motion to Sever, Denying Motion for Hearing, Chieftain Royalty Co. v. QEP Energy Co., No. 5:11-cv-00212-R (W.D. Okla. Aug. 5, 2013), ECF No. 201.
[25] Unnamed class members who never intervened in the action and who opt out have no claims pending in the action after they opt out.

enter a *partial* final judgment under Rule 54(b).[26] Given that the goal of the exercise appears to be to separate the objector's claim from the rest of the suit – so that the appeal by the objector can be said to leave unaffected the implementation of the settlement as to the remaining class members – I would have thought that this should be viewed as a joinder question, not a partial-final-judgment question. Civil Rule 21 provides: "Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party." It seems to me that Rule 21 is more closely on point than Rule 54(b) in this context. But stating the problem in those terms brings to light the problem: Once the question is viewed as one of joinder and severance, one wonders why the question is not governed by Rule 23 rather than Rule 21.[27] And if the question is governed by Rule 23, then it restates the question I treated in Part I above: When can the class validly be redefined to exclude the objector? I do not think that the answer can be that the class can be redefined to exclude unnamed class members whose only distinguishing feature is that they object to the proposed settlement.

In sum, a district-court order purporting to "sever" an objector merely in order to assure the named parties that the settlement can safely be implemented despite the pendency of the objector's appeal seems highly dubious. The objector is objecting to the resolution of the claims of other parties as well as his own. The objector's objection isn't solely about his own separate claim; rather, the objection is to the judgment proposed to be entered on the claims of the entire class (because that judgment affects him). If an objector were to press his appeal despite such a purported "severance"[28] and if the appeal succeeded on the merits, I would expect the court of appeals to direct that the district court, on remand, must vacate the settlement as to *all* class members despite the purported severance. The Tenth Circuit's observations, regarding a similar tactic attempted on appeal, seem equally apposite here:

> Plaintiffs seek dismissal of the appeals as to all class members other than Objectors because, inasmuch as the settlement agreement provides that there shall be no distributions as long as there are appeals pending, the pendency of Objectors' appeals prevents any distribution.
>
> While we are sympathetic to Plaintiffs' plight, we can see no practical way to separate Objectors' individual interests from those of the other class members without upsetting the entire settlement fund. Moreover, in *Devlin v. Scardelletti*, 536 U.S. 1, 122 S.Ct. 2005, 153 L.Ed.2d 27 (2002), in which the Supreme Court held that nonnamed non-intervening class members objecting to the approval of a settlement may

[26] This is not to say that Civil Rule 54(b) has no application in the class-action context. For instance, it can be used to enter final judgment as to class claims against one defendant even though class claims against another defendant have not been finally resolved. *See* Nat'l Ass'n of Chain Drug Stores v. New England Carpenters Health Benefits Fund, 582 F.3d 30, 38 (1st Cir. 2009).

[27] *See* 4 NEWBERG ON CLASS ACTIONS § 11:69 (4th ed.) ("In a class action context, Rule 21, governing misjoinder of parties, is aimed at misjoinder of named parties and not unnamed absent class members.").

[28] I would think that the objector would be well advised to amend his notice of appeal to include the severance order.

> appeal that approval even though they were not permitted to intervene, the Court noted that such an objector "will only be allowed to appeal that aspect of the District Court's order that affects him." Id. at 2013, 2010. The Court described that "aspect," however, as "the District Court's decision to disregard his objections." Id. at 2010. Objectors' objections were directed at the entire settlement. We therefore deny Plaintiffs' motion to partially dismiss the appeals.[29]

One further topic bears mention in this context. Note that the motion in *Hitch Enterprises* suggested that "Class Counsel could simply choose to confess judgment for the entire amount of Objector's claim." The implication is that such an offer would render the objector's appeal moot even if the objector refused the offer. Last Term, in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013), the Supreme Court noted but did not resolve a circuit split concerning "whether an unaccepted offer that fully satisfies a plaintiff's claim is sufficient to render the claim moot." *Id*. at 1528-29. The four dissenting Justices in *Genesis Healthcare* made clear that in their view, "an unaccepted offer of judgment cannot moot a case." *Id.* at 1533 (Kagan, J., joined by Ginsburg, Breyer, & Sotomayor, JJ., dissenting).

It may be relevant, in this context, to recall Justice Rehnquist's concurrence in *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980). Explaining why he joined in the majority's ruling that (on the facts of the case) "a tender to named plaintiffs in a class action of the amounts claimed in their individual capacities, followed by the entry of judgment in their favor on the basis of that tender, over their objection" did not "moot[] the case and terminate[] their right to appeal the denial of class certification,"[30] Justice Rehnquist observed:

> The distinguishing feature here is that the defendant has made an *unaccepted* offer of tender in settlement of the individual putative representative's claim. The action is moot in the Art. III sense only if this Court adopts a rule that an individual seeking to proceed as a class representative is required to accept a tender of only his individual claims. So long as the court does not require such acceptance, the individual is required to prove his case and the requisite Art. III adversity continues. Acceptance need not be mandated under our precedents since the defendant has not offered all that has been requested in the complaint (i.e., relief for the class) and any other rule would give the defendant the practical power to make the denial of class certification questions unreviewable.[31]

[29] Rutter & Wilbanks Corp. v. Shell Oil Co., 314 F.3d 1180, 1183 n.1 (10th Cir. 2002); *see also* Lopatka & Smith, *supra* note 3, at 891 n.113 ("[O]bjections if successful on appeal would typically result in a benefit to at least a group of class members including the objector, and so the appeal would necessarily be undertaken on behalf of multiple class members, with a resolution affecting potentially the entire class.").
[30] *Roper*, 445 U.S. at 327 (majority opinion).
[31] *Id.* at 341 (Rehnquist, J., concurring).

The situation of an objector is not identical to that of a class representative. If the objector is asking only for relief for himself, an offer of that relief (in full) does not leave out some requested relief, unlike the offer to a class representative that Justice Rehnquist noted was insufficient to moot the class representative's claim. But there is a related concern about named parties' picking off objectors simply by offering them a payment equivalent to the amount of their individual share of the class's claims.

III. The Appeal-Hurdle Approach

Another sort of approach seeks to remove objectors' leverage by making it harder for them to take appeals, either by making appeals more expensive or by imposing a merit-screening mechanism. In Part III.A I discuss the possible use of appeal bonds for this purpose, while in Part III.B I discuss the possibility of requiring objectors to obtain a "certificate of appealability" in order to appeal.

A. Appeal bonds

Traditionally, appeal bonds were modest in amount and were designed to secure the appellee against the possibility that an appellant – ordered at the end of an appeal to pay the appellee's costs – might not have the money to do so. In recent years, some enterprising courts have imposed very large appeal bond requirements as a condition of an objector's appeal from a judgment approving a class action settlement.[32] But caselaw interpreting Appellate Rule 7 will not always justify the inclusion of attorney fees and/or settlement-implementation-delay costs in a Rule 7 cost bond required of an objector-appellant.

1. Practice under current Rule 7

Appellate Rule 7 provides that "[i]n a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal." Rule 7 does not define "costs on appeal"; neither does Appellate Rule 39 (which sets the framework for the allocation of costs on appeal).[33] 28 U.S.C. § 1920 authorizes the taxation of certain items as costs, but none of

[32] The findings in Marie Leary's informative exploratory study included the following: "FRAP 7 bonds were more likely to be imposed in response to requests in class action litigation (80% of requests (N= 8)) than in all appeals (51% (N=17))." Marie Leary, Federal Judicial Center Exploratory Study of the Appellate Cost Bond Provisions of Rule 7 of the Federal Rules of Appellate Procedure 5 (FJC 2008). "Targets of motions in class actions were most often interveners or objectors (80% (N=8))." *Id*. "In two class action appeals, substantial portions of bonds of hundreds of thousands of dollars were attributable to anticipated delays and increased costs in administering a class settlement." *Id*. at 6. "In one class action appeal, an objector voluntarily dismissed the appeal after being ordered to pay a $1,240,500 bond." *Id*.

[33] Rule 39(a) sets general default rules for allocating appellate costs. Rule 39(b) addresses cost awards for or against federal government litigants. Rule 39(c) addresses copying costs. Rule 39(d) covers the procedure for requesting and objecting to costs and for including costs in the mandate. Rule 39(e) lists "costs on appeal [that] are taxable in the district court … : (1) the preparation and transmission of the record; (2) the reporter's transcript, if needed to determine the appeal; (3) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; and (4) the fee for filing the notice of appeal."

those items could be read to encompass attorney fees or damages caused by delay in implementation of a settlement.[34]

The Supreme Court has not addressed the interpretation of "costs" in Appellate Rule 7, but *Marek v. Chesny*, 473 U.S. 1 (1985), decided an arguably analogous question. In *Marek*, the Court held that Civil Rule 68's reference to "costs"[35] includes attorney fees where there is statutory authority for the award of attorney fees and the relevant statute "defines 'costs' to include attorney's fees." *Marek*, 473 U.S. at 9. The Court explained that because neither Rule 68 nor its Note defined "costs," and because the drafters of the original Rules were aware of the existence of fee-shifting statutes, "the most reasonable inference is that the term 'costs' in Rule 68 was intended to refer to all costs properly awardable under the relevant substantive statute or other authority." *Id.*

It might be difficult, though, to ascribe to the drafters of Appellate Rule 7's cost-bond provision an awareness of the costs of appeal-related delay in implementing class action settlements. The notion of requiring security for costs on appeal can be traced back to the First Judiciary Act.[36] The Revised Statutes carried forward the security requirement,[37] and Civil Rule 73 as initially adopted reflected that statutory backdrop. Original Civil Rule 73(c) provided:

> Bond on Appeal. Whenever a bond for costs on appeal is required by law, the bond shall be filed with the notice of appeal. The bond shall be in the sum of two hundred and fifty dollars, unless the court fixes a different amount or unless a supersedeas bond is filed, in which event no separate bond on appeal is required. The bond on appeal shall have sufficient surety and shall be conditioned to secure the payment of costs if the appeal

[34] Section 1920 authorizes taxation of:

> (1) Fees of the clerk and marshal;
> (2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;
> (3) Fees and disbursements for printing and witnesses;
> (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;
> (5) Docket fees under section 1923 of this title;
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

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

[36] Section 22 of the Act provided for certain civil appeals and required that "every justice or judge signing a citation on any writ of error as aforesaid, shall take good and sufficient security, that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good." Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 73, 85.

[37] Section 1000 of the Revised Statutes provided: "Every justice or judge signing a citation on any writ of error, shall, except in cases brought up by the United States or by direction of any Department of the Government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a supersedeas and stays execution, or all costs only where it is not a supersedeas as aforesaid." 1 Rev. Stat. 187 (1878).

> is dismissed or the judgment affirmed, or of such costs as the appellate court may award if the judgment is modified. If a bond on appeal in the sum of two hundred and fifty dollars is given, no approval thereof is necessary. After a bond on appeal is filed an appellee may raise objections to the form of the bond or to the sufficiency of the surety for determination by the clerk.

The following decade, Congress enacted the 1948 Judicial Code and repealed the statutory appeal bond requirement, evidently because it was thought that this requirement should instead be implemented through the Rules.[38] Accordingly, the 1948 amendment to Civil Rule 73 altered Rule 73(c)'s first sentence to read as follows: "Unless a party is exempted by law, a bond for costs on appeal shall be filed with the notice of appeal."[39] Civil Rule 73(c) – as amended in 1966[40] – formed the basis for Appellate Rule 7, which, as originally adopted, read as follows:

> Unless an appellant is exempted by law, or has filed a supersedeas bond or other undertaking which includes security for the payment of costs on appeal, in civil cases a bond for costs on appeal or equivalent security shall be filed by the appellant in the district court with the notice of appeal; but security shall not be required of an appellant who is not subject to costs. The bond or equivalent security shall be in the sum or value of $ 250 unless the district court fixes a different amount. A bond for costs on appeal shall have sufficient surety, and it or any equivalent security shall be conditioned to secure the payment of costs if the appeal is finally dismissed or the judgment affirmed, or of such costs as the court of appeals may direct if the judgment is modified. If a bond or equivalent security in the sum or value of $ 250 is given, no approval thereof is necessary. After a bond for costs on appeal is filed, an appellee may raise for determination by the clerk of the district court objections to the form of the bond or to the sufficiency of the surety. The provisions of Rule 8(b) apply to a surety upon a bond given pursuant to this rule.

The 1979 amendments deleted most of the text of original Rule 7 and substituted the following:

[38] *See, e.g.*, Thrift Packing Co. v. Food Machinery & Chemical Corp., 191 F.2d 113, 114 n.3 (5th Cir. 1951) ("Title 28 U.S.C. § 869 (1940), which provided that a bond for costs on appeal must be given by an appellant, was repealed by the 1948 revision because its provisions covered a subject more appropriately regulated by rule of court.").

[39] *See* 1948 Committee Note to Civil Rule 73(c) ("R.S. § 1000, Title 28, U.S.C., § 869 (1946), which provided for cost bonds, is repealed and its provisions are not included in revised Title 28. Since the Revisers thought that this should be controlled by rule of court as in the case of supersedeas bond, see subdivision (d), no amendment to Title 28 will be proposed to restore the omission. The requirement of a cost bond should, therefore, be incorporated in the rule, and the amendment so provides.").

[40] *See* 1966 Committee Note to Civil Rule 73(c) ("The additions to the first sentence permit the deposit of security other than a bond and eliminate the requirement of security in cases in which the appellant has already given security covering the total cost of litigation at an earlier stage in the proceeding (a common occurrence in admiralty cases) and in cases in which an appellant, though not exempted by law, is nevertheless not subject to costs under the rules of the courts of appeals.").

> The district court may require an appellant to file a bond or provide other security in such form and amount as it finds necessary to ensure payment of costs on appeal in a civil case. The provisions of Rule 8(b) apply to a surety upon a bond given pursuant to this rule.

As the 1979 Committee Note explained:

> The amendment would eliminate the provision of the present rule that requires the appellant to file a $ 250 bond for costs on appeal at the time of filing his notice of appeal. The $ 250 provision was carried forward in the F.R.App.P. from former Rule 73(c) of the F.R.Civ.P., and the $ 250 figure has remained unchanged since the adoption of that rule in 1937. Today it bears no relationship to actual costs. The amended rule would leave the question of the need for a bond for costs and its amount in the discretion of the court.

The 1998 restyling, which was intended to produce no change in substance, gave Rule 7 its current wording.

The substance of Rule 7's cost bond requirement, thus, was adopted at latest in 1979 – before the Court decided *Marek*. As of 1979, it seems doubtful that the rulemakers would have had occasion to consider the possibility that settlement-implementation-delay costs would be includable in the bond.[41] In fact, the available evidence suggests that the rulemakers regarded the 1979 elimination of the presumptive $ 250 bond amount as a relatively trivial change.[42]

The text of Rule 7 thus leaves unresolved two issues that are important in determining the amount of a cost bond in connection with an objector's appeal: Should the bond include attorney fees, and should the bond include the projected costs of delay in implementation of the settlement?

In two circuits – the Third and the D.C. Circuits – the answer appears to be no, because applicable caselaw[43] limits the costs for which a Rule 7 bond can be required to

[41] Minutes of the Appellate Rules Committee meeting(s) at which the 1979 amendment of Rule 7 would have been discussed are not currently available on the uscourts.gov website.

Admittedly, the deletion of the presumptive $ 250 bond amount stemmed from the rulemakers' view that this amount "bears no relationship to actual costs." 1979 Committee Note to Appellate Rule 7. But there is a great deal of difference between deciding that $ 250 did not reflect actual costs on appeal and deciding that costs on appeal should include hundreds of thousands of dollars' worth of delay costs.

[42] On the topic of the proposed amendment to Rule 7, the minutes of the 1978 Standing Committee meeting state merely: "This rule was not submitted to the bench and bar, however, the members agreed the change is not significant. The amendment was approved as printed in the deskbook." Committee on Rules of Practice and Procedure, Minutes of the Meeting of July 17-18, 1978, at 3.

[43] Admittedly, in one of those circuits, the applicable caselaw is an unpublished nonprecedential opinion, *Hirschensohn v. Lawyers Title Ins. Corp.*, No. 96-7312, 1997 WL 307777 (3d Cir. June 10, 1997).

those that are awardable under Rule 39.[44] But five other circuits – the First,[45] Second,[46] Sixth, Ninth,[47] and Eleventh[48] Circuits – have concluded that attorney fees can be

[44] In *In re American President Lines, Inc.*, 779 F.2d 714, 719 (D.C. Cir. 1985) (per curiam), the D.C. Circuit ordered a $10,000 appeal bond requirement to be reduced to $450. The court rejected the district court's justifications for the larger bond amount, including the district court's prediction that the appeal likely would be found frivolous (occasioning an award of damages and costs under Rule 38). Rule 7 "costs," the court explained, "are simply those that may be taxed against an unsuccessful litigant under Federal Appellate Rule 39, and do not include attorneys' fees that may be assessed on appeal." *Id*. at 716. (However, a later D.C. Circuit opinion held that for purposes of Rule 39(d)'s 14-day time limit on filing the bill of costs, "costs" does include attorney fees. *See* Montgomery & Assocs., Inc. v. Commodity Futures Trading Comm'n, 816 F.2d 783, 785 (D.C. Cir. 1987) (concluding that a "motion for attorneys' fees was subject to Rule 39(d)'s 14-day time limit").) Though *American President Lines* was decided some six months after *Marek*, the D.C. Circuit did not discuss *Marek*'s possible relevance to the Rule 7 question.

By contrast, when the Third Circuit followed the *American President Lines* approach in *Hirschensohn*, the court took pains to distinguish *Marek*'s treatment of Civil Rule 68 costs from the question of Appellate Rule 7 costs. The *Hirschensohn* court followed the D.C. Circuit's lead, stating that Rule 7 costs "are those that may be taxed against an unsuccessful litigant under Federal Rule of Appellate Procedure 39." *Hirschensohn*, 1997 WL 307777, at *1. The court reasoned that because "[a]ttorneys' fees are not among the expenses that are described as costs for purposes of Rule 39," such fees are likewise not within the scope of Rule 7 costs. *Id*. (The *Hirschensohn* court relied on its prior holding in *McDonald v. McCarthy*, 966 F.2d 112, 118 (3d Cir. 1992), that Rule 39 "costs" do not include attorney fees.) The court relied on Rule 39's references to particular types of costs as a means of distinguishing *Marek*: "[U]nlike Rule 68, which does not define costs, Rule 39 does so in some detail. Therefore, *Marek* does not require a different result ...." *Hirschensohn*, 1997 WL 307777, at *2. (The Rule 7 holding in *Hirschensohn* was an alternative holding; an "additional ground" for the result in that case was the court's holding that "the statutory source cited by defendants for an allowance of counsel fees" – namely, a provision of the Virgin Islands Code – "does not apply to appeals in this Court so as to make attorneys' fees recoverable as Rule 39 costs." *Hirschensohn*, 1997 WL 307777, at *3.)

[45] The First Circuit has adopted the majority view, although – somewhat oddly – it chose to do so in a nonprecedential opinion. *Int'l Floor Crafts, Inc. v. Dziemit*, 420 F. App'x 6, 17, 2011 WL 1499857, at *10 (1st Cir. April 21, 2011) ("[W]e endorse the majority view that a Rule 7 bond may include appellate attorneys' fees if the applicable statute underlying the litigation contains a fee-shifting provision that accounts for such fees in its definition of recoverable costs and the appellee is eligible to recover them.").

[46] The Second Circuit, affirming an order requiring (under Rule 7) a $35,000 bond in a copyright case, reasoned as follows:

> The Copyright Act, first adopted in 1909, contained section 40, the predecessor to section 505, which similarly provided for attorney's fees as part of the costs .... Thus, the drafters of Rule 7 ... – like the drafters of Rule 68, discussed in *Marek* – were equally aware of the Copyright Act's provision for the statutory award of attorney's fees "as part of the costs" when drafting Rule 7 and not defining costs therein. See 17 U.S.C. § 505. *Marek* provides very persuasive authority for the proposition that the statutorily authorized costs may be included in the appeal bond authorized by Rule 7.

Adsani v. Miller, 139 F.3d 67, 73 (2d Cir. 1998). The *Adsani* court noted that neither *American President Lines* nor *Hirschensohn* involved a type of case in which a federal statute would authorize an award of attorney fees, see *Adsani*, 139 F.3d at 73-74, but the *Adsani* court's more central point was that it disagreed with those decisions' view of the interaction between Rules 39 and 7:

> Rule 39 does not define costs for all of the Federal Rules of Appellate Procedure. Rule 39 is divided into five sections. These provide: (a) against whom costs will be taxed, (b) the taxability of the United States; (c) the maximum rate for costs of briefs, appendices and copies of records, (d) the procedure by which a party desiring "such costs" may claim them, and (e) that costs incurred in the preparation and transmission of the record on appeal will be taxed in the district court. See Fed.R.App.P. 39(a)-(e). None of these provisions purports to define costs: each concerns procedures for taxing them. Specific

> costs are mentioned only in the context of how that cost should be taxed, procedurally speaking.

Adsani, 139 F.3d at 74. Thus, the *Adsani* court concluded that "Rule 7 does not have a pre-existing definition of costs any more than Fed.R.Civ.P. 68, the rule interpreted in *Marek*, had its own definition." *Id*.

[47] The Ninth Circuit has held that "a district court may require an appellant to secure appellate attorney's fees in a Rule 7 bond, but only if an applicable fee-shifting statute includes them in its definition of recoverable costs, and only if the appellee is eligible to recover such fees." Azizian v. Federated Dep't Stores, Inc., 499 F.3d 950, 953 (9th Cir. 2007). The *Azizian* court cited four reasons for its holding:

> First, Rule 7 does not define "costs on appeal." At the time of its adoption in 1968, however, a number of federal statutes-including the Clayton Act-had departed from the American rule by defining "costs" to include attorney's fees. *Marek*, 473 U.S. at 8-9....
>
> Second, Rule 39 does not contain any "expression[] to the contrary." *See id*. at 9. There is no indication that the rule's drafters intended Rule 39 to define costs for purposes of Rule 7 or for any other appellate rule. The 1967 Rules Advisory Committee note to Rule 39(e) states that "[t]he costs described in this subdivision are costs of the appeal and, as such, are within the undertaking of the appeal bond." Fed. R.App. P. 39(e) advisory committee's note (1967 adoption). We read this language to mean that the costs identified in Rule 39(e) are among, but not necessarily the only, costs available on appeal. Further, Rule 38 provides that the court of appeals may award "damages and ... costs," which include, according to that rule's advisory committee note, "damages, attorney's fees and other expenses incurred by an appellee." Fed. R.App. P. 38; id. advisory committee's note (1967 adoption). The discrepancy between the use of the term "costs" in Rule 39 and its use in Rule 38 strongly suggests that the rules' drafters did not intend for Rule 39 to create a uniform definition of "costs," exclusive of attorney's fees....
>
> Third, while some commentators have criticized *Adsani* and *Pedraza* for "attach[ing] significant consequences to minor and quite possibly unintentional differences in the wording of fee-shifting statutes," 16A Wright, Miller & Cooper ... § 3953, *Marek* counsels that we must take fee-shifting statutes at their word. 473 U.S. at 9....
>
> Fourth, allowing district courts to include appellate attorney's fees in estimating and ordering security for statutorily authorized costs under Rule 7 comports with their role in taxing the full range of costs of appeal. In practice, district courts are usually responsible at the conclusion of an appeal for taxing all appellate costs, including attorney's fees, available to the prevailing party under a relevant fee-shifting statute.

Azizian, 499 F.3d at 958-59.

The *Azizian* court also addressed a related question, holding that "a district court may not include in a Rule 7 bond appellate attorney's fees that might be awarded by the court of appeals if that court holds that the appeal is frivolous under Federal Rule of Appellate Procedure 38." *Azizian*, 499 F.3d at 954. In reaching this conclusion, the *Azizian* court disagreed with the First Circuit, which in a brief per curiam opinion had upheld the imposition of a $5,000 Rule 7 bond (in a case where the motion for the bond relied on Rules 38 and 39) based on the district court's implicit finding "that the appeal might be frivolous and that an award of sanctions against plaintiff on appeal was a real possibility." *Sckolnick v. Harlow*, 820 F.2d 13, 15 (1st Cir. 1987) (per curiam). As the *Azizian* court explained:

> Award of appellate attorney's fees for frivolousness under Rule 38 is highly exceptional, making it difficult to gauge prospectively, and without the benefit of a fully developed appellate record, whether such an award is likely.... Moreover, a Rule 7 bond including the potentially large and indeterminate amounts awardable under Rule 38 is more likely to chill an appeal than a bond covering the other smaller, and more predictable, costs on appeal. Finally, in contrast to ordinary fee-shifting and cost provisions, Rule 38 authorizes an award of appellate attorney's fees not simply as incident to a party's successful appellate defense or challenge of a judgment below, but rather as a sanction for improper conduct on appeal....

included in a Rule 7 cost bond if an underlying statute provides in appropriate language for an award of such fees. The Sixth Circuit decision, *In re Cardizem CD Antitrust Litigation*, is particularly notable because it involved the imposition of a cost bond in connection with a class-action-objector appeal.[49]

Azizian, 499 F.3d at 960. Thus, the *Azizian* court agreed with *American President Lines*' reasoning that "the question of whether, or how, to deter frivolous appeals is best left to the courts of appeals, which may dispose of the appeal at the outset through a screening process, grant an appellee's motion to dismiss, or impose sanctions including attorney's fees under Rule 38." *Azizian*, 499 F.3d at 961 (citing *American President Lines*, 779 F.2d at 717).

[48] In *Pedraza v. United Guaranty Corp.*, 313 F.3d 1323 (11th Cir. 2002), the Eleventh Circuit ruled:

> Federal Rule of Appellate Procedure 7 does not differ from Federal Rule of Civil Procedure 68 in any way that would lead us to adopt a different interpretive approach in this case than was embraced by the Supreme Court in *Marek*. Quite the contrary, close scrutiny reveals that there are several substantive and linguistic parallels between Rule 68 and Rule 7. Both concern the payment by a party of its opponent's "costs," yet neither provision defines the term "costs."... Moreover, just as the drafters of Rule 68 were aware in 1937 of the varying definitions of costs that were contained in various federal statutes, the same certainly can be said for the authors of Rule 7, which bears an effective date of July 1, 1968. As such, the reasoning that guided the *Marek* Court's determination that Rule 68 "costs" are to be defined with reference to the underlying cause of action is equally applicable in the context of Rule 7.

Pedraza, 313 F.3d at 1332. The *Pedraza* court held, however, that the attorney fees authorized under the Real Estate Settlement Procedures Act did not qualify for inclusion in a Rule 7 bond, because RESPA's language – "costs of the action *together with* reasonable attorneys fees" – treated attorney fees as a separate item rather than a subset of costs. *Pedraza*, 313 F.3d at 1334 (quoting 12 U.S.C. § 2607(d)(5); emphasis in case); *see also id*. ("Each and every statute cited in *Marek* as including attorneys' fees within the definition of allowable costs features either the words 'as part of the costs' or similar indicia that attorneys' fees are encompassed within costs."). More recently, the Eleventh Circuit refined its Rule 7 doctrine in the context of civil rights cases, holding that "a district court [may] require ... that a losing plaintiff in a civil rights case post a Fed. R.App. P. 7 bond that includes the defendant's anticipated appellate attorney's fees" only if the district court makes "a finding ... that the would-be appeal is frivolous, unreasonable, or groundless." Young v. New Process Steel, LP, 419 F.3d 1201, 1202 (11th Cir. 2005).

[49] *See* In re Cardizem CD Antitrust Litigation, 391 F.3d 812, 815, 818 (6th Cir. 2004) (with respect to class action settlement objector's appeal, upholding imposition of $174,429 appeal bond that included "prospective administrative costs and attorneys' fees"). Though the *Cardizem* court generally adopted the same reasoning as the *Adsani* and *Pedraza* courts (*see supra* notes 46 and 48), it did diverge from *Pedraza* in one respect: The *Cardizem* court rejected the contention that the statutory authority for the attorney fee must define the fee as part of the costs. Although the state statute at issue in *Cardizem* (a diversity case) authorized an award of "any damages incurred, including reasonable attorney's fees and costs," the court rejected the appellant's contention that the linguistic distinction between fees and costs barred inclusion of the fees in the Rule 7 bond: "*Marek* does not require that the underlying statute provide a definition for 'costs.' Rather, *Marek* requires a court to determine which sums are 'properly awardable' under the underlying statute, and to include those sums as 'costs' under the procedural rule. *Marek*, 473 U.S. at 9." *Cardizem*, 391 F.3d at 817 n.4.

The Sixth Circuit, like a number of other circuits, has held that attorney fees do not count as "costs" for purposes of Rule 39: "As appellate Rule 39 specifically delineates the 'costs' to which it applies, i.e. the 'traditional' costs of printing briefs, appendices, records, etc., the pronouncements of Marek render it inappropriate for this court to judicially-amend Rule 39's cost provisions to include § 1988 attorney's fees." Kelley v. Metro. Cnty. Bd. of Educ., 773 F.2d 677, 682 n.5 (6th Cir. 1985) (holding that a failure to award costs on appeal to a plaintiff does not preclude an award of attorney fees under 42 U.S.C. § 1988). The *Cardizem* court did not explicitly address the possible tension between the view that Rule 39 costs do not include attorney fees and the view that Rule 7 costs can include attorney fees. *Cardizem* cited much of *Pedraza*'s reasoning with approval, so perhaps the *Cardizem* court implicitly adopted the Eleventh

There is less appellate caselaw on the question of whether class-settlement-implementation-delay costs are includable in a Rule 7 cost bond. The Sixth Circuit in *Cardizem* concluded that settlement-administration costs were includable in the Rule 7 cost bond because an applicable state statute in that diversity case provided for the shifting of "any damages incurred, including reasonable attorney's fees and costs."[50] In *Vaughn v. American Honda Motor Co., Inc.*, the Fifth Circuit avoided deciding whether settlement-delay costs can ever be included in a Rule 7 bond amount, and rested its decision instead on its conclusion that in the particular case at hand, the settlement agreement contemplated that the plaintiff class members would not be compensated for delay in receiving the settlement funds.[51]

Stepping back from the details of existing caselaw, one can see that there is likely to be variation from circuit to circuit as to when, if ever, a class-action objector can be required to post a Rule 7 cost bond that includes attorney fees and/or settlement-implementation-delay costs. Even in a circuit where courts typically are willing to include anticipated appellate attorney fees in the bond amount when warranted by an underlying fee-shifting statute, there will be a question whether an *objector* (as distinct from a plaintiff or defendant) is among the types of parties who can be required to pay attorney fees under the relevant statute. Some courts might try to include attorney fees in the bond on the theory that such fees might be ultimately be awarded against the objector under Appellate Rule 38 – but the circuits have split on the includability of Rule 38 damages in an Appellate Rule 7 bond, and there are good reasons to doubt that such damages should be includable in the bond.[52] Moreover, it is unclear how an

Circuit's view that the definition of "costs" for purposes of Rule 7 can differ from the definition of "costs" for purposes of Rule 39.

[50] *Cardizem*, 391 F.3d at 817 (quoting Tenn. Code Ann. § 47-18-109; emphasis omitted); *id.* at 818 (supporting decision to dismiss appeal for failure to post bond partly on the basis that "the pursuit of [appellant's] objections has the practical effect of prejudicing the other injured parties by increasing transaction costs and delaying disbursement of settlement funds").

For a listing of district-court decisions that have included, in Rule 7 bonds, the "costs incurred by delays caused by objectors' appeals in a class action settlement.," see In re *Uponor, Inc., F1807 Plumbing Fittings Prods. Liability Litig.*, No. 11-MD-2247 ADM/JJK, 2012 WL 3984542, at *4 (D. Minn. Sept. 11, 2012). *See also id*. at *5-*6 (including in the amount of the bond $ 125,000 "to cover the costs of any additional class notice that may be required due to the delay caused by the appeal").

[51] The court explained:

> "[T]he costs of delay are adequately captured by the settlement. The settlement agreement makes no provision for the payment of pre-judgment interest on the benefits Honda has agreed to pay, and the settlement does not become effective, by its terms, until any appeals are concluded. The parties to the settlement thus agreed that the financial time-value of the benefits to be paid under the settlement is not to be awarded to the plaintiffs. To the extent that the district court found that interest should be secured as part of 'costs,' it was in error, assuming, without deciding, that interest accrued pending appeal can appropriately be included as part of a bond for costs on appeal.

Vaughn v. Am. Honda Motor Co., Inc., 507 F.3d 295, 299 (5th Cir. 2007) (per curiam); *see also id*. at 297 (reducing size of bond from $ 150,000 – the amount set by the district court – to $ 1,000).

[52] *See supra* note 47 (discussing the Ninth Circuit's decision in *Azizian* and the First Circuit's decision in *Sckolnick*). *See also* In re *Am. President Lines*, 779 F.2d at 717 ("It is … for the court of appeals, not the district court, to decide whether Rule 38 costs and damages should be allowed in any given case…. The

authorization to award attorney fees would encompass authorization to award damages attributable to delay in implementing a settlement.[53] Professor Lopatka and Judge Smith provide a useful summary of these doctrinal intricacies;[54] their assessment is that "courts have disagreed on the legal constraints that affect the availability and magnitude of appeal bonds, and most courts have concluded that the amount of the bond is seriously constrained, undermining its capacity to curb extortionate behavior."[55]

2. The proposal advanced by Judge Smith and Professor Lopatka

To remedy this perceived shortcoming, Judge Smith and Professor Lopatka propose that the rulemakers amend Appellate Rules 7 and 39 to presumptively require – in connection with appeals by unnamed class members – a bond for costs on appeal that includes delay costs and attorney fees attributable to the pendency of the appeal, and to presumptively require the imposition of those costs and fees in the event that the judgment is affirmed.

Specifically, Professor Lopatka and Judge Smith propose the following:

- Amend Federal Rule of Appellate Procedure 39 to add the following subdivision (f): "Notwithstanding other subdivisions of this rule, whenever a nonnamed member of a class certified under Federal Rule of Civil Procedure 23 appeals a judgment approving a settlement of the class action and the judgment is affirmed, the appellate court will tax the appellant the full costs of appeal imposed on others, including all costs of delay, attorney's fees incurred as a result of the appeal, and costs described in subdivision (e) and 28 U.S.C. § 1920, unless the court finds that appellant raised substantial issues of law and did not appeal primarily to obtain a payment for withdrawing the appeal. If the court so finds, it will tax appellant the costs specified in subdivision (e) and 28 U.S.C. § 1920."

- Amend Federal Rule of Appellate Procedure 7 to add the following subdivision: "Whenever a nonnamed member of a class certified under Federal Rule of Civil Procedure 23 appeals a judgment approving a settlement of the class action, the district court will require the appellant to file a bond in the amount of the expected costs specified in Rule 39(f) unless the court finds that (1) appellant raises substantial issues of law and does not appeal

District Court's bond order effectively preempts this court's prerogative to determine, should Safir's appeal be found to be frivolous, whether APL is entitled to a Rule 38 recovery.").

[53] *See, e.g.*, In re Navistar Diesel Engine Prods. Liability Litig., No. 11-C-2496, 2013 WL 4052673, at *2 (N.D. Ill. Aug. 12, 2013) (questioning "how a rule that expressly allows requiring a bond only to secure payment of recoverable costs (which, under some statutes, includes recoverable attorney's fees) can be read to authorize posting a bond to secure payment of expenses that are not recoverable costs").

[54] *See* Lopatka & Smith, *supra* note 3, at 909-18.

[55] *Id.* at 909.

primarily to obtain a payment for withdrawing the appeal and (2) appellant would be financially unable to file a bond in that amount. If the court so finds, the court will impose a bond in whatever amount it deems necessary to protect the interests of the class, but in no event will the bond be less than the costs specified in Rule 39(e) and 28 U.S.C. § 1920."

- Amend Federal Rule of Appellate Procedure 3 to add the following subdivision: "A court of appeals may not hear an appeal brought by a nonnamed member of a class certified under Federal Rule of Procedure 23 seeking review of a judgment approving a settlement of the class action, an order under Rule 7 requiring the appellant to file a bond, or the amount of such a bond unless the appellant has filed any bond required by the district court under Rule 7."[56]

The minutes of the Committee's spring meeting contain a detailed discussion of the merits and disadvantages of this proposal. It seems fair to say that a number of participants in the discussion thought that the requirement of a very large appeal bond might be a blunt tool and might chill some meritorious appeals. On the other hand, one could argue that the bond proposal is no more likely to chill meritorious appeals than is the certificate-of-appealability proposal discussed in Part III.B below. A prohibitively large bond would be no more restrictive than the denial of a required certificate of appealability. Indeed, in some instances even a large cost bond would be less restrictive, because in theory the objector could post the bond and, thus, proceed with the appeal. And just as an objector whose request for a certificate of appealability is denied by the district court could obtain (in effect) appellate review of that denial by requesting a certificate of appealability from the court of appeals, an objector could appeal the district court's order imposing a cost bond.

3. Attempts to draft around the limits of Rule 7

It appears that some class action lawyers are now attempting to draft around the possible limits on Rule 7 cost bonds by including in the class-settlement agreement a provision that purports to obligate any member of the class who wishes to appeal to post a bond covering delay costs. In *Hershey v. ExxonMobil Oil Corp.*, No. 07-1300-JTM, 2013 WL 66075 (D. Kan. Jan. 4, 2013), the district court relied on such a provision[57] in requiring objectors to file a more than $ 9 million appeal bond:

> Objectors … oppose the motion, contending that such a bond requirement is precluded by Fed.R.App.Pr. 7 and 39. However, the court finds that the

[56] Lopatka & Smith, *supra* note 3, at 928.

[57] The provision read: "Any Class Member wishing to remain a Class Member, but objecting to any part of the Settlement can do so only as set forth in the Class Notice …. Because any appeal by an objecting Class Member would delay the payment under the Settlement, each Class Member that appeals agrees to put up a cash bond to be set by the district court sufficient to reimburse Class Counsel's appellate fees, Class Counsel's expenses, and the lost interest to the Class caused by the delay." *Hershey*, 2013 WL 66075, at *1 (quoting Settlement Agreement).

> authorities relied upon by the objectors do not involve class actions in which the parties have, as here, allocated the risks and burden of an appeal by explicit agreement. Further, the objectors have failed to present any authority demonstrating that, pursuant to such an explicit fee-shifting agreement, the court may not enforce that agreement to the extent the appeal causes additional expenses and delays to the settlement class.

Id. at *2. The objectors appealed both the judgment approving the settlement and also the order requiring the appeal bond; those appeals were pending in the Tenth Circuit as of August 25, 2013.[58]

It seems hard to justify reliance on a provision in the class settlement agreement in order to authorize the imposition of a multimillion dollar appeal bond requirement when an objector seeks to appeal the judgment approving the settlement. Such an argument seems circular: how can a court rely on the challenged class settlement to justify a bond requirement that poses a barrier to appellate review of that very settlement?

B. Requiring a 'certificate of appealability'

During the spring 2013 meeting, a member suggested that another possible approach for addressing objector appeals would be to adopt a certificate-of-appealability ("COA") requirement like that which applies to appeals by habeas petitioners. Under 28 U.S.C. § 2253(c)(1), a habeas or Section 2255 petitioner must obtain a COA in order to appeal. Section 2253(c)(2) provides that the COA "may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." Section 2253(c)(3) provides that the COA "shall indicate which specific issue or issues satisfy the showing required by paragraph (2)."

Imposing a COA requirement could screen out truly meritless appeals. The standard for an objector-appeal COA might, for example, require that the objector who wishes to appeal make a substantial showing of the merit of the appeal. To flesh out that standard, one might require the objector to make a showing that reasonable jurists would find the district court's assessment of the class action settlement debatable or wrong.[59]

The objector would seek the COA, in the first instance, from the district judge. That could leverage the district judge's detailed knowledge of the settlement by producing a succinct opinion from the district court explaining why the court's approval of the challenged aspects of the settlement either is or is not debatable. Admittedly, a skeptic might ask whether a district judge would be willing to pronounce her own ruling debatable; but there is no doubt that some district judges would do so candidly and

[58] *See* Hershey, et al v. ExxonMobil Oil Corporation, No. 12-3309 (appeal from final judgment), and Hershey, et al v. ExxonMobil Oil Corporation, No. 13-3029 (appeal from bond order).

[59] *Cf.* Slack v. McDaniel, 529 U.S. 473, 484 (2000) ("Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.").

insightfully. (To assess the willingness of district judges to perform analogous self-assessment tasks, one could look at the rate at which district judges grant COAs to habeas petitioners.[60])

The timing of the district court's COA ruling, in this context, would present an interesting question. In habeas cases, the district judge must rule on the COA question at the time it denies the petition[61] rather than waiting to see whether the petitioner files a notice of appeal – a requirement that is designed both to "ensure prompt decision making when the issues are fresh" and to "help inform the applicant's decision whether to file a notice of appeal."[62] If a COA mechanism were to be adopted for class-action-objector appeals, it is possible that the calculus might come out differently due to a number of factors (such as the frequency of appeals, the incentives for possible appellants, and the amount of effort that would be required to draft the COA ruling).

Presumably, as with COAs in the habeas context, so too here it would be advisable to give the would-be appellant an alternative means for obtaining the COA if the district court denies it. If one were following the habeas model, one would enable the appellant to seek the COA from a circuit judge in the relevant court of appeals, and (if that request is denied) to seek rehearing in the court of appeals.

If the Committee were to conclude that it would be useful to require a certificate of appealability before an objector could appeal from a judgment approving a class action settlement, the next question would be whether such a requirement could be implemented by rule. As the Supreme Court observed in *Devlin*, "the right to appeal from an action that finally disposes of one's rights has a statutory basis." *Devlin*, 536 U.S. at 14 (citing 28 U.S.C. § 1291). Although Congress has authorized the rulemakers to adopt rules that "define when a ruling of a district court is final for the purposes of appeal under section 1291," 28 U.S.C. § 2072(c), as well as rules that "provide for an appeal of an interlocutory decision to the courts of appeals," 28 U.S.C. § 1292(e), Congress has not authorized the rulemakers to cut off or narrow the right to appeal "all final decisions of the district courts of the United States," 28 U.S.C. § 1291.

The presence in the national Rules of provisions that treat the COA requirement for habeas and Section 2255 matters does not demonstrate rulemaking authority to impose a COA requirement without a statutory mandate. The requirement that a state habeas petitioner obtain a certificate of probable cause in order to take an appeal from the denial of the habeas petition was originally adopted by statute in 1908.[63] Thus, when the

[60] One might also look at the rate at which district judges include, in their interlocutory orders in cases more generally, a statement that "such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation," 28 U.S.C. § 1292(b).
[61] *See* Rule 11 of the Rules governing Section 2254 and Section 2255 proceedings.
[62] *See* 2009 Committee Note to Rule 11 of the Rules governing Section 2254 and Section 2255 proceedings.
[63] *See* Ira P. Robbins, *The Habeas Corpus Certificate of Probable Cause*, 44 Ohio St. L.J. 307, 314 (1983) ("Congress sought this new procedural obstacle to the right of an appeal from a denial of habeas to stem a

rulemakers adopted original Appellate Rule 22, its certificate-of-probable-cause provision was designed to dovetail with a long-preexisting statutory requirement.[64] In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which substituted the current COA requirement for the prior "certificate of probable cause" requirement and which extended the COA requirement to appeals by Section 2255 petitioners.[65] Only after that did the rulemakers amend Rule 22(b) to encompass Section 2255 petitioners.[66]

In sum, though a COA approach is worth exploring, it seems that the adoption of such a mechanism would require legislation.

IV. The Dismissal-Hurdle Approach

Rather than making it harder for an objector to appeal a judgment approving a class settlement, some approaches would instead make it harder for an objector to dismiss such an appeal once brought. One might at first think that limiting the dismissal of such appeals could address both of the problems identified near the outset of this memo (extortionate, non-meritorious appeals, and the dropping of valid appeals). But on closer inspection, a number of problems come to light.

A. Banning dismissals for value (the "inalienability" approach)

Professors Fitzpatrick, Wolfman, and Morrison have proposed that Appellate Rule 42 be amended to require approval from the court of appeals for any dismissal of an appeal from a judgment approving a class action settlement or fee award, and to bar such dismissals absent a certification that no person will give or receive anything of value in exchange for dismissing the appeal.[67] This proposal would impose, at the appellate stage,

perceived tide of state prisoners, already sentenced to death, who were evading execution with frivolous appeals.").

[64] The original Committee Note to Appellate Rule 22(b) stated in part:

> Title 28 U.S.C. § 2253 provides that an appeal may not be taken in a habeas corpus proceeding where confinement is under a judgment of a state court unless the judge who rendered the order in the habeas corpus proceeding, or a circuit justice or judge, issues a certificate of probable cause. In the interest of insuring that the matter of the certificate will not be overlooked and that, if the certificate is denied, the reasons for denial in the first instance will be available on any subsequent application, the proposed rule requires the district judge to issue the certificate or to state reasons for its denial.

[65] *See* 28 U.S.C. § 2253(c).

[66] The 1998 Committee Note to Rule 22(b) stated in part: "[P]aragraph [22(b)(1)] is made applicable to 28 U.S.C. § 2255 proceedings. This brings the rule into conformity with 28 U.S.C. § 2253 as amended by the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132." Likewise, Rule 11 of the Rules Governing Section 2255 Proceedings was amended in 2009 to mirror the statutory COA requirement.

[67] I enclose a copy of their August 2012 letter to Judge Sutton, as well as a representative letter of support from Vincent J. Esades, Esq., an attorney who commented on their proposal. A second letter, from Daniel R. Karon, Esq., appears to track verbatim the wording of Mr. Esades' letter; I am omitting it in order to conserve space.

controls that are somewhat similar, but not identical, to those imposed by Civil Rule 23(e)(5) in the court below.[68]

The proposal is an elegant one in the sense that its goal is to craft a Rule that would cause undesirable objectors to self-select out of the appellate process. If they anticipate that they can get no personal benefit from the appeal, then they will not appeal. However, participants in the Committee's discussions have noted some difficulties with the proposal.

First, the inflexible nature of the inalienability rule has costs as well as benefits. The benefits include ease of administration and predictability. A complete ban on the withdrawal of appeals in exchange for money would send a clear message to self-interested objectors and could be readily applied by the Circuit Clerk's office. But such a ban might sweep too broadly. For example, it would encompass appeals by objectors whose objection is specific to them (rather than generalizable to the class or a subclass) and who therefore might legitimately settle the objection in exchange for a side payment. This feature of the inalienability proposal has led the Committee to consider the possible alternative of requiring court permission but leaving the grant of permission within the court's discretion; I discuss that possibility in Part IV.B below.

Second, it would be unusual for a court of appeals to deny permission to withdraw an appeal. By denying permission, the court would be in the unusual position of forcing a now-unwilling appellant to maintain an appeal.[69] I have not found many cases in which a court did so.[70] Where an appellant has burdened an appellee, the court might deny the appellant's request for *voluntary* dismissal and instead dismiss the appeal by order with an award of costs.[71] Occasionally, the court of appeals has denied permission to dismiss a proceeding on the ground that one of the parties was attempting to manipulate the

[68] Compared with current Civil Rule 23(e)(5), the proposed amendment to Appellate Rule 42 is broader in scope and more stringent in its criteria. Unlike Civil Rule 23(e)(5), the proposed amendment would encompass objections to fee awards. Civil Rule 23(h)(2) does contemplate objections to fee awards, but does not constrain the dropping of such objections in the way that the proposed Appellate Rule 42 amendment would. Even more significantly, Civil Rule 23(e)(5) gives the district court discretion whether to approve the withdrawal of an objection, whereas the proposed amendment to Appellate Rule 42 would remove the court of appeals' discretion to approve the withdrawal of the appeal if there is a payment in exchange for that withdrawal.

[69] As a point of comparison, Supreme Court Rule 46.1 provides: "At any stage of the proceedings, whenever all parties file with the Clerk an agreement in writing that a case be dismissed, specifying the terms for payment of costs, and pay to the Clerk any fees then due, the Clerk, without further reference to the Court, will enter an order of dismissal."

[70] For purposes of the present inquiry, I leave aside cases that involve a request to withdraw or vacate a previously issued decision. The issues posed by such requests for vacatur are distinct from the questions that would be raised in the context of class-action-objector appeals withdrawn before an appellate decision. *See generally* U.S. Bancorp Mort. Co. v. Bonner Mall P'ship, 513 U.S. 18 (1994).

[71] *See* Blount v. State Bank & Trust Co., 425 F.2d 266, 266 (4th Cir. 1970) (per curiam) ("[V]oluntary dismissal is not appropriate when the appellee has been put to trouble and expense because the appellant has not complied with the rules of court. Accordingly, the appellee's motion to dismiss is granted. Costs on appeal are taxed against … one of appellant's counsel, without contribution from the appellant or his other counsel.").

formation of precedent.[72] In some instances the court of appeals might take into account the fact that it has already invested effort in drafting an opinion prior to the parties' attempt to dismiss the appeal.[73] In one case the court denied the defendant-appellant's pro se motion to dismiss because the district court had found him "not competent to make that decision."[74] Among the cases where the court of appeals denied permission to dismiss an appeal, most were cases in which the motion to dismiss was opposed;[75] however, I did find one case in which a court of appeals denied an unopposed motion to

[72] In *Khouzam v. Ashcroft*, 361 F.3d 161 (2d Cir. 2004), the government and the petitioner reached an agreement under which the petitioner would withdraw his petition for review of an order by the Board of Immigration Appeals if the court of appeals would vacate that order. The court of appeals refused to cooperate:

> [W]e are troubled by the government's tactics here. Khouzam's [Convention Against Torture] petition has been fully litigated by both sides. At oral argument, we expressed doubts as to the soundness of the Attorney General's definition of torture …. [T]his is clearly an issue of public importance. For the government to agree to a vacatur two weeks after oral argument suggests that it is trying to avoid having this Court rule on that issue. We therefore decline to grant the order that the parties have agreed to. Instead, we will review Khouzam's CAT petition and grant or deny it according to its merits.

Id. at 168.

In *Albers v. Eli Lilly & Co*., 354 F.3d 644 (7th Cir. 2004), the court of appeals refused to dismiss the appeal where (1) appellant's counsel "essentially conced[ed]" that he was "attempting to manipulate the formation of precedent by dismissing those proceedings that may lead to an adverse decision while pursuing others to conclusion," (2) "a draft of [the court's] opinion had been written" before appellant moved to dismiss, and (3) the appellee did not agree to the dismissal of the appeal. *Id*. at 646.

In *United States v. Hagerman*, 549 F.3d 536 (7th Cir. 2008), after its appeal was fully briefed, a limited liability company fired its lawyer, who was permitted to withdraw. The court of appeals ruled: "In this case, with the appeal fully briefed and the merits free from doubt, we would be mistaken to grant the (imputed) motion. For that would allow Wabash to argue in future regulatory proceedings that the merits of its defense had never been fully adjudicated. We have thought it best, therefore, to affirm the judgment of the district court in order to lay to rest any doubt about the company's guilt." *Id*. at 538.

[73] Thus, in *Telenor Mobile Communications AS v. Storm LLC*, 584 F.3d 396 (2d Cir. 2009), the court of appeals denied the parties' request – made three days before its opinion issued – "to 'withdraw [this appeal] from active consideration.'" *Id*. at 400 n.1 (citing *Khouzam*). *See also Albers*, *supra* note 72; Ford v. Strickland, 696 F.2d 804, 807 (11th Cir. 1983) (per curiam) (denying dismissal where request came only after panel decision, en banc briefing, lengthy oral argument, and "months of deliberation" by the en banc court).

A somewhat related rationale arose in a case where only one of two appellants sought to dismiss its appeal, and the two appellants were making the same arguments on appeal. Reasoning that it would be deciding the same issues either way, the court of appeals denied the request to dismiss. Benton Twp. v. Berrien Cnty., 570 F.2d 114, 119 (6th Cir. 1978).

[74] United States v. DeShazer, 554 F.3d 1281, 1285 n.1 (10th Cir. 2009).

[75] *See, e.g.*, *Albers*, *supra* note 72, at 646 ("When the parties do not agree on terms, dismissal is discretionary with the court. Doubtless there is a presumption in favor of dismissal, but the procedure is not automatic.").

In one case, the Seventh Circuit suggested that an appellee's opposition would foreclose a Rule 42(b) dismissal: "[D]ismissal is available under [Rule 42(b)] only on the parties' joint motion or, if the motion is solely the appellant's, on terms agreed by the parties." Hope Clinic v. Ryan, 249 F.3d 603, 605 (7th Cir. 2001). This view seems to me to be at odds with the text of the Rule, which states in part that "[a]n appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court." And, in fact, the *Hope Clinic* court phrased its denial of permission to dismiss the appeal in terms that made the decision sound more discretionary than the statement quoted above would suggest: "Given the lack of agreement among the parties, it is best to resolve the appeal on the merits and let the district court apply [42 U.S.C.] § 1988 on plaintiffs' request for costs and fees." *Hope Clinic*, 249 F.3d at 605.

dismiss.[76] Some of the decisions remark upon the awkwardness of denying an appellant permission to drop an appeal and raise concerns about the lack of adversary presentation by an unwilling appellant.[77] That concern shades into the third problem: the question of mootness.

At the Committee's spring meeting, a participant asked whether an objector might find a way around the proposed ban on appeal dismissals by arguing that, when and if class counsel pay the objector a satisfactory settlement, the objector's appeal becomes moot. There are precedents holding that when a district court certifies a class action (or erroneously denies such certification), the class gains its own legal status such that subsequent events mooting the individual plaintiff's claim do not thereby moot the class action.[78] However, the Court recently refused to apply those precedents in the context of a collective action brought by an employee under the Fair Labor Standards Act on behalf of similarly situated employees.[79]

None of the existing Supreme Court precedents directly addresses whether an *objector*'s appeal becomes moot once the objector voluntarily settles and seeks to withdraw the appeal. Even if it is possible to argue that there remains a case and controversy concerning the validity of the objection to the settlement,[80] it would seem that an objector who accepted (via settlement of the objection) payment in full of her substantive claim (and of any accompanying claim to attorney fees)[81] might lack the

[76] *See* Washington Legal Found. v. Texas Equal Access to Justice Found., 270 F.3d 180, 184 n.3 (5th Cir. 2001) (noting without further explanation that the court of appeals had denied an appellant's "unopposed … motion (post-oral argument) to dismiss his appeal"), *cert. granted and judgment vacated on other grounds sub nom.* Phillips v. Washington Legal Found., 538 U.S. 942 (2003).

[77] In *United States v. Washington Dep't of Fisheries*, 573 F.2d 1117 (9th Cir. 1978), two Native American tribes appealed an order ruling that the district court had jurisdiction to regulate tribes' on-reservation fishing. The court of appeals granted the tribes' motion to dismiss their appeal. Then-Judge Kennedy, writing for the court, noted that as of the date of the order, "no injunctions regulating on-reservation fishing were of current effect," and he observed: "We are reluctant to determine an issue presented in the abstract, and we should be especially cautious of doing so when it appears that one of the parties is not willing to fully contest the issue. Accordingly, we find no basis for exercising our discretionary authority to decline to grant the appellants' motion to dismiss." *Id*. at 1118.

In *In re Chicago, Milwaukee, St. Paul and Pacific R. Co.*, No. 80-1346, 1980 WL 324449 (7th Cir. Dec. 8, 1980), the appellants moved to dismiss their appeal on the day before argument. Over the objection of some of the appellees, the court of appeals granted the motion, reasoning that "[w]ith the appellant no longer desirous of pursuing this appeal, there is no longer the adversariness needed in order to find an ongoing controversy between the parties." *Id*. at *2.

[78] *See* Sosna v. Iowa, 419 U.S. 393 (1975), and U.S. Parole Comm'n v. Geraghty, 445 U.S. 388 (1980).

[79] *See* Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523 (2013).

[80] A certified class is a legal entity distinct from either the named class representative or any objector. It seems to me that the class members' interest in obtaining relief through a legally appropriate settlement would survive any particular objector's settlement of her individual claim.

[81] In *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980), the named class representatives were permitted to appeal the denial of class certification despite the tender of payment in full on their individual claims; the representatives "asserted as their personal stake in the appeal their desire to shift to successful class litigants a portion of those fees and expenses that have been incurred in this litigation and for which they assert a continuing obligation." *Roper*, 445 U.S. at 334 n.6.

requisite personal stake in continuing to litigate the appeal.[82] It would be key, in this analysis, that the objector voluntarily settled and sought to dismiss the appeal. An instance where the named parties and their counsel sought to "pick off" an objector appeal by tendering a payment that the objector rejected should not, in my view, result in a finding that the appeal is moot.[83] But the instances on which the Committee is focusing are those in which the objector is a willing participant in the dismissal. In those instances, it seems difficult to argue that the appeal can continue, unless some other class member is willing to step into the objector's shoes and litigate the appeal. Because that is unlikely to occur in most instances, it seems that a Rule barring dismissal of an appeal would pose a serious problem of judicial administration, if not of Article III power.

B. Requiring discretionary court approval for dismissal of the appeal

As noted above, the possible disadvantages of a strict inalienability rule led some participants in the discussion to suggest an alternative approach: Appellate Rule 42 could be amended to require court approval for the dismissal of an appeal and could direct the court, in reviewing a request for approval, to consider whether the appellant received anything of value in exchange for seeking to dismiss the appeal. Admittedly, the court of appeals would not necessarily be well situated to scrutinize the events that led to a proposed withdrawal of an objector's appeal,[84] but it could remand to the district court for consideration of the motion.

This option is well worth considering. However, it seems to me that a discretionary-dismissal option faces the same basic problems as the inalienability rule discussed above. If the named parties and/or their counsel have paid the objector in full for the objector's claim and any possible attorney fees, and the objector has accepted the payment in exchange for a promise to withdraw the appeal, then the objector appears to lack the requisite personal stake in prosecuting the appeal. Unless another member of the class is willing to take over the prosecution of the appeal, sound judicial administration – if not Article III itself – would likely counsel against withholding permission to withdraw the appeal.[85]

[82] In the analogous context of a named class representative's settlement of her individual claim, the question of whether that person was no longer suited to litigate on behalf of the class might be addressed, in the first instance, as a question of adequacy of representation under Civil Rule 23(a). However, no similar provision governs the role of objectors.

[83] *See supra* notes 30 - 31 and accompanying text.

[84] An example of the complexities that could ensue is provided by the majority and dissenting opinions in *Safeco Insurance Co. v. American Int'l Group, Inc*., 710 F.3d 754 (7th Cir. 2013) (a case previously brought to the Committee's attention by Marie Leary).

[85] The reader might, by this time, be wondering whether I think that a similar problem attends Civil Rule 23(e)(5)'s requirement of court permission for the withdrawal of objections in the district court. I do not think that the trial-level context presents the same set of issues. At the trial level, the district court will address the objections as part of its overall duty to assess the settlement's appropriateness under Civil Rule 23(e). The objections will simply form a component of that overall analysis, which will occur in any event. By contrast, when an objector appeals, the objector's appeal forms the only reason for continued judicial activity.

V. Conclusion

Objectors play an important role in class action litigation. Sometimes they provide needed information and raise valid arguments. At other times they press meritless objections in order to extract a payment. Adopting a rule amendment that curbs the latter sort of objection without chilling the former may prove challenging. However, in the light of the gravity of the charge that some objectors are exploiting federal class action litigation as an opportunity for extortionate behavior, the matter warrants serious consideration. I look forward to the Committee's further discussions of the topic.

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TAB 9B

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August 22, 2012

The Honorable Jeffery S. Sutton
Chair, Advisory Committee on Appellate Rules
260 Joseph P. Kinneary U.S. Courthouse
85 Marconi Boulevard
Columbus, OH 43215

Re: Proposed Amendment to Appellate Rule 42

Dear Judge Sutton:

We are writing to urge the Advisory Committee on the Appellate Rules to consider an amendment to Appellate Rule 42. The amendment would bar class action objectors from dropping their appeals of district court approvals of class action settlements and fee awards in exchange for money from class counsel or the defendant. As has been documented by courts and commentators, the prospect of receiving this money has encouraged class members to file non-meritorious objections and appeals to delay settlements until it becomes rational for class counsel and the defendant to pay them to go away. This practice is known as "objector blackmail." *See* Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 Vand. L. Rev. 1623 (2009). Objector blackmail not only financially taxes class counsel and defendants without reason, but it also tarnishes legitimate objectors and delays the distribution of settlement proceeds to class members. Our proposed amendment would bar these side payments to objectors from class counsel and the defendant. District courts would continue to exercise their authority to

VANDERBILT UNIVERSITY
131 21st Avenue South
Nashville, Tennessee 37203-1181
www.law.vanderbilt.edu
tel 615.322.2615
fax 615.322.6631

compensate counsel for class members when their objections created value for the class. The text of our proposed amendment is appended to this letter.

Class members who object legitimately to settlements and fee petitions serve a vital role in class action litigation. Because both class counsel and the defendant, by definition, support class settlements, the only adversarial testing in either the district court or the court of appeals of settlements and fee petitions usually comes from objections litigated by absent class members. For this reason, it is important to ensure that class members who wish to improve settlements and cause closer scrutiny of fee awards have the means and opportunity to do so through objections.

But we now know that some class members and their counsel file objections not because they want to improve settlements or reduce extravagant fee awards, but, rather, because they want to delay settlements and extract private benefit for themselves. Objectors can cause delay because they have the right to file appeals in the courts of appeals when district courts overrule their objections and approve class action settlements and fee awards. These delays impose costs on class members, class counsel, and the defendant. Not only does it take time and money to file briefs even in frivolous appeals, but even frivolous appeals can significantly postpone the distribution of settlements to class members, the distribution of fee awards to class counsel, and the finality for which the defendant has agreed to pay. These costs and delays can become so significant that it becomes rational for class counsel (most commonly) or the defendant to pay the objectors to drop their appeals. In essence, current law permits one class member to hold everything up for everyone else, and, thereby, extract money from those affected by the delay.

The prospect of these side deals has encouraged, we are told, ever more class members to file objections and appeals to collect the blackmail payments. As a result, the Federal Judicial Center has warned judges to "[w]atch out . . . for canned objections filed by professional

objectors" and to "be wary of self-interested professional objectors who often present rote objections to class counsel's fee requests and add little or nothing to the fee proceedings." Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges*, at 15, 31 (Federal Judicial Center, 2d ed. 2009), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/classgd2.pdf/$file/classgd2.pdf. Many courts have also commented on the blackmail problem. *See, e.g.*, *Vaughn v. Am. Honda Motor Co., Inc.*, 507 F.3d 295, 300 (5th Cir. 2007) ("In some circumstances objectors may use an appeal as a means of leveraging compensation for themselves or their counsel."); *Duhaime v. John Hancock Mut. Life Ins. Co.*, 183 F.3d 1, 6 (1st Cir. 2001) (noting that appeals from objections can become "extortive legal proceedings"); *Vollmer v. Publishers Clearing House*, 248 F.3d 698, 709 (7th Cir. 2001) (noting that class members sometimes appeal "solely to enable themselves to receive a fee"); *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942, 973 (E.D. Tex. 2000) (noting "objectors who seek out class actions to simply extract a fee by lodging generic, unhelpful protests"); *Barnes v. FleetBoston Fin. Corp.*, 2006 U.S. Dist. LEXIS 71072, at *3 (D. Mass. Aug. 22, 2006) (noting that blackmail-minded objectors "can levy what is effectively a tax on class action settlements"); *Snell v. Allianz Life Ins. Co.*, 2000 WL 1336640, at *9 (D. Minn. Sept. 8, 2000) (noting objectors who "maraud proposed settlements—not to assess their merits—but in order to extort the parties").

A number of solutions to this problem have been tried, but all of them, in our view, have failed. These failed efforts have been catalogued in Fitzpatrick, *supra*, and we will not repeat here what was said there. Suffice it to say that the other potential solutions—sanctions for frivolous objections and appeals, requiring objectors to post appellate bonds, and provisions in settlement agreements that accelerate the payment of fees for class counsel—are either

incomplete solutions to the problem or create cures that are worse than the disease because they chill legitimate objectors as well as blackmail-minded ones (or, in some cases, *only* legitimate objectors and *not* blackmail-minded ones).

What is needed is a way to clearly separate class members who file objections for the purpose of improving settlements from class members who file objections for the purpose of collecting side deals. We believe the best way to do this is the proposal made in Fitzpatrick, *supra*: to prohibit objectors from unilaterally dropping their appeals in exchange for something of value from class counsel or the defendant. With such a rule, only objectors who actually care about the merits of their objections and appeals will file objections and appeals; objectors who are in it only for the side deals will no longer bother. In short, such a rule will effectively screen out blackmail-minded objectors but preserve access for objectors with legitimate bases for an appeal.

Our proposed rule would prohibit even legitimate objectors with meritorious objections from dropping their appeals for something of value for themselves. Although at first blush it might seem strange to prevent someone who has brought a meritorious appeal from settling it, in the special context of class-action objections, private settlements that are kept secret and not presented to judges for approval are never socially beneficial. Any meritorious objection brought by a class member should, if vindicated, benefit not only the objector but other class members as well; if an objector is permitted to settle the objection in a side deal, however, only the objector benefits—none of the similarly-situated class members do. *See, e.g., Holmes v. Continental Can Co.*, 706 F.2d 1144, 1148 (11th Cir. 1983) (indicating that similarly-situated class members should be treated alike unless "rebutted by a factual showing that the higher allocations to certain parties are rationally based on legitimate considerations"). That is, the

positive benefits to other class members that may have been derived from the objections and appeals are lost. For example, if an objector objects to the manner in which a settlement is allocated among class members, all class members who are similarly situated to the objector stand to benefit from the objection. *See, e.g, Klier v. Elf Atochem North America, Inc.*, 658 F.3d 468 (5th Cir. 2011) (settlement objection litigated to final judgment benefited all similarly situated class members). But only the objector will benefit if the appeal is dropped in a side deal. For this reason, some commentators believe that private settlements with objectors are unethical as a general matter. *See* Susan P. Koniak & George M. Cohen, *In Hell There Will Be Lawyers Without Clients or Law*, 30 Hofstra L. Rev. 129, 132 (2001); Katherine Ikeda, Note, *Silencing the Objectors*, 15 Geo. J. L. Ethics 177, 203-04 (2001). Thus, nothing is lost—and, indeed, much gained—when even class members with legitimate objections cannot drop their appeals in exchange for payments from class counsel or the defendant.

In 2003, in response to some of these concerns, Federal Rule of Civil Procedure 23 was amended to require district courts to approve the withdrawal of any objections to class action settlements. *See* Rule 23(e)(5). When this amendment was under consideration, the Civil Rules Advisory Committee considered extending it to require district court approval even if an objection was dropped on appeal. *See* Civil Rules Advisory Committee Meeting Minutes, October 2000, at 9. But the extension was dropped over concern that the district court no longer had jurisdiction over such matters once an appeal was filed. *See* Report of the Civil Rules Advisory Committee, May 20, 2002. As a result, a loophole was created: objectors who wish to blackmail class counsel or the defendant simply wait for the appeal. For this reason, we are asking you to revise Federal Rule of Appellate Procedure Rule 42 to do for objector appeals what Civil Rule 23(e)(5) does for objections before the district court: require permission before a class

member can withdraw. Moreover, in light of what we now know about both the lack of benefit of any settlement in the special context of class-action objections as well as what we are told is the ever-growing blackmail tax levied on class members, class counsel, and defendants, we further believe that Appellate Rule 42 should make clear that no court should grant permission to withdraw unless the objector and counsel for all the parties certify that they have neither given nor received anything of value in return.

We will close by noting that we do not believe that class members who file objections should *never* receive any compensation that other class members do not. Class members who file legitimate objections often must hire lawyers to do so, and, like any other counsel, these lawyers need some economic incentive to participate in the litigation. As such, we believe class members with legitimate objections ought to be able to recoup their attorney's fees. But we further believe that, when objectors recoup these fees, it should only be for successful objections that have created value for other class members (not objections that have failed or were never considered), and it should only come by way of district court approval (not by way of a secret side deal with class counsel or the defendant). Federal courts already widely recognize the authority of district courts to award objectors attorney's fees when their objections create value for the class—for example, when an objection causes the district court to reduce class counsel's fee request or when an objection causes class counsel and the defendant to revise the terms of the settlement—by compensating them from the settlement proceeds or class counsel's fee award. *See, e.g.*, *Rodriguez v. Disner*, --- F.3d ----, 2012 WL 3241334, at *9 (9th Cir., Aug. 10, 2012). Nothing in our proposed amendment would change this authority.[1]

[1] A district court can exercise this authority even when class counsel and the defendant renegotiated a settlement on account of an objection only after the district court approved the settlement and the settlement is on appeal. In this circumstance, the objector-appellant could use Civil Rule 62.1 and Appellate Rule 12.1 to hold the appeal of the original settlement in abeyance while the district court considers the new settlement. If the original settlement was

Although our proposal will mean that only litigated objections will be permissible, we do not believe that this will create more work for federal courts. Quite the contrary. Class members with legitimate objections already pursue their objections in adversary litigation. The objections that concern us are those that are blackmail minded, and those objections will be eliminated by our proposal because they will no longer be profitable, saving the time and resources of both district courts and the courts of appeals alike.

Thank you for your consideration.

Sincerely,

Brian T. Fitzpatrick, Vanderbilt Law School

Brian Wolfman, Georgetown University Law Center

Alan B. Morrison, George Washington University Law School

thereafter vacated by the district court and the new settlement approved to the satisfaction of the objector, the objector could then dismiss its original appeal under our proposed Appellate Rule 42 and apply to the district court for an award of attorney's fees for improving the settlement.

PROPOSED AMENDED APPELLATE RULE 42
(new language underlined)

Rule 42. Voluntary Dismissal

(a) Dismissal in the District Court.

Before an appeal has been docketed by the circuit clerk, the district court may dismiss the appeal on the filing of a stipulation signed by all parties or on the appellant's motion with notice to all parties.

(b) Dismissal in the Court of Appeals.

The circuit clerk may dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due. But no mandate or other process may issue without a court order. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court.

(c) Dismissal of Class Action Appeals.

No appeal from a judgment approving a class action settlement or awarding attorney's fees and expenses to class counsel may be dismissed without approval by the court of appeals. The court of appeals may not approve the dismissal unless the appellant and counsel for all parties have certified that neither they nor any other person will give or receive anything of value in exchange for dismissing the appeal.

VINCENT J. ESADES
VESADES@HEINSMILLS.COM

March 12, 2013

Advisory Committee on Appellate Rules
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle N.E.
Washington, D.C. 20544
Via Email: Rules_Support@ao.uscourts.gov

Re: Item No. 12-AP-F
Proposed Amendment to Rule 42

Dear Committee Members:

To address the growing problem posed by frivolous objections to class action settlements approved by district courts, I write in support of the proposed amendment to Federal Rule of Appellate Procedure 42 submitted by Professors Fitzpatrick, Wolfman and Morrison. (*See* letter to Hon. Steven M. Colloton from Brian T. Fitzpatrick, *et al.*, dated August 22, 2012.) This amendment would prohibit objectors from dismissing their appeals in exchange for money, thus eliminating any incentive to file baseless appeals.

As attorneys who regularly represent plaintiff classes, I am keenly aware that the lure of cash payments is, to some class members and their counsel, an irresistible attraction to file a baseless objection and ensuing appeal. Without affording any benefit to the class as a whole, these appeals needlessly delay class distributions, impose additional defense costs, extort cash payoffs, and burden the courts of appeals. The proposed amendment would rid class litigation of these harms without any of the drawbacks of other potential solutions.

The Problem

The need for this proposed reform is great and urgent. The practice of extorting payments in exchange for dropping appeals is epidemic. Today, meritless objections to class settlements, and appeals from the denial of these objections, are filed in virtually every large class action.

Many are formulaic, filed by serial, or "professional," objectors who ply their trade by recycling tired objections from those filed in other actions.[1]

Frivolous objections to settlements made at the district court level are not the problem – those objections are dealt with swiftly and do not cause much delay. The intent of a professional objector, however, is not to succeed at the district court level, but rather to preserve the objection to use as leverage during a long, drawn-out appeal period. Unless these objections are promptly resolved, an inevitable consequence is unwarranted delay in achieving the objective of class actions: to compensate injured class members. Class members who file frivolous appeals know that their actions delay distribution of settlement proceeds to deserving class members – and exploit the fact that the prospect of delay places substantial pressure on class counsel to resolve their objections, regardless of merit.

The resolution these objectors invariably seek is a cash payment from class counsel – or, rarely, defendants – in exchange for abandoning their challenges. And too often they succeed in exacting a payment, because paying off the objector is the only way to avoid further delay. This "objector blackmail," as the practice has been called,[2] rewards only those class members who hold the litigation and release of settlement funds hostage. Unless remedied, this practice will continue to subordinate the interests of the class to those of a few selfish members. Current law allows it to flourish.[3]

Not only does objector blackmail delay class relief and burden class counsel, it also subverts the orderly process of adjudicating class actions as contemplated by the civil and appellate rules. While objections well-grounded in law and fact serve a salutary purpose consonant with the goals of class litigation, conferring a benefit on the entire class, sham co-opt

[1] Serial objection by template has not escaped judicial attention. *See, e.g.*, *In re Initial Public Offering Sec. Litig.*, 671 F.Supp.2d 467, 497 n. 219 (S.D.N.Y. 2009) (noting that an objector had been criticized by other courts for submitting "canned objections"); *Shaw v. Toshiba Am. Information Sys., Inc.*, 91 F. Supp. 2d 942, 973-74 & n.18 (S.D. Tex. 2000) ("[S]ome of the objections were obviously canned objections filed by professional objectors who seek out class actions to simply extract a fee by lodging generic, unhelpful protests....").

[2] *See* Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 Vand. L. Rev. 1623 (2009).

[3] Numerous courts have recognized the abuse by blackmailing objectors. *See, e.g., Vaughn v. Am. Honda Motor Co., Inc.*, 507 F.3d 295, 300 (5th Cir. 2007) ("In some circumstances objectors may use an appeal as a means of leveraging compensation for themselves or their counsel."); *Duhaime v. John Hancock Mut. Life Ins. Co.*, 183 F.3d 1, 6 (1st Cir. 2001) (noting that appeals from objections can become "extortive legal proceedings"); *Trombley v. Bank of America Corp.*, No. 08–CV–456, 2011 WL 3740488, at * 5 (D.R.I. Aug. 24, 2011) ("Courts have recognized the problems caused by so-called professional objectors, who assert meritless objections in large class action settlement proceedings to extort fees or other payments."); *In re United Health Group Inc. PSLRA Litig.*, 643 F. Supp. 2d 1107, 1109 (D. Minn. 2009) (finding that the objectors' "goal was, and is, to hijack as many dollars for themselves as they can wrest from a negotiated settlement."); *O'Keefe v. Mercedes–Benz U.S.A., LLC*, 214 F.R.D. 266, 295 n. 26 (E.D. Pa. 2003) ("Federal courts are increasingly weary of professional objectors."); *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942, 973 (E.D. Tex. 2000) (noting "objectors who seek out class actions to simply extract a fee by lodging generic, unhelpful protests"); *Snell v. Allianz Life Ins. Co.*, 200 WL 1336640, at *9 (D. Minn. Sept. 8, 2000) (noting objectors who "maraud proposed settlements – not to assess their merits – but in order to extort the parties").

class litigation and defeat its ends. Their proponents are parasitic interlopers who pursue private agendas at odds with the true work of class litigation. Without providing any value to other class members, they clog court dockets, multiply litigation costs, and deprive defendants of the finality they bargained for.

The Proposed Solution

The proliferation of baseless objections cries out for a solution that effectively deters them without also discouraging valid objections.[4] The proposed amendment to Rule 42 would accomplish this goal by prohibiting objectors from dismissing their appeals in return for remuneration – something not sought by legitimate objectors. The amendment would add the following new section to the existing rule:

> (c) Dismissal of Class Action Appeals.
>
> No appeal from a judgment approving a class action settlement or awarding attorney's fees and expenses to class counsel may be dismissed without approval by the court of appeals. The court of appeals may not approve the dismissal unless the appellant and counsel for all parties have certified that neither they nor any other person will give or receive anything of value in exchange for dismissing the appeal.

The proposed language would achieve its objective in two ways. First, by requiring the court of appeals to approve the dismissal of any appeal from a class action settlement, the proposed amendment would bring all objection withdrawals into the light of judicial scrutiny, regardless of procedural stage. The change would mirror the 2003 amendment to Federal Rule of Civil Procedure 23, which requires district courts to approve the withdrawal of any objections to class action settlements. *See* Fed. R. Civ. P. 23(e)(5). Because the amended Rule 23 does not reach the withdrawal of objections on appeal, objectors who wish to extort a payment need only wait to appeal. Amending Rule 42 as suggested would close this loophole.

Second, by conditioning approval of dismissal on a certification that no money changed hands, the new rule would abolish the blackmail incentive altogether. With the lure of a monetary side-deal gone, illegitimate objectors will have no reason to pursue an objection, while objectors truly concerned with the merits of their challenges will remain motivated to have them adjudicated.

Imposing this requirement uniformly on all objections does not penalize meritorious ones. It merely ensures that dropping an appeal will not confer a private benefit on the appellant,

[4] Other proposed solutions have proved ineffective or risk tarring all objections with the same brush. These solutions (e.g., imposing sanctions for frivolous objections and appeals, requiring objectors to post bonds to appeal, and accelerating the payment of fees to class counsel) are thoroughly discussed in Brian T. Fitzpatrick, *supra* n.1, and will not be covered here.

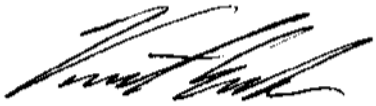
and that—consistent with the purposes underlying Rule 23—the terms of any agreement resolving the appeal will benefit the class as a whole.

It is important to recognize what the proposed amendment would not change. In contrast to a cash payment from class counsel or a defendant, an objector who incurs attorney's fees and costs in connection with reaping a benefit to the class is entitled to be reimbursed even when an appeal is dismissed. Federal courts widely recognize the authority of district courts to award fees and costs.[5] The proposed amendment would not preclude an award of fees and costs to an objector whose challenge has bestowed a benefit on the class. The rule is aimed only at eliminating private gain.

For these reasons, I respectfully urge the Committee to recommend adoption of the proposed amendment to Rule 42.

Very truly yours,

HEINS MILLS & OLSON, P.L.C.



Vincent J. Esades

c: Prof. Catherine T. Struve
(Email: cstruve@law.upenn.edu.)

[5] *See, e.g., Rodriguez v. Disner*, 688 F.3d 645 (9th Cir. 2012).

Study of Class Action Objector Appeals in the Second, Seventh, and Ninth Circuit Courts of Appeals

Report to the Advisory Committee on Appellate Rules of the Judicial Conference of the United States

Marie Leary

Federal Judicial Center
October 2013

This report was undertaken at the request of the Judicial Conference's Advisory Committee on Appellate Rules and is in furtherance of the Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration. While the Center regards the content as responsible and valuable, it does not reflect policy or recommendations of the Board of the Federal Judicial Center.

Contents

Executive Summary

This study focused on class action objector appeals from class action cases, filed in the district courts on or after January 1, 2008, in which final approval of a Rule 23-certified class action settlement was granted and appealed. The objector appeals studied were filed from January 1, 2008, through March 1, 2013, in the Seventh Circuit, through June 1, 2013, in the Second Circuit, and through July 1, 2013, in the Ninth Circuit.

- Our searches of the CM/ECF district court databases of the districts in the Second, Seventh, and Ninth Circuits were limited to cases filed on or after January 1, 2008. We identified instances in which final approval of a Rule 23-certified class action settlement was granted and appealed through March 1, 2013, in the Seventh Circuit, through June 1, 2013, in the Second Circuit, and through July 1, 2013, in the Ninth Circuit. Objector appeals in these cases were not common (but see footnote 2 and surrounding text). Thirty-six objector appeals were filed in 12 class action settlements in the Second Circuit; 27 objector appeals were filed in 8 class action settlements in the Seventh Circuit; and 108 objector appeals were filed in 49 class action settlements in the Ninth Circuit. These objector appeals represented less than one percent of the total number of appeals filed in each of these three circuits from the beginning of fiscal year 2008 through March 31, 2013.
- Objector appeals were typically made in large cases, primarily in the largest districts within the circuits. In the Second Circuit, 92% of the class action objector appeals originated from the Southern District of New York; in the Seventh Circuit, 73% originated from the Northern District of Illinois; and in the Ninth Circuit, 86% originated from the Northern, Central, and Southern Districts of California.
- The majority of class action objector appeals (83%, or 142 out of 171 total objector appeals identified in our study) were filed from court-approved settlements in consolidated class actions or multidistrict litigation (MDL) class actions with large nationwide classes of plaintiffs.
- The pattern with respect to voluntary dismissal of appeals is different in the Second Circuit than in the Seventh and Ninth Circuits. Although the high percentage of class action objector appeals pending in the Ninth Circuit may alter the pattern, the trend in the Seventh and Ninth Circuits is for objector appeals to be voluntarily dismissed pursuant to Federal Rule of Appellate Procedure 42(b) prior to the filing of an appellant brief and within 200 days from the date on which the appeal was filed.
- In the Second Circuit, 63% of terminated appeals (19 of 30) were decided on the merits, in contrast to no objector appeals decided on the merits in the Seventh Circuit, and only 13% of the terminated appeals decided on the merits in the Ninth Circuit. Out of a combined total of 126 terminated objector appeals identified in the study, the objectors or appellants were successful in their appeals on only three occasions.
- Federal Rule of Appellate Procedure 7 cost bonds were requested in 70% of the objector appeals (19 out of the 27 total objector appeals) filed in the Seventh Circuit; 32% (or 6 out of 19) of these bond requests were granted. Cost bonds were requested in 42% of objector appeals (15 out of the 36 total objector appeals) filed in the Second Circuit; none of the plaintiffs' bond requests were granted. In the Ninth Circuit, bonds were requested in 32% of objector appeals (35 out of the 108 objector appeals), and 66% of these requests were granted (23 out of 35).

Study Approach

The purpose of this study was to determine the frequency with which settlements reached in Rule 23-certified class actions are appealed by class action objectors, generally defined as one or more class members who submit an objection to the proposed settlement in the district court prior to final approval of the class action settlement. To identify the cases in which objector appeals were filed, we first conducted computerized searches of the CM/ECF district court databases to identify the universe of cases in which such an appeal might possibly have been filed, and then we examined the docket sheets of these cases to determine whether such an appeal had actually been taken. If such an appeal had been taken, we coded information relevant to the proposals currently under consideration by the Appellate Rules Committee, including whether the appeals by class action objectors were determined to be of a frivolous nature, the final disposition of the objector appeals, and whether a Rule 7 cost bond was requested and imposed on the appealing objectors.[1]

Owing to time constraints and the difficulty of identifying class action objector appeals with automated searches of the CM/ECF databases, the current report is limited to cases filed on or after January 1, 2008, in three circuits (Second, Seventh, and Ninth) and to objector appeals filed from January 1, 2008, through either March 1, 2013 (Seventh Circuit), June 1, 2013 (Second Circuit), or July 1, 2013 (Ninth Circuit). The Second and Ninth Circuits were chosen based on the increased likelihood of the district courts of both circuits having an above-average number of class actions. The Seventh Circuit was chosen as having district courts with an average level of class action filings. Preliminary results based on the districts in the Seventh Circuit were shared in an oral report at the Committee's spring 2013 meeting.

Limiting the search to cases filed after January 1, 2008, likely resulted in an incidence estimate at the lower boundary of the actual rate because some of the class action cases were still pending at the time of our electronic search. In addition, the search would not have captured objector-appeal activity in either pending or closed cases filed before January 1, 2008. However, basing the study on a filing cohort aimed at capturing appeals in recently filed class actions sets relatively unambiguous parameters for the cases included in the study, which in turn allows more straightforward interpretation. Currently, Federal Judicial Center staff are exploring whether it will be fruitful to extend the searches to include earlier filing years, to use an alternative sampling strategy, or to follow up on any cases in the current sample that were pending at the time of our initial work.[2]

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1. Standard codes to identify appeals by class action objectors in the CM/ECF databases do not exist in either the district or appellate courts, and the docketing events that reliably identify Rule 23 class action settlements with objector activity occur at the district-court level. Thus, for each circuit, a tailored search was developed and run for each district within the circuit using the same five-year time period, resulting in a list of cases that would include (if present) cases filed on or after January 1, 2008, with class action settlements that have been granted final approval and from which one or more class members who objected to the proposed settlement filed a notice of appeal. After identifying all legitimate objector appeals in each district, the results were compiled to calculate the circuit-level rate of appeal.

2. Alternative sampling methods include using a termination cohort or a pending cohort of cases. A termination cohort of cases would have provided complete information about the incidence of objector appeals in those cases, but comparisons would likely have been less reliable because the sample would include cases filed in many different years, with some being short-lived cases and some longer lasting. Using a pending cohort also would include cases filed in many different years, with some being short-lived cases and some longer lasting, without the benefit of having complete information about incidence. It may be that a combination sampling strategy will ultimately produce the best estimate of incidence. We recently searched the CM/ECF databases for objector appeal activity from January 1, 2008, through September

A comprehensive record of the results for each of the three circuits is presented in the appendices attached to this report. The appendix for each circuit lists, by district, the class action cases with one or more objector appeals identified in our searches, and for each of these cases the following information was collected:

- whether the case had been consolidated as an MDL by the Judicial Panel on Multidistrict Litigation;
- whether the case is part of a consolidated class action within the district;
- the number of objections submitted by objectors prior to the court's grant of final approval to the class action settlement;
- the date upon which the court granted final approval to the class action settlement or settlements and final judgment from which the objector could appeal, including whether the court also awarded attorneys' fees and expenses;
- the total number of appeals filed by objectors for each case;
- the date on which the notice of appeal was filed in the district court; the name of the objector or objectors filing the notice of appeal; the name of the attorneys (if any) listed on the notice of appeal; name of the attorneys filing appearances on behalf of objectors in the appellate court (if different from the attorney listed on the notice of appeal or if the notice of appeal was filed by the objectors pro se);
- for each appeal identified, the current status of the appeal—either "still pending" or the date of final disposition of the appeal as indicated by the appellate court mandate and the nature of the final disposition (voluntarily dismissed pursuant to a Rule 42(b) motion by the objectors/appellants or per stipulation of the parties; appeal dismissed because of procedural deficiencies; or per decision by the appellate court on the merits);
- whether or not a motion requesting imposition of a Rule 7 cost bond was made—if so, whether the motion was granted and, if granted, the amount of the final bond imposed;
- for each circuit, documentation of each of the events described above for each relevant case, settlement, and appeal.

The following sections of this report summarize the study findings, which are included in greater detail in the appendices, with respect to: the frequency of objector appeals during the period studied, the final disposition of the objector appeals identified, and Rule 7 cost bond activity in each of the three circuits studied.

11, 2013, in any pending case *regardless* of filing year of the underlying case. These searches suggest that the low incidence of objector appeals found in our more detailed study would be replicated in a more expansive study in all districts except the Southern District of New York. The recent search for this district suggests the incidence may be higher than what is reported in this report. However, we cannot make definitive statements without additional review.

Frequency of Class Action Objector Appeals

As described above, the number of objector appeals filed in each of the three circuits during the study period was derived from a compilation of the verified objector appeals identified in the districts within the respective circuits.

For each district included in our search, the table below shows the number of court-approved Rule 23-certified class action settlements from which one or more objector appeals were filed during the five-year study period, and the total number of objector appeals filed in the respective circuit court from those settlements. For each of the districts in our study in which objector appeals were identified, except the Southern District of Illinois and the District of Nevada, there are differences in the number of court-approved Rule 23-certified class action settlements appealed from and the number of objector appeals from the district that were filed in the circuit court. The differences are the result of some cases having multiple objector appeals from the court-approved settlement. Multiple appeals from the same settlement are usually filed by different objectors[3] but in several cases the same objector filed more than one notice of appeal to the same settlement.[4]

In addition, in the Southern District of New York and the Northern District of California the number of court-approved Rule 23-certified class action settlements from which an appeal was taken is greater than the number of class action cases listed for those districts.[5] This is because the large MDL class actions had more than one court-approved settlement.

3. *See, e.g.,* Blessing v. Sirius XM Radio Inc., No. 1:09-cv-10035 (S.D.N.Y. Dec. 7, 2009) (12 separate appeals filed in the Second Circuit by different objectors); *In re* Lawnmower Engine Horsepower Mktg. & Sales Practices Litig. (*No. II*), No. 2:08-md-01999 (E.D. Wis. Dec. 5, 2008) (8 appeals filed in the Seventh Circuit by different objectors); *In re* Online DVD Rental Antitrust Litig., No. 4:09-md-02029 (N.D. Cal. Apr. 13, 2009) (6 appeals filed in the Ninth Circuit by different objectors).

4. *See* Dennings v. Clearwire Corp., No. 2:10-cv-01859 (W.D. Wash. Nov. 15, 2010). Objectors appealed from the December 20, 2012, order granting final approval of the settlement and from the May 3, 2013, order awarding attorneys' fees and expenses.

5. *See In re* Bank of Am. Corp. Sec., Derivative, and Employee Retirement Income Security Act (ERISA) Litig., No. 1:09-md-2058 (S.D.N.Y. June 11, 2009) (1 objector appeal was filed from the April 15, 2013, order awarding attorneys' fees for the January 24, 2013, settlement of the consolidated derivative actions and 4 appeals were filed from the April 8 and 9, 2013, orders approving settlement and awarding attorneys' fees for the consolidated securities actions); *and In re* TFT-LCD (Flat Panel) Antitrust Litig., MDL No. 1827, No. 3:07-md-1827 (N.D. Cal. Apr. 20, 2007) (5 objector appeals were filed from the July 11, 2012, settlement and 8 appeals were filed from the March 29, 2013, settlement).

Class Action Objector Appeals Filed in the Second, Seventh, and Ninth Circuit Courts of Appeals[6]		
District Court	Court Approved Rule 23-Certified Class Action Settlements Appealed by 1 or More Objectors	Separate Objector Appeals Filed
District of Connecticut	0	0
Eastern District of New York	2	3
Northern District of New York	0	0
Southern District of New York	10	33
Western District of New York	0	0
District of Vermont	0	0
Total for Second Circuit	**12**	**36**
Central District of Illinois	0	0
Northern District of Illinois	5	17
Southern District of Illinois	1	1
Northern District of Indiana	0	0
Southern District of Indiana	0	0
Eastern District of Wisconsin	2	9
Western District of Wisconsin	0	0
Total for Seventh Circuit	**8**	**27**
District of Alaska	0	0
District of Arizona	1	3
Central District of California	8	12
Eastern District of California	0	0
Northern District of California	24	65
Southern District of California	8	16
District of Idaho	0	0
District of Montana	0	0
District of Nevada	1	1
District of Oregon	0	0
Eastern District of Washington	0	0
Western District of Washington	7	11
Total for Ninth Circuit	**49**	**108**

6. This table includes class action objector appeals from class action cases that were filed in the district courts on or after January 1, 2008, in which final approval of a Rule 23-certified class action settlement was granted and appealed from between January 1, 2008, through March 1, 2013, in the Seventh Circuit, through June 1, 2013, in the Second Circuit, and through July 1, 2013, in the Ninth Circuit. Owing to time constraints, the total number of objector appeals filed in the Ninth Circuit Court of Appeals does not include objector appeals, if any, that may have originated from the Districts of Hawaii, Guam, and the Northern Mariana Islands.

Although the results summarized here were obtained from searches conducted in the district courts of only three circuit courts of appeals, if similar searches of the CM/ECF databases in the district courts in the other ten circuits were conducted, we would expect similar results.

- Overall, the percentage of appeals filed by class action objectors is likely to be small compared to the total number of appeals filed in each circuit, even if we take into account that the incidence rates reported here are likely lower bounds because the search was limited to cases filed after January 1, 2008.[7]

  As indicated in the table above, in the Second Circuit 36 objector appeals were filed in the 12 class action settlements identified from the approximate five-year sample of filings. Thirty-six appeals is less than one percent of the total number of appeals filed in the Second Circuit from the beginning of fiscal year 2008 through March 31, 2013.[8] Similarly, 27 objector appeals were filed in eight class action settlements in the Seventh Circuit. Twenty-seven appeals is less than one percent of the total number of appeals filed in the Seventh Circuit from the beginning of fiscal year 2008 through March 31, 2013.[9] And finally, 108 objector appeals were filed in 49 class action settlements in the Ninth Circuit. One hundred and eight appeals is less than one percent of the total number of appeals filed in the Ninth Circuit from the beginning of fiscal year 2008 through March 31, 2013.[10]

  At this time, we do not have a count of the total number of Rule 23-certified class action settlements granted final approval from which no objector appeal was taken during the time period of the study. It is likely, however, that the number of court-approved class action settlements appealed by objectors would be a small percentage of such cases.

- The pattern of origination of objector appeals in the Second, Seventh, and Ninth Circuits will likely also be seen in other circuits—that is, most of the objector appeals will be found in the larger districts or in districts considered to be favorable forums for class action filings or frequent transferee districts for MDL consolidations. No or very few objector appeals will be found in smaller districts or districts less popular for class action filings. Thus, the total number of class action objector appeals, by circuit as well as nationwide, will likely originate from a few districts rather than being spread relatively evenly among the districts.

  In the Second Circuit, 92% of the class action objector appeals originated from one district—the Southern District of New York. With the exception of the Eastern District of New York, where a total of three objector appeals were filed, there were no objector appeals at all originating from class action settlements granted final approval in the remaining districts of the sample filing from the Second Circuit.

  Sixty-three percent of the objector appeals (17 out of 27 total appeals) filed in the Seventh Circuit originated from the Northern District of Illinois, and all but one of the remaining 10 appeals were filed from two class action settlements in one other district—the

7. *See supra* note 2 and the surrounding text discussing the implications of a filing cohort limiting our sample to cases filed on or after January 1, 2008.

8. Administrative Office of the United States Courts, Federal Court Management Statistics, available at http://jnet.ao.dcn/resources/statistics/federal-court-management-statistics. Note that these numbers will include filings from October 1, 2007, to December 31, 2007, which are not included in the study's search period.

9. *Id.*

10. *Id.*

Eastern District of Wisconsin. Except for one objector appeal filed from the Southern District of Illinois, no class action objectors appealed in the remaining Seventh Circuit districts during the study period.

In the Ninth Circuit, 86% of the total number of objector appeals originated from three of the California districts, with 60% coming from the Northern District of California (65 out of 108 total appeals), and the remaining 26% split almost evenly between the Southern District of California (16 appeals) and the Central District of California (12 appeals). The majority of the remaining 14% of objector appeals originated from the Western District of Washington (11 of the 15 remaining appeals), with the Districts of Arizona (3 appeals) and Nevada (1 appeal) being the only remaining Ninth Circuit districts where an objector appealed from a class action settlement. Although we have not collected or examined data for the remaining ten circuits, it is likely that the upper limits of an overall nationwide range of objector appeals would be found in the Northern District of California, with 65 objector appeals from 24 court-approved Rule-23 certified class action settlements, and in the Ninth Circuit overall, with 108 objector appeals.

- The majority of class action objector appeals are filed from final settlements in consolidated class actions or MDL class actions with large nationwide classes of plaintiffs.

  In the Second Circuit, 89% of the total number of objector appeals (32 out of 36 objector appeals) were filed from court-approved settlements in either MDL class actions (18 appeals) or consolidated class actions (14 appeals). In the Seventh Circuit, 96% of objector appeals were filed from settlements granted final approval in either MDL class actions (16 out of 27 total objector appeals) or in consolidated class actions (10 appeals). And in the Ninth Circuit, 78% (84 out of 108 total objector appeals) were filed from court-approved settlements reached in either MDL class actions (49 appeals) or consolidated class actions (35 appeals filed).

Final Disposition of Class Action Objector Appeals

The table below shows the current disposition of the objector appeals identified in each of the three study circuits. All of the objector appeals can be placed into one of four disposition categories:

1. the appeal is pending as of August 31, 2013;
2. the appeal has been dismissed voluntarily, either pursuant to the appellate court granting the objectors' Federal Rule of Appellate Procedure 42(b) motion to dismiss the appeal or granting the parties' Rule 42(b) stipulation to dismiss the appeal (usually with prejudice);
3. the appeal has been dismissed pursuant to court order owing to a procedural deficiency including lack of standing to maintain the appeal, default for failure to file the required appellate forms or to file the brief and/or appendix by the due date, failure to prosecute the appeal, or failure to pay the docketing fee; or
4. the appeal has been decided on the merits, resulting in an order either dismissing the appeal, affirming the judgment of the district court, or reversing the judgment in part and remanding the case to the district court for further proceedings.

In addition, for appeals that were voluntarily dismissed, dismissed because of procedural deficiencies, or decided on the merits, the table shows the average length of time in days from the date on which the objectors/appellants filed the notice of appeal in the district court and the date on which final disposition of the appeal occurred in the appellate court, signified by issuance of a mandate pursuant to Federal Rule of Appellate Procedure 41(a) indicating that the appeal has been dismissed.

Finally, for objector appeals that were voluntarily dismissed pursuant to Rule 42(b), the table indicates the number of such appeals in which the objectors/appellants filed their appellant brief prior to filing a Rule 42(b) motion seeking voluntary dismissal of the appeal, either pursuant to a motion brought only by the objector or pursuant to the parties' stipulation.

Disposition of Class Action Objector Appeals Filed in the Second, Seventh, and Ninth Circuit Courts of Appeals[11]					
Court of Appeals (total # of objector appeals filed)	Appeals Pending (as of 08/31/2013)	Appeals Voluntarily Dismissed Pursuant to Fed. R. App. P. 42(b)		Appeal Dismissed Because of Procedural Deficiency	Appeal Decided on the Merits
		Pursuant to Objector(s) Rule 42(b) Motion to Dismiss[12]	Pursuant to Parties' Rule 42(b) Stipulation to Dismiss[13]		
Second Circuit (36 total appeals)	6	6		5[14]	19[15]
		1	5		
Average length of time (in days) between filing notice of appeal and final disposition of appeal[16]	N/A	270 days [92 to 544 days] # Objector appeals voluntarily dismissed: • under 50 days: 0 • between 50 and 100 days: 1 • between 100 and 200 days: 1 • between 200 and 300 days: 2 • over 300 days: 2		146 days [78 to 218 days]	396 days [85 to 548 days]
		544 days [N/A]	215 days [92 to 373 days]		
Number of appeals voluntarily dismissed in which appellant brief was filed prior to final disposition of appeal	N/A	1		N/A	N/A
		1	0		

11. Includes class action objector appeals from class action cases that were filed in the district courts on or after January 1, 2008, in which final approval of a Rule 23-certified class action settlement was granted and appealed from January 1, 2008, through March 1, 2013, in the Seventh Circuit, through June 1, 2013, in the Second Circuit, and through July 1, 2013, in the Ninth Circuit. Owing to time constraints, the total number of objector appeals filed in the Ninth Circuit Court of Appeals does not include objector appeals, if any, that may have originated from the Districts of Hawaii, Guam, and the Northern Mariana Islands due to time constraints.

12. The request is brought solely by the objectors/appellants (or by counsel on behalf of the objectors/appellants) asking the court to voluntarily dismiss the appeal pursuant to Rule 42(b).

13. The request is brought by the parties to the appeal per stipulation (or by counsel on behalf of the parties to the appeal)—including the objectors/appellants, class plaintiffs/appellees, and may also include the defendants—asking the court to voluntarily dismiss the appeal pursuant to Rule 42(b).

14. In the Second Circuit, 5 objector appeals were dismissed for procedural deficiencies, including lack of standing to appeal; default because of failure to file required appellate forms (2 appeals); and failure to file brief and/or appendix by due date (2 appeals).

15. In the Second Circuit, 19 objector appeals were decided on the merits: 2 appeals were dismissed and 17 appeals affirmed the judgment of the district court by summary order.

16. The time period is measured from the day the objectors/appellants files the notice of appeal in the district court to the day the appellate court issues the mandate pursuant to Rule 41(a) finally disposing of the appeal. The range indicating the shortest time to disposition and the longest time period in days is provided where more than one objector appeal was filed.

Disposition of Class Action Objector Appeals Filed in the Second, Seventh, and Ninth Circuit Courts of Appeals[11]					
Court of Appeals (total # of objector appeals filed)	Appeals Pending (as of 08/31/2013)	Appeals Voluntarily Dismissed Pursuant to Fed. R. App. P. 42(b)		Appeal Dismissed Because of Procedural Deficiency	Appeal Decided on the Merits
		Pursuant to Objector(s) Rule 42(b) Motion to Dismiss[12]	Pursuant to Parties' Rule 42(b) Stipulation to Dismiss[13]		
Seventh Circuit (27 total appeals)	0	27		0	0
		19	8[17]		
Average length of time (in days) between filing notice of appeal and final disposition of appeal[18]	N/A	103 days[19] [6 to 177 days] # Objector appeals voluntarily dismissed: • under 50 days: 7 • between 50 and 100 days: 2 • between 100 and 200 days: 12 • between 200 and 300 days: 0 • over 300 days: 0		N/A	N/A
		112 days [19 to 177 days]	14 days [6 to 22 days]		
Number of appeals voluntarily dismissed in which appellant brief was filed prior to final disposition of appeal	N/A	9		N/A	N/A
		3[20]	6[21]		

17. Six of the eight objector appeals in the Seventh Circuit that were voluntarily dismissed pursuant to the parties' Rule 42(b) stipulation during our study period were dismissed only after the majority of a three-judge panel concluded that the terms of the parties' separate settlement of the dispute underlying the appeals did not undo or affect the original settlement approved by the district court in any way. *See Safeco Ins. Co. of Am. v. Am. Int'l Grp., Inc.,* 710 F.3d 754 (7th Cir. Mar. 25, 2013). For additional details, see the report of findings from the Seventh Circuit at Appendix B.

18. *See supra* note 16.

19. The six appeals filed from the settlement reached in *Nat'l Council on Comp. Ins., Inc. v. Am. Int'l Grp.,* No. 1: 07-cv-2898 (N.D. Ill. filed May 24, 2007) and *Safeco Ins. Co. of Am. v. Am. Int'l Grp., Inc.*, No. 1:09-cv-2026 (N.D. Ill. filed April 1, 2009) were not included within the group of voluntarily dismissed appeals for an analysis of disposition time because their inclusion would have made the average life span of these appeals appear misleadingly high. The Seventh Circuit granted the parties' stipulation to dismiss these six appeals, but the additional information requested and time needed for the panel to issue its decision resulted in 431 days elapsing from the filing of the initial notices of appeal.

20. In one of the three objector appeals in which the objector/appellant filed an appellant brief, the brief was rejected as procedurally deficient and the objector filed a Rule 42(b) motion for voluntary dismissal before refiling a corrected brief.

21. Appellant briefs were filed in the six consolidated appeals taken by two objectors in *Nat'l Council on Comp. Ins., Inc. v. Am. Int'l Grp.,* No. 1: 07-cv-2898 (N.D. Ill. filed May 24, 2007) and *Safeco Ins. Co. of Am. v. Am. Int'l Grp., Inc.*, No. 1:09-cv-2026 (N.D. Ill. filed April 1, 2009). On November 29, 2012, a three-judge panel heard oral arguments on the consolidated appeals and took them under advisement. On January 11, 2013, before the panel issued its decision, all parties to the 6 appeals reached a settlement and they all agreed (except for one appellee) to stipulate and file with the court an Agreed Stipulation of Dismissal with prejudice. However, on January 14, 2013, the court ordered the parties to supplement their agreed stipulation of dismissal to address whether the settlement of the dispute underlying the appeals negatively affected the class settlement approved in February 2012. On March 25, 2013, the majority granted the parties' stipulation and dismissed the appeals. *See also supra* note 17 & 19.

Disposition of Class Action Objector Appeals Filed in the Second, Seventh, and Ninth Circuit Courts of Appeals[11]					
Court of Appeals (total # of objector appeals filed)	Appeals Pending (as of 08/31/2013)	Appeals Voluntarily Dismissed Pursuant to Fed. R. App. P. 42(b)		Appeal Dismissed Because of Procedural Deficiency	Appeal Decided on the Merits
		Pursuant to Objector(s) Rule 42(b) Motion to Dismiss[12]	Pursuant to Parties' Rule 42(b) Stipulation to Dismiss[13]		
Ninth Circuit (108 total appeals)	39	53		7[22]	9[23]
		27	26		
Average length of time (in days) between filing notice of appeal and final disposition of appeal[24]	N/A	86 days [7 to 435 days] # Objector appeals voluntarily dismissed: • under 50 days: 19 • between 50 and 100 days: 12 • between 100 and 200 days: 19 • between 200 and 300 days: 1 • over 300 days: 2		172 days [42 to 352 days]	461 days [94 to 603 days]
		104 days [25 to 435 days]	69 days [7 to158 days]		
Number of appeals voluntarily dismissed in which appellant brief was filed prior to final disposition of appeal	N/A	1		N/A	N/A
		1	0		

None of the appeals in the Seventh Circuit and only 17% of those in the Second Circuit were still pending during the study, but 36% of those in the Ninth Circuit were.

In the Seventh Circuit, all of the identified class action objector appeals were voluntarily dismissed pursuant to Rule 42(b). A similar disposition trend is evident in the Ninth Circuit, although because of the high percentage of class action objector appeals in this circuit still pending—appeals that may be voluntarily dismissed or disposed of on the merits—the pattern might change. About two-thirds (77%, or 53 out of 69) of the *terminated* class action objector appeals in the Ninth Circuit were voluntarily dismissed pursuant to Rule 42(b). In the Seventh Circuit, of the dismissals pursuant to Rule 42(b), about two-thirds were by motion and about a third by stipulation. In the Ninth Circuit, the dismissals were split almost evenly between motion and stipulation.

22. In the Ninth Circuit, 7 objector appeals were dismissed for procedural deficiencies, including failure to prosecute (6 appeals) and failure to pay the docketing fee.

23. In the Ninth Circuit, 9 objector appeals were decided on the merits: 6 appeals affirmed the judgment of the district court, and the judgment of the district court was reversed in part, affirmed in part, and remanded per published opinion in three appeals. For additional details on the three appeals in which the objector/appellant was successful, see Ninth Circuit Appeal No. 10-55129 from the settlement in *Fairchild v. AOL, LLC,* No. 2:09-cv-03568 (C.D. Cal. May 19, 2009); and Ninth Circuit Appeal Nos. 11-55674 and 11-55706 from the settlement in *Dennis v. Kellogg Co.,* No. 3:09-cv-01786 (S.D. Cal. Aug. 17, 2009).

24. *See supra* note 16.

In the Second Circuit, a decidedly different disposition trend is found: of the 30 objector appeals that had been terminated, only 6 (or 20%) of the objector appeals were voluntarily dismissed, and all but one of these dismissals was pursuant to the parties' Rule 42(b) stipulation of dismissal.

Dismissals owing to procedural deficiencies resulting from the objectors/appellants' failure to perform a requirement essential for the appeal to proceed (such as file forms required under local circuit rules or payment of the docketing fee) arguably could be considered *de facto* voluntary dismissals. Therefore, we examined whether the above trends were still evident if the appeals dismissed because of procedural deficiencies (5 appeals in the Second Circuit, no appeals in the Seventh, and 7 appeals in the Ninth Circuit) were added to the number of appeals voluntarily dismissed pursuant to a Rule 42(b) motion or stipulation. Although the percentage increased in the Second Circuit (from 20% to 37%) and the Ninth Circuit (from 77% to 87%), the general trend toward voluntary dismissal in the Seventh and Ninth Circuits and toward a merits disposition in the Second Circuit remained. Although Federal Rule of Appellate Procedure 7 cost bonds are discussed in the final section of this report, we note here that procedural deficiencies resulting in the dismissal of the 12 objector appeals discussed above did not include dismissals owing to the objectors' failure to pay a required Rule 7 cost bond.

Examining disposition from a different angle, 63% of the terminated appeals (19 of 30) in the Second Circuit were decided on the merits, including two appeals that were dismissed on the merits and 17 objector appeals where the judgment of the district court was affirmed by summary order. In contrast, no objector appeals were decided on the merits in the Seventh Circuit, and only 13% of the terminated appeals (9 out of 69) were decided on the merits in the Ninth Circuit, including six appeals affirming the judgment of the district court and three appeals reversing the judgment in part, affirming in part, and remanding the case back to the district court for further proceedings.[25] Thus, out of a combined total of 126 *terminated* objector appeals identified in the study, the objectors/appellants were successful in their appeals on only three occasions.[26] Again, it should be noted that some of the pending appeals may result in favorable merits terminations.

Examining objector appeals terminated by voluntary dismissal, the length of time between the filing of the notice of appeal in the district court to the issuance of the mandate dismissing the appeal in the court of appeal was shorter in the Seventh and Ninth Circuits than in the Second Circuit. In both the Seventh and the Ninth Circuits, almost all of the objectors/appellants dismissed their appeals in under 200 days, but in the Second Circuit, two-thirds of the appeals (4 out of 6) lasted over 200 days. The relatively long life of some of the Second Circuit appeals may be the result of the unique circumstances of the complex cases from which they originate. And again, the number of pending cases in the Ninth Circuit leaves open the possibility that this trend of shorter dismissal times might change. More specifically, examination of the disposition times shows the following:

25. *See supra* note 23.

26. A closer look at the decisions of the appellate court shows that the court did not reject the district court's approval of the settlement agreement as a whole, but rejected the lower court's approval of a specific provision of the agreements. *See Dennis v. Kellogg Co.*, 697 F.3d 858 (9th Cir. Sept. 4, 2012). After a careful review of the class settlement, the Ninth Circuit concluded that the district court did not apply the correct legal standards governing *cy pres* distributions and thus abused its discretion in approving the settlement. *See also Nachshin v. AOL, LLC,* 663 F.3d 1034 (9th Cir. Nov. 21, 2011).

- In the Seventh Circuit, excluding the six appeals voluntarily dismissed in the *Safeco* case,[27] 100% (all 21) of the voluntarily dismissed appeals were dismissed under 200 days, and slightly less than half of these were dismissed within the first 100 days.
- In the Ninth Circuit, 94% of the objector appeals dismissed voluntarily were done so under 200 days, and slightly more than half of these were terminated within the first 100 days.
- In all three circuits, voluntarily dismissed appeals pursuant to the parties' stipulation lasted on average a shorter number of days (215 days in the Second Circuit, 14 days in the Seventh Circuit, and 69 days in the Ninth Circuit) compared to the appeals voluntarily dismissed pursuant to a motion submitted only by the objectors (on average 544 days in the Second Circuit, 112 days in the Seventh Circuit, and 104 days in the Ninth Circuit).
- Assuming appeals dismissed for procedural deficiencies are *de facto* voluntary dismissals, the 146-day average length of time for final disposition of those appeals in the Second Circuit falls closer in line with the average in the Seventh Circuit (103 days) and Ninth Circuit (86 days).

If an appellant has made the time and financial commitment to file the opening appellant brief, then this can be viewed as a likely predictor that the appellant does not intend to dismiss the appeal. Likewise, if an appellant has not filed the opening brief and has requested numerous extensions of the deadline on which the brief is due, this can be seen as a likely predictor that the filer does not intend to pursue the appeal to obtain a decision on the merits. For each objector appeal in the study that was voluntarily dismissed pursuant to Federal Rule of Appellate Procedure 42(b), information was collected on the significant documents and/or motions that were filed by the objectors/appellants prior to filing of the request for a Rule 42(b) voluntary dismissal.

The findings are identical in the Second and Ninth Circuits, in which an appellant brief was filed in only one of the objector appeals voluntarily dismissed pursuant to Rule 42(b). In the Seventh Circuit, however, an appellate brief was filed in 9 out of 27 such appeals. It is important to note, however that this number is skewed by the *Safeco* case. Briefs were filed in the six appeals associated with *Safeco* prior to oral arguments, but before the panel issued its opinion the parties settled and filed an agreement upon stipulation to dismiss the appeals. Also, in another of the appeals in which the objector/appellant filed the appellant brief with the court, the court rejected the brief for procedural deficiencies and the appellant voluntarily dismissed his appeal instead of refiling the brief.[28]

To summarize our findings with respect to final disposition of the objector appeals that we identified in the Second, Seventh, and Ninth Circuits, the trend in two of these circuits (Seventh and Ninth) appears to be that these objector appeals are overwhelmingly terminated voluntarily pursuant to Rule 42(b) prior to the filing of an appellant brief and within 200 days from the date on which the appeal was filed.

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27. After 431 days the majority of a three-judge panel granted the parties' stipulation to voluntarily dismiss the appeals filed from the settlement reached in *Nat'l Council on Comp. Ins., Inc. v. Am. Int'l Grp.,* No. 1: 07-cv-2898 (N.D. Ill. filed May 24, 2007) and *Safeco Ins. Co. of Am. v. Am. Int'l Grp., Inc.*, No. 1:09-cv-2026 (N.D. Ill. filed Apr. 1, 2009), while the panel was preparing to issue its decision on the merits following oral arguments. *See* discussion of *Safeco Ins. Co. of Am. v. Am. Int'l Grp., Inc.,* 710 F.3d 754 (7th Cir. Mar. 25, 2013), *supra* notes 17, 19, & 21.

28. *See* Appeal No. 11-2588 filed in *In re AT&T Mobility Wireless Data Servs. Tax Litig.*, MDL 2147, No. 1:10-cv-02278 (N.D. Ill. Apr. 7, 2010).

Rule 7 Cost Bonds and Class Action Objector Appeals

The table below summarizes the data collected on Federal Rule of Appellate Procedure 7 cost bond activity from the objector appeals identified in our searches.

Federal Rule of Appellate Procedure 7 Cost Bond Activity in Class Action Objector Appeals in the Second, Seventh, and Ninth Circuits[29]		
Circuit	Objector Appeals in Which Plaintiffs Filed Motion for a Rule 7 Cost Bond	Disposition of Plaintiffs' Rule 7 Bond Requests
Second (36 Total Objector Appeals)	Total Number of Appeals for Which Plaintiffs Requested Bond: 15[30] Average Bond Amount Requested Per Appeal: $25,500[31]	Total Number of Bond Requests Not Ruled On: 2[32] Total Number of Bond Requests Denied: 13[33] Total Number of Bond Requests Granted: 0 Average Amount of Bond Imposed Per Appeal: N/A

29. This table includes class action objector appeals from class action cases that were filed in the district courts on or after January 1, 2008, in which final approval of a Rule 23-certified class action settlement was granted and appealed between January 1, 2008, through March 1, 2013, in the Seventh Circuit, through June 1, 2013, in the Second Circuit, and through July 1, 2013, in the Ninth Circuit. Owing to time constraints, the total number of objector appeals filed in the Ninth Circuit Court of Appeals does not include objector appeals, if any, that may have originated from the Districts of Hawaii, Guam, and the Northern Mariana Islands.

30. In the Second Circuit, plaintiffs asked the district court to impose a Rule 7 cost bond in 15 objector appeals that were filed in three class actions: *In re Bayer Corp. Combination Aspirin Prods. Mktg. & Sales Practice Litig.*, No. 1:09-md-2023 (E.D.N.Y. Apr. 14, 2009) (requesting a $132,500 cost bond collectively for Appeals Nos. 13-1928 and 13-1939); *In re Ambac Fin. Grp., Inc. Sec. Litig.*, No. 1:08-cv-411 (S.D.N.Y. Jan. 16, 2008) (requesting a $50,000 cost bond for Appeal No. 11-4643); and *Blessing v. Sirius XM Radio Inc.*, No. 1:09-cv-10035 (S.D.N.Y. Dec. 7, 2009) (requesting the 12 appellants to collectively post a $200,000 bond for Appeals Nos. 11-3696, 11-3729, 11-3834, 11-3883, 11-4064, 11-3908, 11-3910, 11-3916, 11-3965, 11-3970, 11-3972, and 11-0406). For additional details of findings from the Second Circuit, see Appendix A.

31. *See supra* note 30. Note that the bond amount used to calculate the average bond amount requested per appeal from collective bond requests is the amount found after splitting the overall bond amount requested evenly between the number of appeals for which the bond is being requested.

32. In *In re Bayer Corp.*, No. 1:09-md-2023, Appeals Nos. 13-1928 and 13-1939 were dismissed on the merits before the court ruled on the plaintiffs' bond motion.

33. Plaintiffs' cost bond requests were denied in *In re Ambac Financial Group,* No. 1:08-cv-411, and in *Blessing,* No. 1:09-cv-10035.

Federal Rule of Appellate Procedure 7 Cost Bond Activity in Class Action Objector Appeals in the Second, Seventh, and Ninth Circuits[29]		
Circuit	Objector Appeals in Which Plaintiffs Filed Motion for a Rule 7 Cost Bond	Disposition of Plaintiffs' Rule 7 Bond Requests
Seventh (27 total Objector Appeals)	Total Number of Appeals for Which Plaintiffs Requested Bond: 19[34] Average Bond Amount Requested Per Appeal: $35,368[35]	Total Number of Bond Requests Not Ruled On: 6[36] Total Number of Bond Requests Denied: 7[37] Total Number of Bond Requests Granted: 6[38] Average Amount of Bond Imposed Per Appeal: $4,500[39]

34. In the Seventh Circuit, plaintiffs filed a motion requesting the district court to order appellants/objectors to post a Rule 7 cost bond in 19 objector appeals filed in six separate class actions: *In re Discover Payment Protection Plan Mktg. & Sales Practices Litig.*, MDL 2217, No. 10-cv-6994 (N.D. Ill. Feb. 7, 2011) (requesting a $25,000 cost bond for Appeal No. 12-2366); *In re AT&T Mobility Wireless Data Servs. Tax Litig.*, MDL 2147, No. 1:10-cv-02278 (N.D. Ill. Apr. 7, 2010) (requesting a $4,500 cost bond each for the 6 appellants in Appeals Nos. 11-2490, 11-2491, 11-2492, 11-2497, 11-2522, and 11-2588); *Schulte v. Fifth Third Bank,* No. 1:09-cv-06655 (N.D. Ill. Oct. 21, 2009) (requesting a $10,000 bond each for Appeals Nos. 11-2922, 11-2964, and 11-2963); *Masters v. Lowe's Home Centers, Inc.,* No. 09-cv-00255 (S.D. Ill. Apr. 9, 2009) (requesting a $5,000 cost bond for Appeal No. 11-2688); *Ori v. Fifth Third Bank*, No. 2:08-cv-00432 (E.D. Wis. May 16, 2008) *consol. with Baird v. Fifth Third Bank & Fiserv, Inc.,* No. 2:10-cv-00929 (E.D. Wis. Oct. 25, 2010) (requesting a $25,000 cost bond for Appeal No. 12-1288); and *In re Lawnmower Engine Horsepower Mktg. & Sales Practices Litig. (No. II),* No. 2:08-md-01999 (E.D. Wis. Dec. 5, 2008) (requesting a cost bond of $80,000 each for Appeals Nos. 10-2971, 10-3127, 10-3141, 10-3146, 10-3157, 10-3158, and 10-3185). For additional details of findings from the Seventh Circuit, see Appendix B.

35. *See supra* note 34.

36. The objectors/appellants in six appeals filed from the following four class actions voluntarily dismissed their appeals pursuant to Rule 42(b) before the court ruled on the plaintiffs' bond motion: *In re Discover,* MDL 2217, No. 10-cv-6994; *Schultz,* No. 1:09-cv-06655; *Masters,* No. 09-cv-00255; and *Ori,* No. 2:08-cv-00432.

37. The court denied plaintiffs' request to impose an $80,000 cost bond per appeal in each of seven appeals filed from the settlement in *In re Lawnmower*, No. 2:08-md-01999.

38. The court granted plaintiffs' request to order appellants to post a cost bond of $4,500 each in Appeals Nos. 11-2490, 11-2491, 11-2492, 11-2497, 11-2522, and 11-2588, in *In re AT&T*, MDL 2147, No. 1:10-cv-02278.

39. The $4,500 average cost bond imposed is a misleading figure since it is derived from only one bond request granted for each of the six appeals filed from in *In re AT&T,* MDL 2147, No. 1:10-cv-02278.

Federal Rule of Appellate Procedure 7 Cost Bond Activity in Class Action Objector Appeals in the Second, Seventh, and Ninth Circuits[29]		
Circuit	Objector Appeals in Which Plaintiffs Filed Motion for a Rule 7 Cost Bond	Disposition of Plaintiffs' Rule 7 Bond Requests
Ninth (108 total Objector Appeals)	Total Number of Appeals for Which Plaintiffs Requested Bond: 35[40] Average Bond Amount Requested Per Appeal: $63,158[41]	Total Number of Bond Requests Not Ruled On: 4[42] Total Number of Bond Requests Denied: 2[43] Total Number of Bond Requests Granted: 23[44] Average Amount of Bond Imposed Per Appeal: $16,504[45] Total Number of Bond Requests Pending: 6[46]

40. In the Ninth Circuit, plaintiffs filed a motion requesting the district court to order appellants/objectors to post a Rule 7 cost bond in 35 objector appeals filed in 17 separate class actions: *Frederick v. FIA Card Servs., N.A.,* No. 2:09-cv-03419 (C.D. Cal. May 14, 2009) (requesting a $20,000 cost bond for Appeal No. 11-56609) (court imposed a $1,000 bond); *In re Wachovia Corp. "Pick-A-Payment" Mortgage Mktg. & Sales Practices Litig.,* No. 5:09-md-02015 (N.D. Cal. Mar. 13, 2009) (requesting a $116,250 cost bond each for Appeals Nos. 11-16507 and 11-16513) ($15,000 bond required in Appeal No. 11-16507; Appeal No. 11-16513 voluntarily dismissed pursuant to Rule 42(b) stipulation of the parties filed 20 days after bond request and prior to bond motion decided); *Yingling v. eBay, Inc.*, No. 5:09-cv-01733 (N.D. Cal. Apr. 21, 2009) (requesting $5,000 cost bond for Appeal No. 11-16033) (court ordered a $5,000 cost bond); *Embry v. ACER Am. Corp.,* No. 5:09-cv-01808 (N.D. Cal. Apr. 24, 2009) (requesting a $70,650 bond for Appeal No. 12-15555 and a $346,814.51 bond in Appeal No. 12-15633) (court imposed a $70,650 bond each in Appeals Nos. 12-15555 and 12-15633); *In re MagSafe Apple Power Adapter Litig.,* No. 5:09-cv-01911 (N.D. Cal. May 1, 2009) (requesting a $200,000 cost bond each for Appeals Nos. 12-15740, 12-15757, 12-15782, and 12-15816, and a $25,000 bond for Appeal No. 12-16053) (court ordered a $15,000 bond for each of the five appeals); *Schulken v. Washington Mutual Bank,* No. 5:09-cv-02708 (N.D. Cal. June 18, 2009) (requesting a $20,000 appeal bond in Appeal No. 13-15191) (court imposed a $5,000 bond); *In re Netflix Privacy Litig.,* No. 5:11-cv-00379 (N.D. Cal. Jan. 26, 2011) (requesting objectors in Appeals Nos. 13-15723, 13-15733, 13-15734, 13-15751, 13-15754, and 13-15759 to post a $21,519 appeal bond) (motion under submission without oral argument on Aug. 19, 2013); *Adams v. AllianceOne Receivables Mgmt., Inc.,* No. 3:08-cv-00248 (S.D. Cal. Feb. 8, 2008) (requesting a $64,536.69 appeal bond imposed on objectors in Appeals Nos. 12-56957 and 12-56970 jointly and severally) (motion denied as moot since objectors voluntarily dismissed their appeals prior to court ruling on bond motion); *Dennis v. Kellogg Co.,* No. 3:09-cv-01786 (S.D. Cal. Aug. 17, 2009) (requesting a $3,000 appeal bond imposed on objectors in Appeals Nos. 11-55674 and 11-55706 jointly and severally) (court ordered a $3,000 bond imposed on objectors in both appeals jointly and severally); *In re Easysaver Rewards Litig.,* No. 3:09-cv-02094 (S.D. Cal. Sept. 24, 2009) (requesting a $15,000 bond for Appeal No. 13-55373) (court imposed a $15,000 cost bond); *In re Ferrero Litig.,* No. 3:11-cv-00205 (S.D. Cal. Feb. 1, 2011) (requesting a $21,970.12 cost bond imposed jointly and severally in Appeals Nos. 12-56469 and 12-56478) (court denied bond requests in for both appeals); *Gallucci v. Boiron, Inc.,* No. 3:11-cv-02039 (S.D. Cal. Sept. 2, 2011) (requesting court to order objectors in Appeals Nos. 12-57074, 12-57081, and 12-57184 to post a $235,500.66 appeal bond) (court ordered objectors in the three appeals to collectively post a $5,000 appeal bond); *Foos v. Ann, Inc.,* No. 3:11-cv-02794 (S.D. Cal. Dec. 1, 2011) (requesting a $5,000 bond in Appeal No. 13-55059) (court ordered objector to post a $1,000 bond); *In re General Motors Corp. Speedometer Prods. Liability Litig.,* MDL No. 1896, No. 2:07-cv-00291 (W.D. Wash. Feb. 23, 2007) (requesting objectors in Appeals No. 08-36005 and 08-36028 to post a $40,811.20 cost bond jointly and severally) (court ordered objectors in both appeals jointly and severally responsible to post a $1,000 bond); *Arthur v. Sallie Mae, Inc.,* No. 2:10-cv-198 (W.D. Wash. Feb. 2, 2010) (requesting a $189,344 cost bond in Appeal No. 12-35860) (motion not ruled on owing to plaintiffs withdrawing their bond motion when objectors voluntarily dismissed their appeal); *Dennings v. Clearwire Corp.,* No. 2:10-cv-01859 (W.D. Wash. Nov. 15, 2010) (requesting objectors in Appeals Nos. 13-35038 and 13-35491 to post a $41,150 cost bond jointly and severally) (ordered objectors to post a $41,150 cost bond in each appeal); *Herfert v. Crayola, LLC,* No. 2:11-cv-01301 (W.D. Wash. Aug. 5, 2011) (requesting both objector and counsel for objector in Appeal No. 12-35393 to be jointly and severally liable for a $20,000 appeal bond) (ordered objector and her attorney to file an appeal bond of $20,000).

The summary in the above table of class plaintiffs' requests for appellate costs bonds illustrates the current lack of uniformity among district courts (and, along with published cases, among circuits) of the factors considered when ruling on requests for Rule 7 bonds and of the costs that may be included in the final dollar amount imposed on the appellant, in addition to the taxable costs specified by Federal Rule of Appellate Procedure 39(c). The frequency with which plaintiffs filed a motion requesting imposition of a cost bond varied across the districts: in the Seventh Circuit, 70% (19 out of the 27 total objector appeals); in the Second Circuit, 42% (15 out of the 36 total objector appeals); and in the Ninth Circuit, 32% (35 out of the 108 objector appeals).

The disposition of the bond motions also varied across districts. In the Second Circuit, 0% of the plaintiffs' bond requests were granted, 87% (13 of 15) of the requests were denied, and 13% (2 of 15) were not ruled on. In the Seventh Circuit, 32% of the bond requests (6 of 19) were granted, 37% (7 of 19) were denied, and 36% (6 of 19) were not ruled on. In the Ninth Circuit, 66% of the class plaintiffs' bond requests (23 of 35) were granted, 6% (2 of 35) of the requests were denied, 11% (4 of 35) were not ruled on, and 17% (6 of 35) were still pending.

As indicated in the notes accompanying the table, bond amounts requested varied considerably both among the districts within the circuits and among the circuits, with the districts in the Ninth Circuit appearing to have the highest overall average bond amount requested per appeal ($63,158), compared to the districts in the Seventh Circuit ($35,368) and the Second Circuit ($25,500).

Further comparisons of Federal Rule of Appellate Procedure 7 cost bond activity between the circuits is not useful given the small number of bonds granted in the Seventh Circuit and none granted in the Second Circuit during our search period. However, we can make several interesting observations about Rule 7 cost bond activity in the Ninth Circuit given the larger sample size:

- The average amount of a Rule 7 cost bond actually imposed per appeal is much lower than the average amount requested by class plaintiffs (e.g., $16,504 average bond imposed compared to a $63,158 average bond requested in the Ninth Circuit).
- Although we cannot establish a direct relationship between plaintiffs' request for, or the district court's imposition of, a Rule 7 cost bond and the final disposition of an objector's appeal, in the Ninth Circuit objectors voluntarily dismissed four appeals in 88 days or less following plaintiffs' motion for a cost bond, even before the court ruled on the motion. In

41. *See supra* note 40. Note that to calculate the average bond amount requested per appeal, for collective bond requests (or requests to hold two or more objectors jointly and severally liable to post a bond), we used the amount derived from dividing the overall bond amount requested by the number of separate appeals the bond could be applied to.

42. *See supra* note 40. The objectors/appellants in four appeals filed from three class actions voluntarily dismissed their appeals pursuant to Rule 42(b) before the court ruled on the plaintiffs' bond motion.

43. *See supra* note 40. Court denied plaintiffs' motion for a Rule 7 cost bond for Appeals Nos. 12-56469 and 12-56478 filed in *In re Ferrero Litig.*, No. 3:11-cv-00205 (S.D. Cal. Feb. 1, 2011).

44. *See supra* note 40. Plaintiffs' cost bond motions were granted for 23 objector appeals filed in 13 out of the 17 class actions in which plaintiffs filed a Rule 7 cost bond request.

45. *See supra* note 40. Note that the bond amount used to calculate the average bond amount imposed per appeal for orders imposing an appeal bond collectively (or orders holding objectors jointly and severally liable to post a bond) is the amount found after splitting the overall bond amount ordered evenly between the number of appeals for which the bond is being imposed.

46. *See supra* note 40 for details on *In re Netflix Privacy Litig.,* No. 5:11-cv-00379 (N.D. Cal. Jan. 26, 2011) (bond request taken under submission without oral argument on August 23, 2013).

addition, the 23 objector appeals filed in the Ninth Circuit for which the district courts imposed a Rule 7 cost bond were disposed of as follows: 11 appeals were voluntarily dismissed pursuant to Rule 42(b) within an average of 59 days following the courts' bond order (bond was not paid before dismissal in 9 appeals); 2 appeals were dismissed for procedural deficiencies (bond not paid before dismissal for failure to prosecute in both appeals); judgment on the merits was reached in 3 appeals (bond not paid prior to decision in 1 appeal); and 7 of these objector appeals are currently still pending (cost bond not paid in 2 appeals). Note that in the 12 appeals in which a cost bond was ordered by the district court but not paid by the objector prior to final disposition of the appeal, and the 2 pending objector appeals in which no bond was posted as ordered, failure to post the Rule 7 bond did not result in dismissal of the appeal by the Ninth Circuit pursuant to a procedural deficiency.

- Although failure to post the Rule 7 cost bond did not result in dismissal by the Ninth Circuit, objectors' refusal to comply with the district courts' bond orders initiated an escalating exchange between plaintiffs, objectors, counsel for objectors, and the court, resulting in a contempt finding and imposition of the sanction of striking the objectors' objections to the final settlement in 2 appeals and a contempt finding against objectors' counsel and resulting sanction of revoking counsel's authorization to practice before the district court in a third appeal.[47]
- The district courts' cost bond order was appealed by objectors (by amending their notice of appeal to include the bond order) in 9 of the 23 appeals ordered to post the bond—5 of these appeals remain pending[48] (cost bond paid in 3 appeals) and 4 were voluntarily dismissed pursuant to Rule 42(b)[49] (bond was paid prior to dismissal in 1 appeal).

47. *See* Appeal No. 12-15555 in *Embry v. ACER Am. Corp.,* No. 5:09-cv-01808 (N.D. Cal. Apr. 24, 2009); Appeal No. 12-15757 in *In re MagSafe Apple Power Adapter Litig.,* No. 5:09-cv-01911 (N.D. Cal. May 1, 2009); and Appeal No. 13-35491 in *Dennings v. Clearwire Corp*., No. 2:10-cv-01859 (W.D. Wash. Nov. 15, 2010). For additional details, see entry for above cases and related notes in Appendix C.

48. Appeal Nos. 12-15757 and 12-15782 in *In re MagSafe Apple Power Adapter Litig.,* No. 5:09-cv-01911 (N.D. Cal. May 1, 2009); Appeal No. 13-15191 in *Schulken v. Washington Mutual Bank,* No. 5:09-cv-02708 (N.D. Cal. June 18, 2009); Appeal No. 13-55373 in *In re Easysaver Rewards Litig.,* No. 3:09-cv-02094 (S.D. Cal. Sept. 24, 2009); and Appeal No. 13-35491 in *Dennings v. Clearwire Corp.,* No. 2:10-cv-01859 (W.D. Wash. Nov. 15, 2010).

49. Appeal No. 11-16033 in *Yingling v. eBay, Inc*., No. 5:09-cv-01733 (N.D. Cal. Apr. 21, 2009); Appeal No. 12-15555 in *Embry v. ACER Am. Corp.,* No. 5:09-cv-01808 (N.D. Cal. Apr. 24, 2009); Appeal No. 12-35393 in *Herfert v. Crayola, LLC,* No. 2:11-cv-01301 (W.D. Wash. Aug. 5, 2011); and Appeal No. 11-56609 in *Frederick v. FIA Card Servs., N.A.,* No. 2:09-cv-03419 (C.D. Cal. May 14, 2009).

Appendices

Study of Class Action Objector Appeals in the Second, Seventh, and Ninth Circuit Courts of Appeals

Report to the Advisory Committee on Appellate Rules of the Judicial Conference of the United States

Marie Leary

Federal Judicial Center

October 2013

This report was undertaken at the request of the Judicial Conference's Advisory Committee on Appellate Rules and is in furtherance of the Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration. While the Center regards the content as responsible and valuable, it does not reflect policy or recommendations of the Board of the Federal Judicial Center.

Appendix A

Class Action Objector Appeals in the Second Circuit Court of Appeals
January 1, 2008 – June 1, 2013

Class Action Objector Appeals in the Second Circuit Court of Appeals from Cases Filed Between January 1, 2008, and June 1, 2013[1]

36 Total Objector Appeals

District Court • MDL/Consolidated Class Action • # Objections Submitted • Date Final Approval of Class Action Settlement Granted	Appellate Court • # Appeals Filed by Objector(s) • Date Notice of Appeal(s) Filed • Identity of Filing Objector(s) & Attorney(s) (if any)	Final Disposition of Objector Appeal(s) • Date & Nature of Final Disposition • Indicate if Appeal is "Pending"	FRAP 7 Cost Bond • Motion Filed • Disposition of Motion • Amount Imposed (if granted)
District of Connecticut: 0 objector appeals			
Eastern District of New York: 3 objector appeals			
In re Bayer Corp. Combination Aspirin Products Marketing and Sales Practice Litigation, No. 1:09-md-2023 (E.D.N.Y. Apr. 14, 2009). • MDL • 6 Objections submitted[2] • 4/11/2013: Final Order and Judgment granting final approval of the amended settlement agreement; approving the plan for allocation; and dismissing all individual and class claims in MDL 2023.[3]	2 Appeals Filed: • 5/13/2013: Objector Shelley Stevens – filed by Thomas L. Cox, Jr./ The Cox Firm (Dallas, Texas)	• 8/6/2013: Appeal No. 13-1928—dismissed on the merits pursuant to court order granting appellees' motion to dismiss[4]	• 6/21/2013: Plaintiffs filed a motion for Objectors Stevens and Johnson to file an appeal bond in the amount of $132,500[6] • Appeals dismissed before Court ruled on bond motion
	• 5/13/2013: Objector Janis Johnson – filed by Gary W. Sibley/ The Sibley Law Firm (Dallas, Texas)	• 8/6/2013: Appeal No. 13-1939—dismissed on the merits pursuant to court order granting appellees' motion to dismiss[5]	• See above
Anderson v. Nationwide Credit, Inc., Nos. 2:10-cv-03825 & 2:08-cv-01016 (E.D.N.Y. Aug. 19, 2010). • Consolidated Class Action • 1 Objection submitted[7] • 5/31/2012: Final Order granting final approval of the settlement agreement and awarding attorneys' fees and costs.[8]	1 Appeal Filed: • 6/15/2012: Objectors Farobag Cooper & Susan Fox – filed by Attorney Tiffany N. Hardy/Edelman, Combs, Latturner & Goodwin, LLC (Chicago, IL)	• 3/7/2013: Appeal No. 12-2421—voluntarily dismissed pursuant to FRAP 42(b) stipulation of the parties[9]	• No motion for cost bond
Northern District of New York: 0 objector appeals			
Southern District of New York: 33 objector appeals			
In re Ambac Financial Group, Inc. Securities Litigation, No. 1:08-cv-411 (S.D.N.Y. Jan. 16, 2008). • Consolidated Class Action • 3 Objections submitted[10] • 9/28/2011: Consent Judgment granting final approval of class action settlements with (1) Underwriter Defendants and (2) Defendant Ambac and the Individual Defendants; Order granting request for attorneys' fees and expenses: Order approving Plan of Allocation.[11]	1 Appeal Filed: • 10/28/2011: Objector Police and Fire Retirement System of the City of Detroit[12] – filed by Attorney Denis F. Sheils/ Kohn, Swift & Graf, PC (Philadelphia, PA)	• 7/12/2012: Appeal No. 11-4643[13]—judgment of the district court affirmed by summary order[14]	• 12/15/11: Lead plaintiffs filed a motion to require the objector to post an appeal bond for $50,000 to cover taxable costs[15] • 1/12/2012: Court denied lead plaintiffs motion for a FRAP 7 appeal bond[16]

Class Action Objector Appeals in the Second Circuit Court of Appeals from Cases Filed Between January 1, 2008, and June 1, 2013[1]

36 Total Objector Appeals

District Court • MDL/Consolidated Class Action • # Objections Submitted • Date Final Approval of Class Action Settlement Granted	Appellate Court • # Appeals Filed by Objector(s) • Date Notice of Appeal(s) Filed • Identity of Filing Objector(s) & Attorney(s) (if any)	Final Disposition of Objector Appeal(s) • Date & Nature of Final Disposition • Indicate if Appeal is "Pending"	FRAP 7 Cost Bond • Motion Filed • Disposition of Motion • Amount Imposed (if granted)
Hayes v. Harmony Gold Mining Co. Ltd., No. 1:08-cv-3653 (S.D.N.Y. Apr. 16, 2008). • 1 Objection submitted[17] • 11/14/2011: Order and Final Judgment granting final approval of the class action settlement, attorneys' fees and expenses, and dismissing the action with prejudice.[18]	2 Appeals Filed: • 12/13/2011: Objector James J. Hayes – filed *pro se* – Appeal from order granting preliminary approval of settlement and order denying Objector's motion to reconsider the final approval of the settlement[19] • 2/1/2013: Objector James J. Hayes – filed *pro se* – Appeal from the Order issued on Jan. 2, 2013, denying Objector Hayes' Fed. R. Civ. P. 60(b) motion for reconsideration of the Nov. 14, 2011 Order approving the Settlement Agreement and Plan of Allocation[20]	• 1/29/2013: Appeal No. 12-0118—judgment of the district court affirmed by summary order[21] • 7/18/2013: Appeal No. 13-0635—judgment of the district court affirmed by summary order[22]	• No motion for cost bond • No motion for cost bond
Chin v. RCN Corp., No. 1:08-cv-7349 (S.D.N.Y. Aug. 19, 2008). • 6 Objections submitted[23] • 9/8/2010: Memorandum and Order granting final approval of the settlement agreement; awarding attorneys' fees, costs and incentive fee; dismissing all claims with prejudice.[24]	1 Appeal Filed: • 10/8/2010: Objector Thomas J. Lavery – filed *by* attorney Brian L. Bromberg/ Bromberg Law Office, P.C. (New York, NY)	• 3/11/2011: Appeal No. 10-4057—voluntarily dismissed pursuant to FRAP 42(b) stipulation of the parties[25]	• No motion for cost bond
In re Tremont Securities Law, State Law and Insurance Litigation, Master File No. 1:08-cv-11117 (S.D.N.Y. Dec. 22, 2008) for No. 09-md-2052 (S.D.N.Y. June 11, 2009).[26] • MDL • 16 Objections submitted[27] • 8/19/2011: Final Judgment and Order of Dismissal with Prejudice granting final approval of a partial settlement of Securities Law, State Law and Insurance Actions; Judgment and Order granting insurance class counsel's motion for an award of attorneys' fees and expenses and insurance class plaintiffs' incentive awards; and Judgment And Order granting plaintiffs' state and securities law settlement class insurance class	4 Appeals Filed:[29] • 9/16/2011: Objector Orloff Family Trust – filed by attorneys Forrest S. Turkish/ Law Offices of Forrest S. Turkish (Bayonne, NJ) & Joseph D. Palmer/ Law Offices of Darrell Palmer PC (Solana Beach, CA) • 9/16/2011: Objectors Lakeview Investment, LP; Phoenix Lake Partners, L.P.; 2005 Tomchin Family Charitable Trust; Edward White, for himself and on behalf of White Trust dated May 3, 2002; & Rigdon O. Dees, III – filed by attorney Benjamin Rozwood/ Rozwood & Company, A.P.C. (Beverly Hills, CA)	• 3/13/2013: Appeal No. 11-3899—voluntarily dismissed pursuant to Objector's FRAP 42(b) motion[30] • 10/24/2012: Appeal No. 11-4022—voluntarily dismissed pursuant to FRAP 42(b) stipulation of the parties[31]	• No motion for cost bond • No motion for cost bond

Class Action Objector Appeals in the Second Circuit Court of Appeals from Cases Filed Between January 1, 2008, and June 1, 2013[1] 36 Total Objector Appeals			
District Court • MDL/Consolidated Class Action • # Objections Submitted • Date Final Approval of Class Action Settlement Granted	Appellate Court • # Appeals Filed by Objector(s) • Date Notice of Appeal(s) Filed • Identity of Filing Objector(s) & Attorney(s) (if any)	Final Disposition of Objector Appeal(s) • Date & Nature of Final Disposition • Indicate if Appeal is "Pending"	FRAP 7 Cost Bond • Motion Filed • Disposition of Motion • Amount Imposed (if granted)
counsels' motion for an award of attorneys' fees, reimbursement of expenses, and awards to state law and securities plaintiffs.[28]	• 9/19/2011: Objector Philadelphia Financial Life Assurance Company – filed by attorney Richard G. Haddad/ Otterbourg, Steindler, Houston & Rosen, P.C. (New York, New York)	• 4/24/2012: Appeal No. 11-3923— dismissed for lack of standing to maintain the appeal[32]	• No motion for cost bond
	• 9/20/2011: Objectors Madelyn Haines & Paul Zamrowski – filed by attorney Vincent T. Gresham/Law Office of Vincent T. Gresham (Atlanta, Georgia)	• Appeal No. 11-4030— pending[33]	• No motion for cost bond
Anwar v. Fairfield Greenwich Ltd., Master File No. 1:09-cv-00118 (S.D.N.Y. Jan. 7, 2009) for No. 09-md-2088 (S.D.N.Y. Oct. 6, 2009).[34] • MDL • 4 Objections submitted to the Partial Settlement with Fairfield Greenwich Defendants[35] • 3/25/2013: Final Judgment and Order of Dismissal with Prejudice granting final approval of the partial class action settlement with Fairfield Greenwich Defendants.[36] • 3/28/2013: Final Judgment and Order Awarding Fees and Expenses from the settlement.[37]	1 Appeal Filed from Partial Settlement with Fairfield Greenwich Defendants:[38] • 4/23/2013: Objectors Morning Mist Holdings Ltd. and Miguel Lomeli[39] – filed by attorney Robert A. Wallner/Milberg LLP (New York, New York)	• Appeal No. 13-1581— pending[40]	• No motion for cost bond

Class Action Objector Appeals in the Second Circuit Court of Appeals from Cases Filed Between January 1, 2008, and June 1, 2013[1]

36 Total Objector Appeals

District Court • MDL/Consolidated Class Action • # Objections Submitted • Date Final Approval of Class Action Settlement Granted	Appellate Court • # Appeals Filed by Objector(s) • Date Notice of Appeal(s) Filed • Identity of Filing Objector(s) & Attorney(s) (if any)	Final Disposition of Objector Appeal(s) • Date & Nature of Final Disposition • Indicate if Appeal is "Pending"	FRAP 7 Cost Bond • Motion Filed • Disposition of Motion • Amount Imposed (if granted)
In re Bank of America Corporation Securities, Derivative, and Employee Retirement Income Security Act (ERISA) Litigation, No. 1:09-md-2058 (S.D.N.Y. June 11, 2009).[41] • MDL • 4 Objections submitted to the proposed settlement of the Consolidated Derivative Actions[42] • 1/24/2013: Order and Final Judgment granting final approval to class action settlement of the Consolidated Derivative Actions[43] • 4/15/2013: Order awarding attorneys' fees and expenses to lead counsel and objector's counsel in the Consolidated Derivative Actions; denying attorneys' fee request from Objector Pinsly.[44]	5 Total Appeals Filed: 1 Appeal filed from Settlement in Consolidated Derivative Actions: [48] • 5/9/2013: Objector Matthew Pinsly – filed by attorney Christopher L. Nelson/Weiser Law Firm, P.C. 4 Appeals Filed from Settlement in Consolidated Securities Actions:[49] • 4/23/2013: Objectors AMP Capital Investors Limited, Colonial First State Investments Ltd and H.E.S.T. Australia Ltd. – filed by attorney Hung G. Ta/ Hung G.Ta, Esq. PLLC (New York, New York)	• 8/9/2013: Appeal No. 13-1883—voluntarily dismissed pursuant to FRAP 42(b) stipulation of the parties [50] • Appeal No. 13-1573—pending	• No motion for cost bond • No motion for cost bond
• 8 Objections submitted to the proposed settlement of the Consolidated Securities Actions[45] • 4/8/2013: Order awarding attorneys' fees and expenses to co-lead counsel and awards to lead plaintiffs in the Consolidated Securities Actions.[46] • 4/9/2013: (1) Judgment granting final approval to the Class Action Settlement of the Consolidated Securities Actions; and (2) Order approving Plan of Allocation of the Net Settlement Funds.[47]	• 5/7/2013: Objectors Michael and Laurel Washenik – filed by attorney Steve A. Miller/ Steve A. Miller, P.C. (Denver, CO) • 5/8/2013: Objectors Orloff Family Trust DTD 10/3/91, Orloff Family Trust DTD 12/31/01, & St. Stephen, Inc. – filed by Forrest S. Turkish/ Law Office of Forrest S. Turkish (Bayonne, NJ) • 5/8/2013: Objectors Leonard & MaryAnn Masiowski, Michael J. & Babette Rinis, & Michael J. Rinis IRA – filed by N. Albert Bacharach/ N. Albert Bacharach, Jr., PA (Gainesville, FL)	• Appeal No. 13-1798—pending • Appeal No. 13-1830—pending • Appeal No. 13-1853—pending	• No motion for cost bond • No motion for cost bond • No motion for cost bond
In re Sony Corp. SXRD Rear Projection Television Marketing, Sales Practices and Products Liability Litigation, No. 09-MD-2102 (S.D.N.Y. Oct. 13, 2009). • MDL • 9 Objections submitted[51] • 8/24/2010: Opinion and Order granting final approval to the	6 Appeals Filed:[53] • 9/21/2010: 13 Objectors (Objecting Plaintiffs) joined in 1 appeal[54] – filed by attorneys Sanford P. Dumain, Leigh Smith & Jennifer Czeisler/ Milberg LLP (New York, NY); Attorney Robert I. Lax/ Lax LLP (New York, NY); Attorney	• 9/23/2011: Appeal No. 10-3806—judgment of the district court affirmed by summary order[55]	• No motion for cost bond

Class Action Objector Appeals in the Second Circuit Court of Appeals from Cases Filed Between January 1, 2008, and June 1, 2013[1]

36 Total Objector Appeals

District Court • MDL/Consolidated Class Action • # Objections Submitted • Date Final Approval of Class Action Settlement Granted	Appellate Court • # Appeals Filed by Objector(s) • Date Notice of Appeal(s) Filed • Identity of Filing Objector(s) & Attorney(s) (if any)	Final Disposition of Objector Appeal(s) • Date & Nature of Final Disposition • Indicate if Appeal is "Pending"	FRAP 7 Cost Bond • Motion Filed • Disposition of Motion • Amount Imposed (if granted)
proposed class action settlement, and awarding attorney's fees and expenses.[52]	Joseph J.M. Lange & Jeffrey A. Koncius/ Lange & Koncius, LLP (El Segundo, CA)		
	• 9/21/2010: Appeal by Objectors Meserole, Miller, Monroe, Ploubis, Streholski, Seidi, and Mead (the 7 named Plaintiffs in *Meserole v. Sony Corp. of Am.,* No. 08-cv-8987) – filed by attorneys Sanford P. Dumain, Leigh Smith& Jennifer Czeisler/ Milberg LLP (New York, NY); Attorney Robert I. Lax/ Lax LLP (New York, NY); Attorney Joseph J.M. Lange & Jeffrey A. Koncius/ Lange & Koncius, LLP (El Segundo, CA)	• 9/23/2011: Appeal No. 10-3814—judgment of the district court affirmed by summary order[56]	• No motion for cost bond
	• 9/21/2010: Appeal by Objector Crusinberry (the named Plaintiff in *Crusinberry v. Sony Corp. of Am., Inc.,* 09-cv-3461) – filed by attorneys Sanford P. Dumain, Leigh Smith& Jennifer Czeisler/ Milberg LLP (New York, NY); Attorney Robert I. Lax/ Lax LLP (New York, NY); Attorney Joseph J.M. Lange & Jeffrey A. Koncius/ Lange & Koncius, LLP (El Segundo, CA)	• 9/23/2011: Appeal No. 10-3824—judgment of the district court affirmed by summary order[57]	• No motion for cost bond
	• 9/21/2010: Appeal by Objector Webber (the named Plaintiff in *Webber v. Sony Corp. of Am., Inc.,* 09-cv-2557) – filed by attorneys Sanford P. Dumain, Leigh Smith& Jennifer Czeisler/ Milberg LLP (New York, NY); Attorney Robert I. Lax/ Lax LLP (New York, NY); Attorney Joseph J.M. Lange & Jeffrey A. Koncius/ Lange & Koncius, LLP (El Segundo, CA)	• 9/23/2011: Appeal No. 10-3829—judgment of the district court affirmed by summary order[58]	• No motion for cost bond
	• 9/21/2010: Appeal by Objectors Ouellette, Smith and Beers (the 3 named Plaintiffs in *Ouellette v. Sony Corp. of Am., Inc.,* 09-cv- 1939) – filed by attorneys Sanford P. Dumain, Leigh Smith& Jennifer Czeisler/ Milberg LLP (New York,	• 9/23/2011: Appeal No. 10-3873—judgment of the district court affirmed by summary order[59]	• No motion for cost bond

Class Action Objector Appeals in the Second Circuit Court of Appeals from Cases Filed Between January 1, 2008, and June 1, 2013[1]

36 Total Objector Appeals

District Court • MDL/Consolidated Class Action • # Objections Submitted • Date Final Approval of Class Action Settlement Granted	Appellate Court • # Appeals Filed by Objector(s) • Date Notice of Appeal(s) Filed • Identity of Filing Objector(s) & Attorney(s) (if any)	Final Disposition of Objector Appeal(s) • Date & Nature of Final Disposition • Indicate if Appeal is "Pending"	FRAP 7 Cost Bond • Motion Filed • Disposition of Motion • Amount Imposed (if granted)
	NY); Attorney Robert I. Lax/ Lax LLP (New York, NY); Attorney Joseph J.M. Lange & Jeffrey A. Koncius/ Lange & Koncius, LLP (El Segundo, CA)		
	• 9/21/2010: Appeal by Objector Raymo (the named Plaintiff in *Raymo v. Sony Corp. of Am., Inc.,* 09-cv-2820) – filed by attorneys Sanford P. Dumain, Leigh Smith& Jennifer Czeisler/ Milberg LLP (New York, NY); Attorney Robert I. Lax/ Lax LLP (New York, NY); Attorney Joseph J.M. Lange & Jeffrey A. Koncius/ Lange & Koncius, LLP (El Segundo, CA)	• 9/23/2011: Appeal No. 10-3874—judgment of the district court affirmed by summary order[60]	• No motion for cost bond
Blessing v. Sirius XM Radio Inc., No. 1:09-cv-10035 (S.D.N.Y. Dec. 7, 2009). • Consolidated Class Action • 67 Objections submitted[61] • 8/24/2011: Opinion and Order granting final approval to the class action settlement and awarding attorneys' fees and expenses.[62]	12 Appeals Filed: • 9/13/2011: Objectors Ruth Cannata, Craig Cantrall, Lee Clanton, Adam Falkner, Ben & Kim Frampton, Jill Piazza, Marvin Union, and Ken Ward – filed by attorney Edward F. Siegel/ Law Office of Edward F. Siegel (Cleveland, Ohio)	• 3/13/2013: Appeal No. 11-3696—judgment of the district court affirmed by summary order[63]	• 10/5/2011: Plaintiffs filed a motion to require the 12 appellants collectively to post an appeal bond for at least $200,000 to cover costs and attorneys' fees on appeal[75] • 11/22/2011: Court denied Plaintiffs' motion for a FRAP 7 appeal bond[76]
	• 9/13/2011: Objector Joel Broida – filed by attorney Stephen B Morris/ Morris and Associates (San Diego, CA)	• 11/30/2011: Appeal No. 11-3729—dismissed in default due to Objector's failure to file required Forms C and D[64]	• See above
	• 9/21/2011: Objectors Jason Hawkins, Sheila Massie, and John Sullivan – filed by Robert K. Erlanger/ Erlanger Law Firm PLLC (New York, New York)	• 2/16/2012: Appeal No. 11-3834—dismissed in default due to Objectors failure to file a brief and appendix by due date[65]	• See above
	• 9/22/2011: Objector Nicolas Martin – filed by attorney David Stein/ Samuel & Stein (New York, New York); and attorney Theodore H. Frank/ Center for Class Action Fairness LLC (Washington, DC)	• 3/13/2013: Appeal No. 11-3883—judgment of the district court affirmed by summary order[66]	• See above

Class Action Objector Appeals in the Second Circuit Court of Appeals from Cases Filed Between January 1, 2008, and June 1, 2013[1]

36 Total Objector Appeals

District Court • MDL/Consolidated Class Action • # Objections Submitted • Date Final Approval of Class Action Settlement Granted	Appellate Court • # Appeals Filed by Objector(s) • Date Notice of Appeal(s) Filed • Identity of Filing Objector(s) & Attorney(s) (if any)	Final Disposition of Objector Appeal(s) • Date & Nature of Final Disposition • Indicate if Appeal is "Pending"	FRAP 7 Cost Bond • Motion Filed • Disposition of Motion • Amount Imposed (if granted)
	• 9/22/2011: Objector Christopher Batman – filed *pro se*	• 2/22/2012: Appeal No. 11-4064—dismissed in default due to Objector's failure to file a brief and appendix by due date[67]	• See above
	• 9/23/2011: Objectors Steven Crutchfield, Scott D. Krueger, Asset Strategies, Inc., Charles B. Zuravin, and Jennifer Deachin – filed by attorney Matthew J. Weiss/ Weiss & Associates, P.C.	• 3/13/2013: Appeal No. 11-3908—judgment of the district court affirmed by summary order[68]	• See above
	• 9/23/2011: Objector Randy Lyons – filed by attorney R. Stephen Griffis/ R. Stephen Griffis, PC (Hoover, AL)	• 3/13/2013: Appeal No. 11-3910—judgment of the district court affirmed by summary order[69]	• See above
	• 9/23/2011: Objector Tom Carder – filed by attorney Charles M. Thompson, Esq./ Charles M. Thompson, PC (Birmingham, AL)	• 3/13/2013: Appeal No. 11-3916—judgment of the district court affirmed by summary order[70]	• See above
	• 9/23/2011: Objector John Ireland – filed *pro se* – 10/4/2011: notice of appearance in Appeal No. 11-3965 filed on behalf of Appellant Ireland by Joseph Darrell Palmer/ Law Offices of Darrell Palmer (Solana Beach, CA)	• 3/13/2013: Appeal No. 11-3965—judgment of the district court affirmed by summary order[71]	• See above
	• 9/23/2011: Objectors Michael Hartleib and Brian David Goe – filed *pro se*	• 3/13/2013: Appeal No. 11-3970—judgment of the district court affirmed by summary order[72]	• See above
	• 9/26/2011: Objector Jeannine Miller – filed by attorney Steve A. Miller/ Steve A. Miller, P.C. (Denver, CO)	• 3/13/2013: Appeal No. 11-3972—judgment of the district court affirmed by summary order[73]	• See above
	• 9/26/2011: Objector Donald K. Nace – filed *pro se*	• 2/10/2012: Appeal No. 11-0406—dismissed in default due to Objector's failure to file required Form D-P[74]	• See above

Class Action Objector Appeals in the Second Circuit Court of Appeals from Cases Filed Between January 1, 2008, and June 1, 2013[1] 36 Total Objector Appeals			
District Court • MDL/Consolidated Class Action • # Objections Submitted • Date Final Approval of Class Action Settlement Granted	Appellate Court • # Appeals Filed by Objector(s) • Date Notice of Appeal(s) Filed • Identity of Filing Objector(s) & Attorney(s) (if any)	Final Disposition of Objector Appeal(s) • Date & Nature of Final Disposition • Indicate if Appeal is "Pending"	FRAP 7 Cost Bond • Motion Filed • Disposition of Motion • Amount Imposed (if granted)
Fishbein v. All Market Inc., No. 1:11-cv-5580 (S.D.N.Y. Aug. 10, 2011). • 1 Objection submitted[77] • 8/22/2012: Final Order and Judgment Approving Class Action Settlement and Dismissing Class Action with Prejudice[78]	1 Appeal Filed: • 9/17/2012: Objector Timothy Blanchard – filed *pro se* – on 10/24/2012, Objector Blanchard notified the court he retained attorney Christopher Bandas/ Bandas Law Firm, P.C. (Corpus Christi, TX)	• 4/26/2013: Appeal No. 12-3892—voluntarily dismissed pursuant to FRAP 42(b) stipulation of the parties[79]	• No motion for cost bond
Western District of New York:	0 objector appeals		
District of Vermont:	0 objector appeals		

1. Includes class action objector appeals from class action cases that were filed in the district courts on or after January 1, 2008, in which final approval of a Rule 23-certified class action settlement was granted and appealed from between January 1, 2008, through June 1, 2013.

2. *See Plaintiffs' Response to Objections* (Doc. #219) (filed Mar. 1, 2013) (Plaintiffs responded to all six objections, although one *pro se* objection was filed after the Feb. 5, 2013 deadline).

3. *See Final Order and Judgment* (Doc. #234) (filed April 11, 2013). The court's Final Order and Judgment did not address plaintiffs' motion for attorney fees and expenses. At the April 8, 2013 fairness hearing, the objectors were given the option of supplementing their objection to plaintiffs' motion for attorneys' fees and submitting an application to recover attorneys' fees associated with litigating the objection. Counsel for Objector Timmen Cermak (Attorney Charles Chalmers/Allegiance Litigation (Fairfax, CA)) and counsel for Objector Theodore H. Frank (Attorney Adam E. Schulman/ Center for Class Action Fairness (Washington, DC)) have filed motions for attorneys' fees.

4. *See Motion Order*, Nos. 13-1928(L) & 13-1939(con) (2d Cir. Aug. 6, 2013) (Doc. #74) The Second Circuit granted Appellees' motion to dismiss the Objectors' appeals deciding that the Objector/Appellants' challenge to the district court's approval of the amended settlement agreement lacked an arguable basis in fact or law because appellants forfeited their right to seek review of the agreement when they failed to object to the amended settlement agreement in the district court. The Court explained that the Appellants' objections to the original proposed settlement agreement were insufficient to preserve their objections, as the original proposed agreement was substantially modified in response to those objections, and the district court's orders made clear that objections to the amended agreement had to be submitted in advance of the fairness hearing. In addition, the Second Circuit clarified that it lacked jurisdiction to consider the appellants' challenge to the Class's motion for attorneys' fees, as the district court had not yet ruled on the motion and there was not yet any final order to appeal from.

5. *See supra* note 4.

6. *See Letter Requesting a Pre-Motion Conference* (Doc. #242) (filed June 21, 2013). Plaintiffs submitted that the bond should be set at a minimum of $132,500.00. This amount included: (1) taxable costs, including but not limited to costs incurred for photocopying, printing, binding, filing and service, preparation and transmission of the record and fees for filing the notice of appeal, in the amount of $25,000.00; (2) costs incurred as a result of the delay in administration of the class funds in the amount of $57,500.00; and (3) attorneys' fees in the amount of $50,000.00.

7. *See Joint Opposition to Motion to Intervene and Objection Filed by Farobag Cooper and Susan Fox* (Doc. #19) (Apr. 13, 2012).

8. *See Final Order* (Doc. #24) (filed May 31, 2012).

9. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Forms C (Pre-Argument Statement) & D (Transcript Information Form); Motion to Stay Appeal (denied); Motion to Vacate Judgment & Remand Appeal (denied); motion to extend time to file opening brief (granted); FRAP 42(b) motion to withdraw appeal with prejudice submitted by all parties.

10. *See Plaintiffs' Reply Memorandum of Law* (Doc. #135) (filed Sept. 12, 2011). Two *pro se* objectors submitted objections solely to Plaintiffs' request for attorneys' fees. The third objection was submitted by the lawyers for the Police and Fire Retirement System of Detroit, the plaintiff in the stayed state court derivative proceeding, *In re Ambac Fin. Grp., Inc. Shareholders Derivative Litig.,* C.A. No. 3521 (Del. Ch.), and they objected only to the extent that the Ambac bankruptcy estate—which owns the derivative claims as a result of the Ambac bankruptcy filing—had agreed to release its claims as part of the Ambac Settlement. The Plaintiffs argued that the objection had previously been ruled on and rejected by the Bankruptcy Court. *See infra* note 13.

11. *See Consent Judgment Approving Class Action Settlement with the Underwriter Defendants* (Doc. #145) (filed Sept. 28, 2011); *Consent Judgment* approving class action settlement with Ambac and the individual defendants (Doc. #146) (filed Sept. 28, 2011); *Order Granting Lead Counsel's Application for an Award of Attorneys' Fees and Reimbursement of Expenses* (Doc. #144) (filed Sept. 28, 2011); *Order Approving Plan of Allocation* (Doc. #143) (filed Sept. 28, 2011).

12. The Court granted the Appellees' motion to dismiss the appeal of Objector-Appellant Police and Fire Retirement System of the City of Detroit to the extent that it sought to appeal from the Judgment Approving Class Action Settlement with the Underwriter Defendants because the Objector-Appellant waived any argument as to the Underwriters Judgment by failing to object in the district court to the underlying settlement agreement. *See Motion Order,* Nos. 11-4643 Lead, 12-59 Con (2d Cir. Mar. 21, 2012) (Doc. #102).

13. The Settlement also required the approval of the S.D.N.Y. Bankruptcy Court where Ambac's Chapter 11 proceeding was pending. *In re Ambac Fin. Grp., Inc.,* No. 10-15973 (S.D.N.Y. Bankr. Nov. 8, 2010). The Objector-Appellant Police and Fire Retirement System of the City of Detroit appeared and objected to the Settlement in the Bankruptcy Court, which overruled the objections and entered an order on Sept. 13, 2011, approving the Settlement pursuant to Bankruptcy Rule 9019. The Appellant appealed that order to the District Court which affirmed the Bankruptcy Court's order. *In re Ambac Fin. Grp., Inc.,* Nos. 10-15973, 11-7529, 2011 WL 6844533 (S.D.N.Y. Dec. 29, 2011). The Objector-Appellant appealed on Jan. 6, 2012 (2d Cir. Appeal No. 11-59). On January 27, 2012 the Second Circuit granted Appellee's motion to consolidate appeals No. 11-4643 and No. 11-59, and expedite Lead Appeal No. 11-4643.

14. *In re Ambac Fin. Grp., Inc.,* Nos. 11-4643 Lead, 12-59 Con, 2012 WL 2849748 (2d Cir. July 12, 2012) (Summary Order and Judgment) (Judgment Mandate issued Aug. 3, 2012).

15. *See Lead Plaintiffs' Memorandum of Law for an Appeal Bond* (Doc. #157) (filed Dec. 5, 2011). Plaintiffs contended that a $50,000 bond amount was needed for copying costs for briefs and compilation of the substantial appellate record: "the copying costs, alone, taxed at the Second Circuit rate of $0.20 per page for commercial reproduction, will likely amount to tens of thousands of dollars given the voluminous filings in connection with the approval of the two settlements and the related bankruptcy court records, including two days of evidentiary proceedings."

16. *See In re Ambac Fin. Grp., Inc. Sec. Litig.,* Nos. 11-4643 Lead, 12-59 Con, 2012 WL 260231(S.D.N.Y. Jan. 12, 2012). Although the Court concluded that the Objector/Appellant had the financial ability to pay an appeal bond and that the appeal lacked merit, the court denied Plaintiffs' motion for an appeal bond. The Court found that there was a low risk of nonpayment should the Objector/Appellant lose its appeal and the court identified this factor as "perhaps the most important of any under consideration, as the Second Circuit has indicated that protection of an appellee from the risk of nonpayment by an unsuccessful appellant is the central purpose behind Rule 7." *Id*. at *2. Further, the court pointed out that "plaintiffs' concern seems to be that [the Objector's] appeal was filed not in the hope of succeeding on the merits, but rather with the goal of inducing the settling parties to offer compensation to [the Objector] such that [the Objector] would drop its objections and allow the distribution of the settlement. In our view, if this concern is justified and the appeal is indeed frivolous, the appropriate remedy is an award of damages under Rule 38 of the Federal Rules of Appellate Procedure and not an appeal bond under Rule 7." *Id*.

17. *See Memorandum of Law in Support of Plaintiffs' Motion for Final Approval of Settlement* (Doc. #85) (filed Nov. 1, 2011). Two additional objections were submitted but dismissed as invalid because the objectors were not class members with standing to object. The sole objector James Hayes was also the Class Representative. On August 17, 2011, Class Representative Hayes appealed from the Order preliminarily approving the settlement entered on August 2, 2011, and the Order declining reconsideration of the August 2, 2011 order, which was entered on August 10, 2011. *See Notice of Appeal* (Doc. #79) (filed Aug. 19, 2011). On October 28, 2011, Appeal No. 11-3609 was dismissed for lack of jurisdiction because a final order had not been issued by the district court as required by 28 U.S.C. § 1291. (Doc. #82) (filed Oct. 28, 2011).

18. *See Order and Final Judgment* approving settlement and dismissing the action with prejudice (Doc. #88) (filed Nov. 14, 2011).

19. *See Order Preliminarily Approving Settlement and Providing for Notice of Settlement* (Doc. #74)(filed Aug. 2, 2011); *and Hayes v. Harmony Gold Min. Co. Ltd.,* No. 08-cv-03653, 2011 WL 6019219 (S.D.N.Y. Dec. 2, 2011) (denial of Objector's motion for reconsideration of the Court's Nov. 14, 2011 Order and Final Judgment granting final approval of the class action settlement and awarding attorneys' fees).

20. *See Order* (denying Class Representative James J. Hayes' motion pursuant to Federal Rule of Civil Procedure 60 seeking reconsideration of the Court's November 14, 2011, approval of the Settlement Agreement and Plan of Allocation and requesting an order requiring the Claims Administrator to file a summary report on all claims submitted against the Settlement Fund) (Doc. #105) (filed Jan. 2, 2013).

21. *Hayes v. Harmony Gold Min. Co. Ltd.,* No. 12-118, 2013 WL 322921 (2d Cir. Jan. 29, 2013) (Summary Order and Judgment) (Judgment Mandate issued April 2, 2013). Appellant-Objector James Hayes filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc.* After the court denied the motion by Order dated March 26, 2013, Appellant-Objector Hayes submitted an application for an extension of time within which to file a petition for a writ of certiorari to Justice Ginsburg. By letter dated June 20, 2013, Justice Ginsberg extended the time to and

including July 29, 2013. The petition for a writ of certiorari was filed by James Hayes on July 27, 2013 and placed on the docket August 1, 2013 as No. 13-143. *See U.S. Supreme Court Notice of Writ of Certiorari filing*, No. 12-0118, (2d Cir. Aug. 1, 2013) (Doc. #156).

22. *See Motion Order*, No. 13-635 (2d Cir. July 18, 2013) (Doc. #107). The Court construed the appellees' motions to dismiss the appeal as motions for summary affirmance, and, as construed, the appellees' motions were granted. And although Appellees' motion for monetary sanctions pursuant to Federal Rule of Appellate Procedure 38 was denied absent a showing of bad faith, the Court warned Objector/Appellant Hayes that the "continued filing of duplicative, vexatious, or clearly meritless appeals, motions, or other papers regarding appeals of class action securities fraud claims in the Harmony Gold litigation will result in the imposition of sanctions, which may include a leave-to-file sanction requiring Appellant to obtain permission from this Court prior to filing any further submissions in this Court."

23. *See Memorandum of Law in Support of Motion for Final Approval of Class Action Settlement* (Doc. #46) (filed May 28, 2010).

24. *See Chin v. RCN Corp.,* No. 08-cv-7349, 2010 WL 3958794 (S.D.N.Y. Sept. 08, 2010).

25. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Forms C (Pre-Argument Statement) & D (Transcript Information Form); FRAP 42 stipulation with prejudice to withdraw appeal signed by counsel for all parties. Note that Appellant Lavery's brief and appendix were due on Feb. 21, 2011; the court issued an order on Feb. 25, 2011 holding Appellant in default and informing that the appeal would be dismissed if appellant's brief and appendix were not filed by March 11, 2011. Appellant's Rule 42 stipulation of dismissal with prejudice was filed on March 9, 2011.

26. When the transfer order was issued on June 11, 2009, creating 09-md-2052 in the Southern District of New York, the Court's consolidation Order and Memorandum issued on March 26, 2009 remained in place establishing 08-cv-11117 (S.D.N.Y. Dec. 22, 2008) as the master docket for three groupings of consolidated cases: Securities Law Actions, 08-cv-11212; State Law Actions, 08-cv-11183; and Insurance Actions, 09-cv-557.

27. Class counsel prepared a Chart of Objections listing 16 separate Objector Groups (comprised of 48 individual objectors) and indicating that six of these Groups withdrew their objections prior to final approval of the settlement. *See* Exhibit B attached to *Plaintiffs' Response* (Doc. # 597-2 in 08-cv-11117) (filed Aug. 9, 2011).

28. *See Final Judgment and Order of Dismissal* with prejudice regarding settlement and Rules 23 and 23.1 (Doc. #604) (filed Aug. 19, 2011); *Judgment and Order* granting insurance class counsel's motion for an award of attorneys' fees and expenses and insurance class plaintiffs' incentive awards (Doc. #602) (filed Aug. 19, 2011); *Judgment and Order* granting plaintiffs' state and securities law settlement class insurance class counsels' motion for an award of attorneys' fees, reimbursement of expenses, and awards to state law and securities plaintiffs (Doc. #203) (filed Aug. 19, 2011). Litigation continues in 09-md-2052 as to non-settling defendants.

29. An additional appeal was filed by lead plaintiffs in the Securities Law Actions appealing on behalf of all class members from the Order entering final judgment pursuant to Rule 54(b) dismissing the securities law claims against Defendants KPMG and Ernst & Young. *See Notice of Appeal* (Doc. # 610 in 08-cv-11117) (filed Sept. 12, 2011). The judgment of the district court dismissing appellants federal securities law claims and common law claims against Defendants KPMG and Ernst & Young was affirmed. *See Meridian Horizon Fund, LP v. KPMG*, Nos. 11-cv-3725, 11-cv-3311, 2012 WL 2754933 (2d Cir. July 10, 2012) (Summary Order).

30. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Forms C (Pre-Argument Statement) & D (Transcript Information Form); Opposition to motions to dismiss; motion to file late; appellant brief; FRAP 42 motion to voluntary dismissal of appeal with prejudice. Note that on April 24, 2012, the court granted Appellees' motion to dismiss Objector/Appellant Orloff's appeal from the Aug. 19, 2011 Final Judgment and Order of Dismissal granting final approval to the partial settlement (Doc. #604), but denied the dismissal of Orloff's appeal from the Orders granting plaintiffs' motions for attorneys' fees and expenses (Docs. #602, 603). *See Order*, No. 11-cv-3899 (2d Cir. April 24, 2012) (Doc. #301).

31. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Forms C (Pre-Argument Statement) & D (Transcript Information Form); motion for leave to respond; motion to file late and to file oversized brief; FRAP 42(b) stipulation with prejudice to withdraw appeal signed by counsel for all parties.

32. The court granted Appellees' motions to dismiss Objector/Appellant Philadelphia Financial Life Assurance Company's appeal for lack of standing to maintain the appeal agreeing with the Appellees that neither the Objector Philadelphia Financial Life Assurance Company nor its policyholders were members of the Settlement Class as defined in the Settlement Agreement. *See Order*, No. 11-cv-3923 (2d Cir. April 24, 2012) (Doc. #63).

33. Oral argument in *Lakeview Invs., LP v. Mass. Mutual Life Ins.*, Appeal No. 11-4030 was heard on June 24, 2013. Decision pending.

34. Pursuant to the transfer order issued on October 6, 2009 by the Judicial Panel on Multidistrict Litigation creating 09-md-2088 in the S.D.N.Y., transferred cases are to be consolidated with lead case No. 09-cv-0118 for all pretrial purposes. All filings in connection with any consolidated actions are to be filed in the lower numbered lead case 09-cv-0118, and the higher numbered case will be closed and removed from the court's database. *See Order* (Doc. #282) (filed Oct. 14, 2009). On June 1, 2012, the court granted final approval to a settlement between the settling class and Defendants EFG Capital International Corp. No objectors appealed the partial settlement. *See Order and Final Judgment* (Doc. #890) (filed June 1, 2012). The March 25, 2013 settlement from which Objectors appealed addressed Plaintiffs' claims against Fairfield Greenwich Limited entity and individual defendants as defined in the court's Final Judgment. Plaintiffs' claims against the PricewaterhouseCoopers Defendants, the Citco Defendants, and GlobeOp Financial Services LLC are not resolved by this Settlement and continue to be prosecuted.

35. *See Plaintiffs' Reply Memorandum in Support of Final Approval of Class Action Settlement* (Doc. #1073) (filed Mar. 8, 2013).

36. *See Final Judgment and Order of Dismissal with Prejudice Settling Action* (Doc. #1097) (filed Mar. 25, 2013).

37. *See Final Judgment and Order Awarding Fees and Expenses from the Settlement* (Doc. #1099) (filed Mar. 28, 2013).

38. Two additional appeals were taken from the March 25, 2013 Final Judgment approving the settlement: (i) Appeal by Irving Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities (No. 13-1392); (ii) Appeal by the Non-Settling Defendants PricewaterhouseCoopers LLP and Citco (No. 13-1642).

39. Appealing Objectors were shareholders of Fairfield Sentry Ltd. (a fund sponsored by Defendants Fairfield Greenwich Group) and Objectors were plaintiffs in *Morning Mist Holdings Ltd. v. Fairfield Greenwich Group*, a derivative action pending on behalf of Fairfield Sentry Ltd. that was filed in May 2009 in New York Supreme Court and then removed to the S.D.N.Y. The Court granted the Plaintiffs/Objectors' motion to remand finding that the Court lacked subject matter jurisdiction under CAFA. *See Anwar v. Fairfield Greenwich Ltd.*, 676 F. Supp. 2d 285, 295, 301 (S.D.N.Y. 2009). On July 22, 2010, the Bankruptcy Court stayed the derivative claims, and the District Court and then the Court of Appeals affirmed. *See In re Fairfield Sentry Ltd,* 440 B.R. 60 (Bankr. S.D.N.Y. 2010), *aff'd*, No. 10-7311, 2011 WL 4357421 (S.D.N.Y. Sept. 16, 2011), *affirmed*, 714 F.3d 127 (2d Cir. April 16, 2013). In their objection, the Objectors/Derivative Plaintiffs sought to change the Settlement terms so that the release and bar order provisions in the Final Judgment did not preclude them from both recovering in the Settlement and pursuing the *Morning Mist* derivative action, which they brought against many of the same defendants arising out of the same facts and circumstances. If those changes were not made, they argued that the Settlement should not be approved. The Release would, if approved by the Court, prevent Settlement Class Members from prosecuting derivative claims on behalf of the Sentry Fund against Released Parties, including the Fairfield Greenwich Defendants.

40. On May 16, 2013, Appellees motion to expedite Appeal No. 13-1581 was granted.

41. The securities, derivative, and ERISA actions were separately consolidated into Master File No. 09 MDL 2058 and ordered to coordinate for pretrial purposes. MDL 2058 remains open pending settlement in the consolidated ERISA Action.

42. *See Lead Plaintiffs' Reply Memorandum of Law in Further Support of Motion for Final Approval of Derivative Action Settlement* (Doc. #782) (filed Dec. 28, 2012).

43. *See Order and Final Judgment settling Consolidated Derivative Action* (Doc. #805) (filed Jan. 24, 2013).

44. *See Order on Motions for Awards of Attorneys' Fees and Reimbursement of Expenses* (Doc. #873) (filed April 15, 2013) (Order awarding attorneys' fees and expenses to lead counsel in the consolidated derivative action and to counsel for Nancy Rothbaum, a former objector to the proposed settlement of the consolidated derivative action and the lead plaintiff in *In re Bank of Am. Corp. Stockholder Derivative Litig.,* No. 4307-CS (Del. Ch.); denying fee request from counsel for Mathew Pinsly, another former objector to the proposed settlement and the lead plaintiff in *Pinsly* v. *Holliday,* No. 12-cv-04778 (S.D.N.Y. June 19, 2012).

45. *See Plaintiffs' Reply Memorandum of Law in Support of Motion to Approve Class Action Settlement and Plan of Allocation* (Doc. #852) (filed Mar. 29, 2013).

46. *See Order Awarding Attorneys' Fees And Expenses* (Doc. #862) (filed Apr. 8, 2013). *See also In re Bank of America Corp. Securities, Derivative, and Employee Retirement Income Sec. Act (Erisa) Litig.,* No. 09-md-2058, 2013 WL 1558686 (S.D.N.Y. April 11, 2013) (granting fee request to lead counsel in Consolidated Securities actions; further explanation of April 8, 2013 decision to deny fee request to law firm of Flanagan, Lieberman, Hoffman and Swaim).

47. *See Judgment Approving Class Action Settlement* (settling Consolidated Securities Actions) (Doc. #871) (filed Apr. 9, 2013); and *Order Approving Plan of Allocation of Net Settlement Fund* (Doc. #868) (filed Apr. 9, 2013).

48. The consolidated Derivative Action was settled on Jan. 24, 2013, and no objectors appealed from the order granting final approval of the settlement. Counsel for Objector Pinsly appealed from the April 15, 2013 Order denying his motion for attorneys' fees and expenses. *See supra* note 44.

49. An additional appeal was filed by Plaintiff Charles Dornfest from the April 9, 2013 Judgment approving the Consolidated Securities Action insofar as the Judgment dismissed his complaint, and from the Sept. 29, 2011 Order denying Plaintiff Dornfest the right to move to certify a class of Bank of America option investors. *See Notice of Appeal* (Doc. #890) (filed Apr. 25, 2013) and *Memorandum and Order* (Doc. #468) (filed Sept. 29, 2011). Appeal No. 13-1677 remains pending.

50. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Forms C (Pre-Argument Statement) & D (Transcript Information Form); FRAP 42(b) stipulation with prejudice to withdraw appeal signed by counsel for all parties.

51. *See Plaintiffs' Memorandum in Support of Motion for Final Approval of Class Action Settlement and Response to Opposition to Proposed Class Action Settlement and Request for Attorneys' Fees* (Doc. #102)(filed Aug. 3, 2010). Eight of the 9 objections were submitted by 8 individual *pro se* objectors, and the final objection was filed by counsel on behalf of 13 objectors ("13 Objecting Plaintiffs"). The 13 Objecting Plaintiffs were the named plaintiffs in 5 class actions against Sony Corp. pending in the S.D.N.Y. that were all filed by attorneys for Milberg LLP, Lax LLP, and Lange & Koncius, LLP. *Meserole v. Sony Corp. of Am.,* 08 Civ. 8987 (S.D.N.Y. Oct. 22, 2008), *Ouellette v. Sony Corp. of Am., Inc.,* 09 Civ. 1939 (S.D.N.Y. Mar. 3, 2009), *Webber v. Sony Corp. of Am., Inc.*, 09 Civ. 2557 (S.D.N.Y. Mar. 19, 2009), *Raymo v. Sony Corp. of Am., Inc.,* 09 Civ. 2820 (S.D.N.Y. Mar. 24, 2009), and *Crusinberry v. Sony Corp. of Am., Inc.,* 09 Civ. 3461 (S.D.N.Y. Apr., 2009). On October 9, 2009, the JPMDL consolidated these 5 class

actions with *Minton v. Sony Electronics, Inc.,* No. 09 Civ. 8651 (S.D.N.Y. Oct. 13, 2009) originally filed in the E.D.N.Y. on March 6, 2009, and *Cardenas v. Sony Corp. of America, Inc.,* No. 09 Civ. 8652 (S.D.N.Y. Oct. 13, 2009), originally filed in the E.D. Tex. on June 18, 2009, transferring them to the S.D.N.Y. into MDL 2102. In November 2009, Plaintiff Cardenas and Defendants reached a class action settlement and the court granted preliminary approval of the settlement in May 2010. *In re Sony Corp. SXRD Rear Projection Television Mktg., Sales Practices & Products Liab. Litig.*, 09 MD 2102, 2010 WL 1993817 (S.D.N.Y. May 19, 2010).

52. *See In re Sony Corp. SXRD Rear Projection Television Mktg., Sales Practices and Products Liab. Litig.,* No. 09-MD-2102, 2010 WL 3422722 (S.D.N.Y. Aug. 24, 2010).

53. Two additional appeals were filed by individual Attorneys Sanford P. Dumain, Leigh Smith, Jennifer Czeisler, Robert I. Lax, Joseph J.M. Lange and Jeffrey A. Koncius (Appeal No. 10-3888 filed on 9/24/2011) and their respective law firms Milberg LLP, Lax LLP, and Lange & Koncius, LLP (Appeal No. 10-3871 filed on 9/22/2011) whom represented plaintiffs in all 5 of the original class actions filed in the S.D.N.Y. These attorneys and their respective firms were appealing from the district court's July 22, 2010 Order imposing Rule 11 sanctions against counsel for making "objectively unreasonable representations in pleadings submitted to the Court, orally in presentations to the Court, and in motion papers without making a sufficient or appropriate investigation as to the truth of such statements." *See Opinion and Order* (Doc. #94) (filed July 22, 2010). Although the Second Circuit affirmed the district court's approval of the class action settlement of the consolidated cases, the July 22, 2010 Order imposing Rule 11 sanctions against appellant attorneys and their firms was vacated. *In re Sony Corp. SXRD,* Nos. 10-3806-CV L, 10-3829-CV CON, 10-3874-CV CON, 10-3814-CV CON, 10-3871-CV CON, 10-3888-CV, 10-3824-CV CON, 10-3873-CV CON, 2011 WL 4425361 (2d Cir. Sept. 23, 2011) (Summary Order and Judgment) (judgment mandate issued October 14, 2011).

54. *See supra* note 51.

55. *In re Sony Corp. SXRD,* Nos. 10-3806-CV L, 10-3829-CV CON, 10-3874-CV CON, 10-3814-CV CON, 10-3871-CV CON, 10-3888-CV, 10-3824-CV CON, 10-3873-CV CON, 2011 WL 4425361 (2d Cir. Sept. 23, 2011) (Summary Order and Judgment) (judgment mandate issued October 14, 2011).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *See Plaintiffs' Memorandum of Law In Response to Objections to Motions for Final Approval of Settlement and for an Award of Attorneys' Fees and Reimbursement of Expenses* (Doc. #149) (filed Aug. 3, 2011) (The 67 objections were submitted by total of 85 objectors with 10 Objections filed by objector's attorney and 57 filed *pro se*).

62. *See Blessing v. Sirius XM Radio Inc.,* No. 09 CV 10035, 2011 WL 3739024 (S.D.N.Y. Aug. 24, 2011). *See also Final Order and Judgment* (Doc. #162) (filed Aug. 25, 2011) & *Order Awarding Attorneys' Fees and Expenses* (Doc. #163) (filed Aug. 25, 2011).

63. *Blessing v. Sirius XM Radio Inc.,* Nos. 11-3696, 11-3883, 11-3908, 11-3910, 11-3916, 11-3965, 11-3970, 11-3972, 2012 WL 6684572 (2d Cir. Dec. 20, 2012) (Summary Order and Judgment) (judgment mandate issued March 13, 2013).

64. Appellant Broida's Forms C and D were due on September 27, 2011. The court informed Appellant Broida that the appeal would be dismissed effective October 18, 2011, if Forms C and D were not filed by that date. *See Order*, No. 11-3729 (2d Cir. Oct. 4, 2011)(Doc. #11). Appellant Broida's motion to reinstate his appeal was denied. *See Motion Order*, No. 11-3729 (2d Cir. Nov. 16, 2011)(Doc. #57).

65. Appellants' brief and appendix were due on January 3, 2012. The court informed Appellants that the appeal would be dismissed effective January 20, 2012 if the brief and appendix were not filed by that date. *See Amended Order*, No. 11-3834 (2d Cir. Feb. 1, 2012)(Doc. #65). The Appellants did not file. The mandate issued on Feb. 16, 2012 dismissing Appeal No. 11-3834. *See Order disposing of appeal*, No. 11-3834 (2d Cir. Feb. 16, 2012)(Doc. #75).

66. *Blessing v. Sirius XM Radio Inc.,* Nos. 11-3696, 11-3883, 11-3908, 11-3910, 11-3916, 11-3965, 11-3970, 11-3972, 2012 WL 6684572 (2d Cir. Dec. 20, 2012) (Summary Order and Judgment) (judgment mandate issued March 13, 2013). Appellant-Objector Nicholas Martin filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. After the court denied the motion by Order dated March 3, 2013, Appellant-Objector Martin submitted an application for an extension of time within which to file a petition for a writ of certiorari to Justice Ginsburg. *See Order*, No. 11-3883 (2d Cir. Mar. 3, 2013) (Doc. #175). By letter dated May 23, 2013, Justice Ginsberg extended the time to and including August 2, 2013. A petition for a writ of certiorari was filed on August 2, 2013 and placed on the Supreme Court docket August 6, 2013 as No. 13-169. *See U.S. Supreme Court Notice of writ of certiorari filing*, No. 11-3883 (2d Cir. Aug. 6, 2013) (Doc. #182).

67. Appellant Batman's brief and appendix were due on December 30, 2011. The court informed Appellant that the appeal would be dismissed effective January 24, 2012 if the brief and appendix were not filed by that date. *See Order*, No. 11-4064 (2d Cir. Jan. 10, 2012) (Doc. #56). Appellant Batman did not file. The mandate issued on Feb. 22, 2012 dismissing Appeal No. 11-4064. *See Order disposing of appeal*, No. 11-4064 (2d Cir. Feb. 22, 2012) (Doc. #71).

68. *Blessing v. Sirius XM Radio Inc.,* Nos. 11-3696, 11-3883, 11-3908, 11-3910, 11-3916, 11-3965, 11-3970, 11-3972, 2012 WL 6684572 (2d Cir. Dec. 20, 2012) (Summary Order and Judgment) (judgment mandate issued March 13, 2013). Appellants-Objectors in Appeal No. 11-3908

filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The court denied the motion by Order dated March 3, 2013. *See Order*, No. 11-3908 (2d Cir. Mar. 3, 2013) (Doc. #173).

69. *Blessing v. Sirius XM Radio Inc.,* Nos. 11-3696, 11-3883, 11-3908, 11-3910, 11-3916, 11-3965, 11-3970, 11-3972, 2012 WL 6684572 (2d Cir. Dec. 20, 2012) (Summary Order and Judgment) (judgment mandate issued March 13, 2013).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Blessing v. Sirius XM Radio Inc.,* Nos. 11-3696, 11-3883, 11-3908, 11-3910, 11-3916, 11-3965, 11-3970, 11-3972, 2012 WL 6684572 (2d Cir. Dec. 20, 2012) (Summary Order and Judgment) (judgment mandate issued March 13, 2013). Appellant-Objector in Appeal No. 11-3972 filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The court denied the motion by Order dated March 3, 2013. *See Order*, No. 11-3972 (2d Cir. Mar. 3, 2013) (Doc. #161).

74. The court informed Appellant Nace that his appeal will be dismissed effective December 30, 2011, if Form D-P was not filed by that date. *See Order*, No. 11-4061 (2d Cir. Nov. 21, 2011) (Doc. #37). Appellant Batman did not file. The mandate issued on Feb. 22, 2012 dismissing Appeal No. 11-4064. *See Order disposing of appeal*, No. 11-4061 (2d Cir. Jan. 17, 2012) (Doc. #47).

75. *See Memorandum of Law in Support Motion to Require Appellants to Post an Appeal Bond* (Doc. #183) (filed Oct. 5, 2011). Plaintiffs asserted that although they were indifferent as to how Appellants chose to allocate among themselves the cost of the bond, because Plaintiffs' expenses and attorneys' fees on the appeal would not be materially reduced even if one or several of the 12 Appellants dropped out of the appeal, it was important for the full $200,000 bond to be posted regardless of how many of the Appellants remained in the appeal or participated in paying for the bond.

76. *See Blessing v. Sirius XM Radio Inc.,* No. 09 CV 10035, 2011 WL 5873383 (S.D.N.Y. Nov. 22, 2011). The Court denied the Plaintiffs' request for a $200,000 appeal bond concluding that although it was unlikely that the Objectors would succeed in their appeals, Plaintiffs had failed to demonstrate either that there was a significant risk of nonpayment or that the Objectors had engaged in bad faith or vexatious conduct.

77. *See Reply Memorandum Of Law in Support of Motion for Settlement* (Doc. #46) (filed Aug. 13, 2012).

78. *See Final Order and Judgment* approving class action settlement and dismissing class action with prejudice (Doc. #52) (filed Aug. 22, 2012); *Order Granting Plaintiffs' Motion for an Award of Attorneys' Fees, Expenses and Incentive Awards* (Doc. #51) (filed Aug. 22, 2012).

79. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Forms C (Pre-Argument Statement) & D (Transcript Information Form); motion to extend time; FRAP 42 stipulation with prejudice to withdraw appeal signed by counsel for all parties.

Appendix B

Class Action Objector Appeals in the Seventh Circuit Court of Appeals
January 1, 2008 – March 1, 2013

Class Action Objector Appeals in the Seventh Circuit Court of Appeals from Cases Filed Between January 1, 2008, and March 1, 2013[80]

27 Total Objector Appeals

District Court • MDL/Consolidated Class Action • # Objections Submitted • Date Final Approval of Class Action Settlement Granted	Appellate Court • # Appeals Filed by Objector(s) • Date Notice of Appeal(s) Filed • Identity of Filing Objector(s) & Attorney(s) (if any)	Final Disposition of Objector Appeal(s) • Date & Nature of Final Disposition • Indicate if Appeal is "pending"	FRAP 7 Cost Bond • Motion Filed • Disposition of Motion • Amount Imposed (if granted)
Central District of Illinois: 0 objector appeals			
Northern District of Illinois: 17 objector appeals			
In re: Discover Payment Protection Plan Marketing and Sales Practices Litigation, MDL 2217, No. 10-cv-6994 (N.D. Ill. Feb. 7, 2011) • MDL • 6 Objections Submitted[81] • 5/10/2012: Final Order and Judgment granting final approval to the class action settlement; Order awarding attorneys' fees, reimbursement of expenses, and service award[82]	1 Appeal Filed: • 6/7/2012: Objector Aaron Petrus – filed *pro se* – 6/15/2012: disclosure statement in Appeal No. 12-2366 filed on behalf of Appellant Petrus by Christopher Andreas Bandas/ Bandas Law Firm, P.C. (Corpus Christi, TX)	• 7/6/2012: Appeal No. 12-2366—voluntarily dismissed pursuant to Objector's FRAP 42(b) motion[83]	• 6/28/2012: Plaintiffs' motioned for objector Petrus to post appellate cost bond of $25,000[84] • Appeal dismissed before motion for bond ruled on
In re: AT&T Mobility Wireless Data Services Tax Litigation, MDL 2147, No. 1:10-cv-02278 (N.D. Ill. Apr. 7, 2010) • MDL • 10 Objections Submitted[85] • 6/2/2011: Memorandum Opinion and Order (1) granting final approval of the class action settlement; and (2) grants in part and denies in part Class Counsel's motion for approval of attorneys' fees, costs, and expenses, and for approval of incentive awards for Class Representatives[86]	6 Appeals Filed: • 6/30/2011: Objectors Angela Vrana & Barbara Fisher – filed by Attorney Bonner C. Walsh/Walsh, PLLC (Athens, TX)	• 7/22/2011: Appeal No. 11-2490—voluntarily dismissed with prejudice pursuant to FRAP 42(b) stipulation of the parties[87]	• 7/22/2011: Class representatives motioned court to order all six appellants to post appellate cost bond of $4,500 each[93] • 7/28/2011: Court orderedObjectors to post a bond of $4,500 each by 8/11/2011[94]
	• 7/1/2011: Objector Karen Wiand – filed by Attorney Mark S. Baumkel/ Mark S. Baumkel & Associates (Bingham Farms, MI)	• 7/7/2011: Appeal No. 11-2491—voluntarily dismissed with prejudice pursuant to FRAP 42(b) stipulation of the parties[88]	• See above. Appeal No. 11-2491 dismissed prior to bond order
	• 7/1/2011: Objectors Travis Cox, Shelly Stevens & Margaret Johnson – filed by Attorney Thomas L. Cox/The Cox Firm (Dallas, TX)	• 11/28/2011: Appeal No. 11-2492—voluntarily dismissed pursuant to Objectors' FRAP 42(b) motion[89]	• See above
	• 7/1/2011: Objector Paige Nash – filed by Gary W. Sibley/Sibley Firm (Dallas, TX)	• 12/6/2011: Appeal No. 11-2497—voluntarily dismissed pursuant to Objectors' FRAP 42(b) motion[90]	• See above

Class Action Objector Appeals in the Seventh Circuit Court of Appeals from Cases Filed Between January 1, 2008, and March 1, 2013[80]

27 Total Objector Appeals

District Court • MDL/Consolidated Class Action • # Objections Submitted • Date Final Approval of Class Action Settlement Granted	Appellate Court • # Appeals Filed by Objector(s) • Date Notice of Appeal(s) Filed • Identity of Filing Objector(s) & Attorney(s) (if any)	Final Disposition of Objector Appeal(s) • Date & Nature of Final Disposition • Indicate if Appeal is "pending"	FRAP 7 Cost Bond • Motion Filed • Disposition of Motion • Amount Imposed (if granted)
	• 7/5/2011: Objector Margaret Strohlein – filed *pro se*; – 10/11/2011: disclosure statement in Appeal No. 11-2522 filed on behalf of Appellant Strohlein by Joseph Darrell Palmer/Law Office of Darrell Palmer (Solana Beach, CA)	• 12/6/2011: Appeal No. 11-2522—voluntarily dismissed pursuant to Objectors' FRAP 42(b) motion[91]	• See above
	• 7/12/2011: Objectors Mike Hale, Summer Hogan, Michael Schulz & Omar Rivero – filed by Christopher A. Bandas/Bandas Law Firm (Corpus Christi, TX) & Peter Higgins (Chicago, IL—local counsel)	• 12/6/2011: Appeal No. 11-2588—voluntarily dismissed pursuant to Objectors' FRAP 42(b) motion[92]	• See above
In re: Kentucky Grilled Chicken Coupon Marketing & Sales Practices Litigation, MDL 2103, No. 1:09-cv-07670 (N.D. Ill. Dec. 4, 2009) • MDL • 1 Objection Submitted[95] • 11/30/2011: Final Approval of Class Action Settlement granting (1) final approval of class action certification and settlement; (2) approval of attorneys' fees and incentive award; and overruling objector Jill K. Cannata's objections[96]	1 Appeal Filed: • 12/8/2011: Objector Jill K. Cannata – filed by Attorney Sam P. Cannata / Cannata Phillips LPA, LLC (Cleveland, OH)	• 2/1/2012: Appeal No. 11-3745—voluntarily dismissed pursuant to Objectors' FRAP 42(b) motion[97]	• No request for cost bond
Schulte v. Fifth Third Bank, No. 1:09-cv-06655 (N.D. Ill. Oct. 21, 2009) • Consolidated Class Action[98] • 13 Objections Submitted[99] • 7/29/2011: Memorandum Opinion and Order and Judgment granting final approval of the class action settlement, Class Counsels' request for attorneys fees; denying Class Counsels request for cost and expense reimbursement without prejudice; and approving an incentive award for the Class Representatives[100]	3 Appeals Filed: • 8/19/2011: Objectors Michelle Keyes,[101] Amanda Ratliff, Verdel Ratliff – filed by local counsel Timothy P. Mahoney/ Hagens Berman Sobol Shapiro LLP (Oak Park, IL); and – filed by attorneys that were members of Plaintiffs' Executive Committee in *In re Checking Account Overdraft Litigation,* 09-md-2036 (S.D. Fla. June 10, 2009)[102]	• 9/28/2011: Appeal No. 11-2922—voluntarily dismissed pursuant to Objectors' FRAP 42(b) motion[104]	• 9/20/2011: Class representatives motioned court to order appellants to post appellate cost bond of $10,000 each[107] • Appeals dismissed before motion for bond ruled on
	• 8/19/11: Appeal by Northcoast Mattress & Recycling, LLC (Ohio limited liability company and class member) – filed by Attorney Sam P. Cannata / Cannata Phillips LPA, LLC	• 9/27/2011: Appeal No. 11-2964—voluntarily dismissed pursuant to Objector's FRAP 42(b) motion[105]	• See above

Class Action Objector Appeals in the Seventh Circuit Court of Appeals from Cases Filed Between January 1, 2008, and March 1, 2013[80]

27 Total Objector Appeals

District Court • MDL/Consolidated Class Action • # Objections Submitted • Date Final Approval of Class Action Settlement Granted	Appellate Court • # Appeals Filed by Objector(s) • Date Notice of Appeal(s) Filed • Identity of Filing Objector(s) & Attorney(s) (if any)	Final Disposition of Objector Appeal(s) • Date & Nature of Final Disposition • Indicate if Appeal is "pending"	FRAP 7 Cost Bond • Motion Filed • Disposition of Motion • Amount Imposed (if granted)
	(Cleveland, OH) (Note: The original objection from which this appeal was taken was submitted by Sam P. Cannata filing *pro se* as a class member and mailing his objection to class counsel)		
	• 8/25/2011: Objector Laura K. Kannapel[103] – filed by Scott D. Gilchrist/ Cohen & Malad, LLP (Indianapolis, IN)	• 9/27/2011: Appeal No. 11-2963—voluntarily dismissed pursuant to Objector's FRAP 42(b) motion[106]	• See above
National Council on Compensation Insurance, Inc. v. American International Group, No. 1:07-cv-2898 (N.D. Ill. filed May 24, 2007) & *Safeco Insurance Company of America et al. v. American International Group, Inc.*, No. 1:09-cv-2026 (N.D. Ill. filed Apr. 1, 2009) • Consolidated Class Action[108] • 3 Objections Submitted[109] • 12/21/2011: Order granting final approval of settlement, but staying the ruling pending a forthcoming opinion. The court granted settlement class plaintiffs' first, second and third interim fee petitions; petition for incentive fee awards to each of the seven Settlement Class Plaintiffs; Objector Liberty Mutual's fee petition was granted in part. Objectors Safeco and Ohio's fee petition was granted in part.[110] • 2/28/2012: Memorandum Opinion and Order and Final Judgment approving the settlement agreement; granting Safeco & Ohio Casualty's motion for reimbursement of attorneys' fees, costs and expenses; granting Liberty's motion for reimbursement of fees and costs in part[111]	6 Appeals Filed:[112] • 1/19/2012: Objectors Safeco Ins. Co. of America and Ohio Casualty Ins. Co. – appeal of Dec. 21, 2011 Order entered in 09-2026 – filed by Michael A. Walsh/ Nutter, McClennen & Fish, LLP (Boston, MA) & Gary Elden, Gary Miller, Matthew Sitzer, Daniel Hinkle; Grippo & Elden, LLC (Chicago, IL)	• 3/25/2013: Appeal No. 12-1158—dismissed per published opinion granting parties stipulation to voluntarily dismiss with prejudice pursuant to FRAP 42(b)[113]	• No request for cost bond
	• 1/19/2012: Objector Liberty Mutual Ins. Co. – appeal of Dec. 21, 2011 Order entered in 09-2026 – filed by James A. Morsch/Butler Rubin Saltarelli & Boyd LLP (Chicago, IL)	• 3/25/2013: Appeal No. 12-1157—dismissed per published opinion granting parties stipulation to voluntarily dismiss with prejudice pursuant to FRAP 42(b)[114]	• No request for cost bond
	• 1/23/2012: Objector Liberty Mutual Ins. Co. – appeal of Dec. 21, 2011 Order entered in 07-2898 – filed by James A. Morsch/Butler Rubin Saltarelli & Boyd LLP (Chicago, IL)	• 3/25/2013: Appeal No. 12-1187—dismissed per published opinion granting parties stipulation to voluntarily dismiss with prejudice pursuant to FRAP 42(b)[115]	• No request for cost bond
	• 3/27/2012: Objectors Safeco Ins. Co. of America and Ohio Casualty Ins. Co. – appeal of Feb. 28, 2012 Opinion and Order & Final Judgment entered in 09-2026 – filed by Michael A. Walsh/ Nutter, McClennen & Fish, LLP (Boston, MA) & Gary Elden, Gary Miller, Matthew Sitzer, Daniel Hinkle; Grippo & Elden, LLC (Chicago, IL)	• 3/25/2013: Appeal No. 12-1730—dismissed per published opinion granting parties stipulation to voluntarily dismiss with prejudice pursuant to FRAP 42(b)[116]	• No request for cost bond

Class Action Objector Appeals in the Seventh Circuit Court of Appeals from Cases Filed Between January 1, 2008, and March 1, 2013[80]

27 Total Objector Appeals

District Court • MDL/Consolidated Class Action • # Objections Submitted • Date Final Approval of Class Action Settlement Granted	Appellate Court • # Appeals Filed by Objector(s) • Date Notice of Appeal(s) Filed • Identity of Filing Objector(s) & Attorney(s) (if any)	Final Disposition of Objector Appeal(s) • Date & Nature of Final Disposition • Indicate if Appeal is "pending"	FRAP 7 Cost Bond • Motion Filed • Disposition of Motion • Amount Imposed (if granted)
	• 3/27/2012: Objector Liberty Mutual Ins. Co. – appeal of Feb. 28, 2012 Opinion and Order & Final Judgment entered in 07-2898 – filed by James A. Morsch/Butler Rubin Saltarelli & Boyd LLP (Chicago, IL)	• 3/25/2013: Appeal No. 12-1753—dismissed per published opinion granting parties stipulation to voluntarily dismiss with prejudice pursuant to FRAP 42(b)[117]	• No request for cost bond
	• 3/27/2012: Objector Liberty Mutual Ins. Co. – appeal of Feb. 28, 2012 Opinion and Order & Final Judgment entered in 09-2026 – filed by James A. Morsch/Butler Rubin Saltarelli & Boyd LLP (Chicago, IL)	• 3/25/2013: Appeal No. 12-1764—dismissed per published opinion granting parties stipulation to voluntarily dismiss with prejudice pursuant to FRAP 42(b)[118]	• No request for cost bond
Southern District of Illinois: 1 objector appeal			
Masters v. Lowe's Home Centers, Inc., No. 09-cv-00255 (S.D. Ill. April 9, 2009) • 5 Objections Submitted[119] • 7/14/2011: Order of Final Approval granting final approval of class action settlement, and granting motion for Attorney Fees and Expenses and Incentive Award to Class Representative[120]	1 Appeal Filed: • 7/25/2011: Objector Grace M. Cannata – filed by Attorney Sam P. Cannata/ Cannata Phillips LPA, LLC (Cleveland, Ohio)	• 12/8/2011: Appeal No. 11-2688 voluntarily dismissed pursuant to Objector's FRAP 42(b) motion[121]	• 8/30/2011: Plaintiff motioned for Objector Cannata to post appellate cost bond of $5,000[122] • Appeal No. 11-2688 dismissed before motion for bond ruled on
Northern District of Indiana: 0 objector appeals			
Southern District of Indiana: 0 objector appeals			

Class Action Objector Appeals in the Seventh Circuit Court of Appeals from Cases Filed Between January 1, 2008, and March 1, 2013[80]

27 Total Objector Appeals

District Court • MDL/Consolidated Class Action • # Objections Submitted • Date Final Approval of Class Action Settlement Granted	Appellate Court • # Appeals Filed by Objector(s) • Date Notice of Appeal(s) Filed • Identity of Filing Objector(s) & Attorney(s) (if any)	Final Disposition of Objector Appeal(s) • Date & Nature of Final Disposition • Indicate if Appeal is "pending"	FRAP 7 Cost Bond • Motion Filed • Disposition of Motion • Amount Imposed (if granted)
Eastern District of Wisconsin: 9 objector appeals			
Ori v. Fifth Third Bank, No. 2:08-cv-00432 (E.D. Wis. May 16, 2008) *consolidated with Baird v. Fifth Third Bank and Fiserv, Inc.,* No. 2:10-cv-00929 (E.D. Wis. Oct. 25, 2010) • Consolidated class action • 1 Objection Submitted[123] • 1/10/2012: Decision and Order and Order of Judgment (1) granting final approval to the class action settlement; (2) granting Settlement Class Counsels' request for attorneys' fees, costs, and expenses, and the incentive award for Representative Plaintiff; (3) responding to and overruling Objector Gatto's objections; and (4) denying plaintiffs request that the court find that Michael Gattos' objection was frivolous and made in bad faith.[124]	1 Appeal Filed: • 2/8/2012: Objector Michael Gatto – filed by attorney Sam P. Cannata/ Cannata Phillips LPA, LLC (Cleveland, Ohio)	• 2/27/2012: Appeal No. 12-1288—voluntarily dismissed pursuant to Objector's FRAP 42(b) motion[125]	• 2/20/2012: Plaintiff motioned for objector Cannata to post appellate cost bond of $25,000[126] • Motion denied as moot because the appeal was dismissed before motion for bond was ruled on
In re: Lawnmower Engine Horsepower Marketing and Sales Practices Litigation (No. II), No. 2:08-md-01999 (E.D. Wis. Dec. 5, 2008) • MDL • 68 Objections Submitted[127] • 8/16/2010: Decision and Order granting final approval for five separate class action Settlement Agreements reached with five separate groups of Defendants; and granting attorneys' fees, litigation expenses, and class-representative service awards[128]	8 Appeals Filed:[129] • 8/23/2010: Objectors Rosalie Borgarts, Paul Palmer, Irving S. Bergrin, Cory A. Buye, Jill Cannata, Robert Falkner and Thomas Basie – notice of appeal filed by Edward F. Siegel (Cleveland, OH); Darrell Palmer/ Law Offices of Darrell Palmer (Solana Beach, CA); Kenneth E. Nelson/ Nelson Law Firm P.C. (Kansas City, MO); Edward W. Cochran (Shaker Heights, Ohio); Sam P. Cannata (Garfield Hts., Ohio) – Disclosure statement filed by Atty. Edward W. Cochran for Objectors/ Appellants in appeal # 10-2971 • 9/10/2010: Objector Carl Olson – filed by John J. Pentz /Class Action Fairness Group (Maynard, MA)	• 2/16/2011: Appeal #10-2971—voluntarily dismissed pursuant to Objectors' FRAP 42(b) motion[131] • 2/16/2011: Appeal #10-3127—voluntarily dismissed pursuant to Objectors' FRAP 42(b) motion[132]	• 8/31/2010: Plaintiff motioned for Objector-Appellants in Appeal #10-2971 to post appellate cost bond of $80,000[139] • 11/2/2010: Court denied class representatives' motion for an appeal bond[140] • 9/14/2010: Plaintiff motioned for Objector-Olson to post an appellate cost bond of $80,000[141] • 11/2/2010: Court denied class representatives' motion for an appeal bond[142]

Class Action Objector Appeals in the Seventh Circuit Court of Appeals from Cases Filed Between January 1, 2008, and March 1, 2013[80]

27 Total Objector Appeals

District Court • MDL/Consolidated Class Action • # Objections Submitted • Date Final Approval of Class Action Settlement Granted	Appellate Court • # Appeals Filed by Objector(s) • Date Notice of Appeal(s) Filed • Identity of Filing Objector(s) & Attorney(s) (if any)	Final Disposition of Objector Appeal(s) • Date & Nature of Final Disposition • Indicate if Appeal is "pending"	FRAP 7 Cost Bond • Motion Filed • Disposition of Motion • Amount Imposed (if granted)
	• 9/14/2010: Objectors Karen Chandler & Thomas L. Cox, Jr – notice of appeal filed by Joshua B. Kons /Law Offices of Joshua B. Kons LLC (Whitefish Bay, WI) – 10/25/2010: disclosure statement filed terminating attorney Kons and adding Thomas L. Cox Jr. (Dallas, TX) as attorney for Objectors Chandler and Cox (himself)	• 2/16/2011: Appeal #10-3141—voluntarily dismissed pursuant to Objectors' FRAP 42(b) motion[133]	• 9/29/2010: Plaintiff motioned for Objector-Appellants in Appeal Nos. #10-3141, 10-3146, 10-3157, 10-3158, & 10-3185 to post an appellate cost bond of $80,000 each.[143] • 11/2/2010: Court denied class representatives' motion for an appeal bond.[144]
	• 9/14/2010: Objectors Douglas Hilbert, Kelly Marie Spann, Kent Stephens, David Borgmeyer, Jarvis Gutridge, Earl Hortiz, Mark Schulte and Munir Abu-Nader – filed by Jonathan E. Fortman (St. Louis, MO) (Attorney for Class Members Douglas Hilbert, Kelly Marie Spann, and Kent Stephens); Attorney Fortman is only attorney to file disclosure statement for appellants in Appeal No. #10-3146 – John C. Kress(St. Louis, MO) (Attorney for Class Members David Borgmeyer, Jarvis Gutridge and Earl Hortiz); – J. Scott Kessinger (Kapaa, HI) (Attorney for Class Members Mark Schulte and Munir Abu-Nader)	• 2/10/2011: Appeal #10-3146—voluntarily dismissed pursuant to Objectors' FRAP 42(b) motion[134]	• See Plaintiffs' 9/29/2010 bond motion above
	• 9/14/2010: Objector Jeannine Miller – filed by Steve A. Miller/Steve A. Miller, PC (Denver, CO)	• 2/16/2011: Appeal #10-3157—voluntarily dismissed pursuant to Objectors' FRAP 42(b) motion[135]	• See Plaintiffs' 9/29/2010 bond motion above
	• 9/15/2010: Objector Scott Kimball III – filed by Mark A Lindow/Lindow, Stephens, Treat LLP (San Antonio, TX)	• 2/10/2011: Appeal #10-3158—voluntarily dismissed pursuant to Objectors' FRAP 42(b) motion[136]	• See Plaintiffs' 9/29/2010 bond motion above
	• 9/15/2010: Objector Clyde Farrel Padgett – filed *pro se* by Clyde F. Padgett (Lufkin, TX)	• 2/10/2011: Appeal #10-3185—voluntarily dismissed pursuant to Objectors' FRAP 42(b) motion[137]	• See Plaintiffs' 9/29/2010 bond motion above
	• 11/19/2010: Objector David Marlow[130] – filed by James H. Price/Lacy, Price & Wagner, PC (Knoxville, TN)	• 2/10/2011: Appeal #10-3689—voluntarily dismissed pursuant to Objectors' FRAP 42(b) motion[138]	• No request for cost bond
Western District of Wisconsin: 0 objector appeals			

80. Includes class action objector appeals from class action cases that were filed in the district courts on or after January 1, 2008, in which final approval of a Rule 23-certified class action settlement was granted and appealed from between January 1, 2008, through March 1, 2013.

81. *See Memorandum of Law (I) In Support of Final Approval of Class Action Settlement; (II) In Response to Timely Objections to the Settlement Agreement; and (III) In Response to Objections to the Award of Attorneys' Fees and Expenses of Class Counsel* (Doc. #171) (filed Apr. 24, 2012) (all 6 objections were filed *pro se*).

82. *See Final Order and Judgment* (Doc. #177) (Apr. 10, 2012); *Order awarding attorneys' fees, reimbursement of expenses, and service award* (Doc. #179) (Apr. 10, 2012).

83. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Docketing Statement; Disclosure Statement filed by Attorney Christopher A. Bandas for Appellant Aaron Petrus; amended Docketing Statement; Objector's FRAP 42(b) motion to voluntarily dismiss the appeal.

84. *See Plaintiffs' Motion to Direct Objector to Post Appeal Bond* (Doc. #187) (June 28, 2012). Plaintiffs asserted that $25,000 was a conservative estimate of the costs both they and Defendants would incur during the pendency of the appeals including thousands of dollars of costs associated with filing briefs to be prepared in multiple copies by a professional appellate printer; increased administrative expenses from the delay caused by Objector's appeal, which would include, among other expenses, additional expenses necessary to extend website maintenance and to process and respond to written and verbal inquiries about the status of claims processing during the appeal, as well as prepare and serve all necessary accounting and tax documents.

85. *See Plaintiffs' Memorandum in Support of Motion for Settlement* (Doc. #163) (filed Mar. 8, 2011) & Ex. 3 Klonoff Declaration (3 of the 10 total objections were filed *pro se*, and remaining 7 were filed by counsel on the Objectors behalf).

86. *See In re AT & T Mobility Wireless Data Servs. Sales Tax Litig.,* 792 F.Supp.2d 1028 (N.D. Ill. June 2, 2011) (Memorandum Opinion and Order granting final approval to class action settlement and dismissing all claims without prejudice until June 1, 2012, after which the dismissal is with prejudice); *In re AT & T Mobility Wireless Data Servs. Sales Tax Litig.*, 792 F.Supp.2d 1028 (N.D. Ill. June 2, 2011) (Memorandum Opinion and Order grants in part and denies in part class counsel's motion for approval of attorneys' fees, costs, and expenses, and for approval of incentive awards for class representatives).

87. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Docketing Statement (incomplete); joint motion by Objectors/appellants and appellee AT&T to voluntarily dismiss the appeal with prejudice pursuant to Rule 42(b). The Second Circuit notified Objectors/Appellants Vrana and Fisher that they had until July 22, 2011, to file a completed Circuit Rule 3(c) docketing statement containing a statement of jurisdiction sufficient to establish diversity of citizenship for federal jurisdiction. *See Order*, No. 11-2490 (2d Cir. July 15, 2011) (Doc. #14). Objectors/Appellants Vrana and Fisher filed a joint stipulation of dismissal on July 22, 2011.

88. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Docketing Statement; joint motion by Objector/appellant and appellee AT&T to voluntarily dismiss the appeal with prejudice pursuant to Rule 42(b).

89. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Amended Docketing Statement; Amended Disclosure Statement filed by Attorney Thomas L. Cox, Jr.; Response in opposition to motion to dismiss; 3 Motions for extensions of time to file appellant brief (granted); Objectors' motion to voluntarily dismiss appeal pursuant to Rule 42(b).

90. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Docketing Statement (amended to establish diversity of citizenship); Disclosure Statement filed by Attorney Gary W. Sibley for Appellant Paige Nash in 11-2497; Response in opposition to motion to dismiss; 3 Motions for extensions of time to file appellant brief (granted); Appellant Brief filed (brief rejected as procedurally deficient and resubmission must occur within 7 days); motion to accept resubmitted appellant brief; Objector's motion to voluntarily dismiss appeal pursuant to Rule 42(b).

91. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Docketing Statement (amended to establish diversity jurisdiction); Disclosure Statement filed by Attorney Joseph Darrell Palmer for Appellant Margaret Strohlein in 11-2522; Response in opposition to motion to dismiss; 3 Motions for extensions of time to file appellant brief (granted); Joint Appellant Brief filed (brief rejected as procedurally deficient and resubmission must occur within 7 days); motion to resubmit late joint appellant brief (granted); joint brief of objectors-appellants filed; Voluntary Joint Motion To Dismiss pursuant to Rule 42(b) of Appellants Margaret Strohlein, Mike Hale, Summer Hogan, Michael Schultz and Omar Rivero, filed on December 5, 2011, by counsel for the appellants in Appeal Nos. 11-2522 and 11-2588.

92. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Docketing Statement (amended to establish diversity jurisdiction); Disclosure Statement filed by Attorney Christopher Bandas for Appellants Mike Hale, Summer Hogan, Omar S. Rivero and Michael Schulz in 11-2588; Response in opposition to motion to dismiss; 3 Motions for extensions of time to file appellant brief (granted); Appellant Brief filed (brief rejected as procedurally deficient and resubmission must occur within 7 days); motion to resubmit late joint appellant brief granted; joint brief of objectors-appellants filed; Voluntary Joint Motion To Dismiss pursuant to Rule 42(b) of

Appellants Margaret Strohlein, Mike Hale, Summer Hogan, Michael Schultz and Omar Rivero, filed on December 5, 2011, by counsel for the appellants in 11-2522 and 11-2588.

93. *See Motion and Memorandum by Service List for Bond (to Require Objectors/Appellants to Post Appeal Bond)* (Docs. #242 & 243) (filed July 22, 2011).

94. *See Minute Entry for Motion Hearing Held on July 28, 2011 on Plaintiffs' Motion for an Appeal Bond* (Doc. #251) (filed July 28, 2011). The Court granted Class Representatives' motion to require objectors/appellants to post an appeal bond, and ordered each Objector to post a bond of $4,500 by 8/11/11.

95. See *Plaintiffs' Motion & Memorandum in Support of Final Approval of Class Action Settlement, and Approval of Attorneys' Fees and Incentive Award* (Doc. #108) (filed Nov. 16, 2011).

96. *See Final Approval of Class Action Settlement* (Doc. #113) (filed Nov. 30, 2011); *Final Approval of Class Certification* (Doc. #112) (filed Nov. 30, 2011); and *Final Judgment Order* (Doc. #115) (filed Dec. 6, 2011).

97. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Second Amended Docketing Statement; Motion for extension to file appellant brief (granted); Objector's FRAP 42(b) motion to voluntarily dismiss appeal.

98. Representative Plaintiff Marlene Willard was a party to the settlement agreement, which provided that upon entry of final approval, the similar action she brought in the Northern District of Georgia (*Willard v. Fifth Third Bank*, Case No. 1:10-cv-0271 (N.D. Ga. Feb. 1, 2010)) would be dismissed with prejudice. On June 3, 2010, the Judicial Panel on Multidistrict Litigation vacated its March 2, 2010, order conditionally transferring the *Schulte* and *Willard* class actions to the Southern District of Florida and ruled that in light of the settlement reached between Plaintiffs Schulte and Willard and the Defendant, that these cases should not be transferred into MDL No. 2036, *In re Checking Account Overdraft Litig.,* which was pending in the Southern District of Florida. *See In re Checking Account Overdraft Litig.*, No. MDL 2036, 715 F.Supp.2d 1358 (J.P.M.L. June 3, 2010).

99. *See Plaintiffs' Proposed Motion for Final Approval* (Doc. #103-1) (filed Mar. 7, 2011) (11 objections were filed *pro se* in letter format and 2 objections were filed by class members represented by attorneys who were also members of the Plaintiffs' Executive Committee in *In re Checking Account Overdraft Litigation,* No. 09-md-2036 (S.D. Fla. June 10, 2009). On March 14, 2011, the court granted a joint motion filed by the 4 objectors represented by counsel (Laura Kannapel, Michelle Keyes, Amanda Ratliff, and Verdel Ratliff) for a temporary protective order precluding the taking of their depositions and the production of documents in response to subpoenas served upon them by Plaintiffs counsel. *See Protective Order Precluding Depositions and Production of Subpoenaed Documents* (Doc. #111) (filed Mar. 14, 2011).

100. *See Memorandum Opinion and Order* (Doc. #124) (filed July 29, 2011) and *Judgment* (Doc. #125) (filed July 29, 2011).

101. Appellant/Objector Keyes was the named plaintiff in *Keyes v. Fifth Third Bank,* No 10-cv-2283 (S.D. Fla. Apr. 2, 2010), an overlappng class action that was made part of MDL 2036, *In re Checking Account Overdraft Litigation*, pending in the Southern District of Florida. Represented by the Plaintiffs' Executive Committee in MDL No. 2036, Appellants/Objectors Michelle Keyes, Amanda Ratliff and Verdel Ratliff filed an objection to Representative Plaintiffs' motion for preliminary approval of the proposed settlement in addition to objecting to the proposed final settlement.

102. Bruce S. Rogow/Alters Law Firm, P.A. (Miami, FL); Aaron S. Podhurst, Robert C. Josefsberg, Peter Prieto, John Gravante, III/Podhurst Orseck, P. A. (Miami, FL); Robert C. Gilbert, Stuart Z. Grossman/ Grossman Roth, P.A. (Coral Gables, FL); Michael W. Sobol, David Stellings, Roger Heller, Jordan Elias/ Lieff, Cabraser, Heimann & Bernstein, LLP (San Francisco, CA); E. Adam Webb, G. Franklin Lemond, Jr./ Webb, Klase & Lemond, L.L.C. (Atlanta, GA); Ted E. Trief, Barbara E. Olk/ Trief & Olk (New York, NY); Ruben Honik, Kenneth J. Grunfeld/ Golomb & Honik, P.C. (Philadelphia, PA); Russell W. Budd, Bruce W. Steckler, Mazin Sbaiti/ Baron & Budd, P.C. (Dallas, TX).

103. Appellant/Objector Laura K. Kannapel was represented by the Plaintiffs' Executive Committee in *In re Checking Account Overdraft Litigation,* MDL No. 2036 (S.D. Fla. June 10, 2009) in addition to Cohen & Malad, LLP (Indianapolis, IN) when she filed her original objection.

104. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Docketing Statement/Seventh Circuit Transcript Information Sheet/ Disclosure Statement filed by Attorney Timothy P. Mahoney; Objectors' FRAP 42(b) motion to voluntarily dismiss appeal.

105. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Docketing Statement/Seventh Circuit Transcript Information Sheet/ Disclosure Statement filed by Attorney Sam P. Cannata; Response in Opposition to Appellees' Motion to Dismiss; Plaintiff-Appellant Northcoast Mattress & Recycling LLC by and through it attorney Sam P. Cannata FRAP 42(b) motion for voluntary dismissal of Appeal No. 11-2964. On Sept. 15, 2011, Plaintiffs-Appellees filed a motion to dismiss the Appeal of Northcoast Mattress & Recycling LLC for lack of jurisdiction, arguing that because Northcoast did not object to the settlement in the District Court and was not a "party" to the litigation under Rule 3(c) of the Federal Rules of Appellate Procedure, the Court lacked jurisdiction over its appeal and the appeal should be dismissed. *See Appellees' Motion to Dismiss Case*, No. 11-2964 (7th Cir. Sept. 15, 2011) (Doc. #21). On September 26, 2011, Sam Cannata on behalf of Plaintiff-Appellant Northcoast Mattress & Recycling LLC filed both a response to Appellees' motion to dismiss and a FRAP 42(b) motion to voluntarily dismiss Appeal No. 11-2964. *See Response in Opposition by Appellant Northcoast Mattress & Recyling, LLC to Motion to Dismiss & Motion filed by Appellant Northcoast Mattress & Recyling, LLC to Dismiss Case*, No. 11-2964 (7th Cir. Sept. 26, 2011) (Docs. #22 & 23).

106. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Docketing Statement/Seventh Circuit Transcript Information Sheet/ Disclosure Statement filed by Attorney Scott D. Gilchrist; Objector's FRAP 42(b) motion to voluntarily dismiss appeal.

107. *See Representative Plaintiffs' Motion for Imposition of Appeal Bonds and Incorporated Memorandum of Law* (Doc. #149) (filed Sept. 20, 2011). Plaintiffs' asked the court to order objectors to post a $10,000 cost bond for each of the three appeals to cover the "likely costs and attorneys' fees Settlement Class Counsel will incur in opposing these appeals."

108. The settlement approved by the court dismissed all claims in both *National Council on Compensation Ins., Inc. v. Am. Int'l Grp.*, No. 1: 07-cv-2898 (N.D. Ill. filed May 24, 2007) and *Safeco Ins. Co. of Am. et al. v. Am. Int'l Grp., Inc.*, No. 1:09-cv-2026 (N.D. Ill. filed April 1, 2009). Brief history of the litigation: After the class representative in the original class action 07-2898 was dismissed for lack of standing in 2009, the defendant American International Group (AIG) was realigned as the plaintiff because AIG filed counterclaims and a third party complaint against the 24 insurance companies who were members of the original Plaintiff class. *Am. Int'l Grp., Inc. v. ACE INA Holdings, Inc.,* Nos. 09-2026, 07-2898 (N.D. Ill. May 24, 2007). On April 1, 2009, Safeco Insurance Company of America and Ohio Casualty Insurance Company filed a class action against AIG bringing claims that mirrored the claims in the original 07-2898 complaint. *Safeco Ins. Co. of Am. et al. v. Am. Int'l Grp., Inc.*, No. 1: 09-cv-2026 (N.D. Ill. filed April 1, 2009). Two members of the Plaintiff class in *Safeco*, Liberty Mutual Insurance Company and The Hartford Financial Services Group, asserted counterclaims against AIG in the original action 07-2829 arising out of AIG's alleged underreporting of workers compensation premiums. On January 13, 2011, the Court granted Settlement Class Plaintiffs (7 companies representing insurance companies that were members of the original plaintiff class in 07-2829) leave to intervene in *Safeco* (09-2026) and leave to file their complaint in intervention to present the terms of the settlement reached between Settlement Class Plaintiffs and Defendant AIG. Safeco Insurance Company together with Ohio Casualty Insurance Company, and Liberty Mutual Insurance Company—all three class members in Appeal No. 09-2026—objected to the settlement even before preliminary approval was granted, as well as submitting formal objections after preliminary approval was granted.

109. *See Settlement Class Plaintiffs' Status Report About Opt-Outs and Objections* (Doc. #506 in Appeal No. 09-2026) (filed Oct. 6, 2011). One Objection was filed by class members Safeco Ins. Co. of America and Ohio Casualty Ins. Co.—the original plaintiffs in Appeal No. 09-2026 and subsidiaries of the Liberty Mutual group of companies. Another Objection was filed by class member Liberty Mutual Ins. Co.—also the counter-claimant against Defendant AIG in 07-2829. A third objection was formally withdrawn prior to final approval of the settlement.

110. *See Order* (Doc. #589) (filed Dec. 21, 2011). On November 29, 2011, the court held a final fairness hearing, and on December 21, 2011, the court held a hearing on the parties' various fee petitions. Although the Court's Order issued on December 21 granted final approval of the settlement, that ruling was stayed pending the court's determinations of fees and issuance of a final memorandum opinion.

111. *See Am. Int'l Grp., Inc. v. ACE INA Holdings, Inc.,* Nos. 07-cv-2898, 09-cv-2026, 2012 WL 651727 (N.D. Ill. Feb. 28, 2012). The court entered Final Judgment on March 1, 2012 (Doc. #614) (filed Mar. 1, 2012).

112. After the Objector-Appellants received notice from the Seventh Circuit on January 26, 2012, that the district court's December 21, 2011, Order may not be a final appealable judgment within the meaning of 28 U.S.C. § 1291, Safeco Ins. Co. and Liberty Mutual filed additional notices of appeal from the district court's February 28, 2012, Memorandum Opinion and Order and March 1, 2012 Final Judgment. On April 2, 2012, the Seventh Circuit granted the Appellants' motions to consolidate the 6 appeals for briefing and disposition: Appeal Nos. 12-1157, 12-1158, 12-1186, 12-1730, 12-1753, 12-1764.

113. *Safeco Ins. Co. of Am. v. Am. Int'l Grp., Inc.,* 710 F.3d 754 (7th Cir. Mar. 25, 2013). On November 29, 2012, a three-judge panel (Chief Judge Frank Easterbrook, and Circuit Judges Richard Posner and Daniel Manion) heard oral arguments on the consolidated appeals and took them under advisement. Before the panel issued its decision, on January 11, 2013, all parties to the 6 appeals reached a settlement and they all agreed (except for appellee ACE INA Holdings) to stipulate and file with the court an Agreed Stipulation of Dismissal with prejudice, each party to bear its own FRAP 39 costs. Although ACE INA Holdings did not join the stipulation, it did not oppose the settlement and request for dismissal. *See Motion filed by Appellants to Dismiss Case*, Appeal Nos. 12-1157, 12-1158, 12-1186, 12-1730, 12-1753, 12-1764 (7th Cir. Jan. 11, 2013) (Doc. #143). On January 14, 2013, the Court ordered the parties to supplement their "agreed stipulation of dismissal" to address (1) whether the settlement of the dispute underlying the appeals should be approved by the district court as affecting the class settlement approved in February 2012, and (2) whether the appellants should be allowed to reinstate their appeal if the district court refused to approve their settlement. *See Order re: "Agreed Stipulation of Dismissal,"* Appeal Nos. 12-1157, 12-1158, 12-1186, 12-1730, 12-1753, 12-1764 (7th Cir. Jan. 14, 2013) (Doc. #144). In an opinion written by Chief Judge Easterbrook, the majority concluded that since none of the parties were objecting to the settlement between Liberty Mutual and AIG, since the terms of their separate settlement did not undo or effect the original settlement approved by the district court in any way, and since there was no one wanting to adjudicate the case any further, then the appeals should be dismissed. *Safeco Ins. Co. of Am.,* 710 F.3d at 758. Although Judge Easterbrook did not appear to be troubled by the settlement between Liberty Mutual and AIG that was reached while the appeal was pending as long as this "de facto opt-out on appeal" did not call into question the settlement's fairness to the other class members, in his dissent Judge Posner felt the court had dismissed the appeal too quickly without actually examining the terms of the settlement between Liberty Mutual and AIG: "We don't know the terms of the settlement on which dismissal is predicated, so we don't know whether the settlement sells out the interests of the class. But it may." *Id.* (Posner, J., dissenting). Judge Posner suggested that a request for a voluntary dismissal in the class action context deserves closer scrutiny. *Id.* at 761–62.

114. *See id.*

115. *See id.*

116. *See id.*

117. *See id.*

118. *See id.*

119. *See Plaintiff's Response to Objections to Class Action Settlement* (Doc. #59) (filed July 1, 2011) (One of the five objections was deemed invalid because the objector's wife and not the objector was a class member. The remaining four objections were filed *pro se* in letter format, although the six-page objection filed *pro se* by "Grace M. Cannata Pro Se Objector" stated at the conclusion of her objection that "she intends to hire Attorney Sam P. Cannata to represent her interests in this matter.")

120. *See Order of Final Approval* (Doc. #63) (filed July 14, 2011).

121. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Docketing Statement/Seventh Circuit Transcript Information Sheet/ Disclosure Statement filed by Attorney Sam Cannata; opposition to appellees motion to dismiss the appeal; Objector's Rule 42(b) motion to voluntarily dismiss the appeal.

122. See *Plaintiffs' Motion for Appellate Cost Bond* (Doc. #68) (filed Aug. 30, 2011). Plaintiffs requested that Objector Grace Cannata and/or her counsel, Sam Cannata, be required to post a bond of $5,000.00, based on a reasonable estimate of the taxable costs that are likely to be incurred, but limited to costs described in 28 U.S.C. § 1920 and Federal Rule of Appellate Procedure 39 such as the costs of copying briefs and appendices, preparation and transmission of the record on appeal, and obtaining the court reporter's transcript.

123. *See Representative Plaintiff's Amended Memorandum of Law in Support of Motion for Final Approval of Class Action Settlement and Award of Attorneys' Fees, Costs, Expenses, and Incentive Award* (Doc. #205) (filed Jan. 3, 2012) (Representative Plaintiff responds to objections submitted by the sole Objector Michael Gatto, filed by his attorney Sam P. Cannata, and Representative Plaintiff asked the court to make a finding of frivolity and bad faith in connection with Michael Gatto's objection.). On January 3, 2012, Settlement Class Counsel served Michael Gatto with a subpoena for a deposition. The subpoena was issued by the United States District Court for the Northern District of Ohio, and the deposition was noticed for January 6, 2012 in Cleveland, Ohio. (Doc. #210) (filed Jan. 3, 2012) On January 4, 2012, Gatto filed a motion to quash the subpoena. (Doc. #211) (filed Jan. 4, 2012) Plaintiffs argued that the deposition and documents were needed to determine the legitimacy of Gatto's objection given Gatto's attorney Cannata's history and Gatto's lack of knowledge of his objection. (Doc. #212) (filed Jan. 4, 2012) The district court denied Objector Gatto's motion to quash declaring that it lacked jurisdiction because a motion to quash must be presented to the court for the district in which the deposition would occur. (Doc. #213) (filed Jan. 5, 2012) Attorney Cannata responds in outrage to the "ad hominem attacks and name calling against the Plaintiff-Objector and his counsel" that Representative Plaintiff and their Class Counsel had resorted to. (Doc. #214) (filed Jan. 5, 2012) Following Objector Gatto's deposition that was held on Jan. 9, 2012 in the Southern District of Ohio, Class counsel submitted 7-page reply arguing that the deposition revealed Gatto's lack of familiarity with his objections and showed his hatred for class action cases in general. Class counsel repeated their original request for a finding that the objection was frivolous and filed in bad faith. (Doc. #215) (Jan. 9, 2012).

124. *See Decision and Order* (Doc. #216) (filed Jan. 10, 2012) (Representative Plaintiff asked the court to make a finding of frivolity and bad faith in connection with Michael Gatto's objection. District Judge Lynn Adelman addressed each of Objector Gatto's seven arguments and concluded that "[w]hile the evidence is not sufficient to conclude that Gatto's objections are clearly frivolous or made in bad faith, he has not made any valid arguments that justify altering the terms of the settlement agreement or denying the motion for attorneys' fees." Judge Adelman found that Gatto's objections were either mooted by the Settlement Agreement or not supported by credible evidence.). *See also Order of Judgment* (Doc. #217) (filed Jan. 10, 2012).

125. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Docketing Statement/Seventh Circuit Transcript Information Sheet/ Disclosure Statement filed by Attorney Sam Cannata; Objector's FRAP 42(b) motion to voluntarily dismiss the appeal.

126. *Representative Plaintiffs Motion for Imposition of Appeal Bond and Incorporated Memorandum of Law* (Doc. #224) (filed Feb. 20, 2012). Plaintiffs argued that the Court should order the Objector/Appellant to post an appeal bond in the amount of $25,000 to cover the likely costs and attorneys' fees Settlement Class Counsel would incur in opposing Appellant's appeal—which would "almost certainly exceed this amount."

127. *See Brief in Support filed by All Plaintiffs* (Doc. #334) (filed June 15, 2010) (although 73 total objections were originally filed by class members, five objections were withdrawn by June 15, 2010 thus resulting in 68 final objections submitted).

128. *See In re Lawnmower Engine Horsepower Mktg. & Sales Practices Litig.*, 733 F.Supp.2d 997 (E.D. Wis. Aug. 16, 2010). See also the five individual Orders and Judgments filed on August 16, 2010 approving five settlement agreements between the plaintiff class and all defendants and awarding attorneys' fees and costs to class counsel, thereby resolving all actions that were transferred and consolidated for pretrial purposes by the Panel on Multidistrict Litigation into MDL 1999: MTD Settlement (Doc. #381); Group of Six Settlement (Doc. #382); Honda Settlement (#383); Kawasaki Settlement (Doc. #384); and Kohler Co. Settlement (Doc. #385).

129. The Seventh Circuit consolidated all 8 appeals for purposes of briefing and disposition: Appeal Nos. 10-2971, 10-3127, 10-3141, 10-3146, 10-3157, 10-3158, 10-3185, 10-3689. Note that Appeal No. 10-3154 is not included as it is an appeal by defendant Husqvarna Outdoor Products Inc.

130. On September 13, 2010, Objector David Marlow filed a timely Civil Rule 59(e) motion to amend/correct the judgment. *See Motion to Amend/Correct Order dated August 16, 2010 by David C Marlow* (Doc. #402) (filed Sept. 14, 2010). Briefing was stayed on all appeals filed prior to final disposition on the Rule 59(e) motion in the district court. *See Order*, Appeal Nos. 10-2971, 10-3127, 10-3141, 10-3146, 10-3157, 10-3158, 10-3185 (7th Cir. Sept. 28, 2010) (Doc. #19). On October 28, 2010, the District Court denied Objector Marlow's motion to amend, and appellant briefs in all consolidated appeals were due on Dec. 15, 2010, and then extended to Jan. 18, 2011. *See Order Denying Motion to Amend/Correct* (Doc. #468) (filed Oct. 28, 2010). Objector Marlow filed his notice of appeal on November 19, 2010.

131. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Docketing Statement/Seventh Circuit Transcript Information Sheet/Disclosure Statement filed by Attorney Edward W. Cochran; Objectors' motion to voluntarily dismiss their appeal pursuant to FRAP 42(b).

132. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Docketing Statement/Seventh Circuit Transcript Information Sheet; jurisdictional memorandum; status report by Attorney John J. Pentz III for Appellant Carl Olson, Jr., on disposition of motion to alter or amend filed by David Marlow; Objector's motion to voluntarily dismiss the appeal pursuant to Rule 42(b).

133. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Docketing Statement (amended as late)/Seventh Circuit Transcript Information Sheet; jurisdictional memorandum; Disclosure statement filed by Attorney Thomas L. Cox Jr. for Objector/Appellant Thomas L. Cox Jr.(himself) and Objector/Appellant Karen Chandler, in case 10-3141; Objectors' motion to voluntarily dismiss the appeal pursuant to Rule 42(b).

134. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Docketing Statement (amended as late); jurisdictional memorandum; Disclosure Statement filed by Attorney Jonathan E. Fortman for Appellants Kent Stephens, Douglas Hilbert, Kelly M. Spann, David Borgmeyer and Jarvis Gutridge; Objectors' motion to voluntarily dismiss the appeal pursuant to Rule 42(b).

135. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Docketing Statement/Seventh Circuit Transcript Information Sheet/Disclosure Statement filed by Attorney Steve A. Miller; statement of jurisdiction; jurisdictional memorandum; Objector's motion to voluntarily dismiss her appeal pursuant to Rule 42(b).

136. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Docketing Statement/Seventh Circuit Transcript Information Sheet/Disclosure Statement filed by Attorney Theodore C. Schultz; statement of jurisdiction; jurisdictional memorandum; Objector's motion to voluntarily dismiss the appeal pursuant to Rule 42(b).

137. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Docketing Statement/Seventh Circuit Transcript Information Sheet; jurisdictional statement; Objector's motion to voluntarily dismiss the appeal pursuant to Rule 42(b).

138. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Docketing Statement (filed late); Objector's motion to voluntarily dismiss the appeal pursuant to Rule 42(b).

139. *See Memorandum in Support of Plaintiff's Motion for an Appeal Bond* (Doc. #393) (filed Aug. 31, 2010). Plaintiffs asserted that an appeal bond in the amount of $80,000 was justified in recognition of the following harms to Class Members the appeal will impose: additional Rule 39(c) costs of copying, printing, and reproducing documents up to $25,000; costs associated with the prolonged settlement administration period that an objector's appeal necessitates including additional costs associated with website maintenance, online claim filing, claim form processing and validation, telephone support, distribution and tax reporting, project management and technical consulting fees, and other miscellaneous administrative costs up to $55,000; costs arising from delays to the distribution of settlement benefits including the distribution of cash, warranty and injunctive benefits included in the settlement reached in this case; and costs associated with the additional attorneys' fees incurred while defending the Objectors' appeal. In their Reply briefs, class representatives state that they are not asking for a cost bond that includes class counsel's attorneys' fees as well as the costs attributable to the delay in distributing settlement benefits to class members. *See Reply Brief* (Doc. #464) (filed Oct. 12, 2010) & *Reply Brief* (Doc. #469) (filed Nov. 1, 2010).

140. *See In re Lawnmower Engine Horsepower Mktg. & Sales Practices Litig.,* No. MDL 08-1999, 2010 WL 4630846 (E.D. Wis. Nov. 2, 2010). The court stated that the "text of the rule indicates that only one element must be met before a bond may be required—namely, that the district court finds a bond "necessary to ensure" payment of costs on appeal. Thus, if the movant points to facts giving rise to a reasonable probability that the appellant will fail to pay any costs taxed by the court of appeals when the appeal is over, the district court should require a bond." *Id.* at *1. The Court rejected class representatives argument that there was a risk of nonpayment case because the objecting class members were geographically dispersed and represented by attorneys who were alleged to be "professional objectors." The Court also rejected plaintiffs argument that a bond was appropriate because the professional objectors' appeals were meritless, finding that the "text of Rule 7 does not indicate that the district court should consider the merits of the appeal when deciding whether to require an appeal bond." *Id.* To the extent that the merits are relevant to the risk of nonpayment, the Court could not conclude that the appeals were meritless or pursued for an improper purpose based upon the evidence on the record, refusing the give any weight to other cases cited by class representatives in which district courts found that certain of the attorneys representing the objectors in these appeals had objected in bad faith. *Id.*

141. *See Memorandum in Support of Plaintiffs' Motion for an Appeal Bond* (Doc. #413) (filed Sept. 14, 2010). *See supra* note 139 for a description of the costs included in the $80,000 bond amount requested by plaintiffs.

142. *See supra* note 140 for details regarding the court's denial of Plaintiffs' motion for an appeal bond in *In re Lawnmower Engine Horsepower Mktg. & Sales Practices Litig.*, No. MDL 08-1999, 2010 WL 4630846 (E.D. Wis. Nov. 2, 2010).

143. *See Memorandum in Support of Plaintiffs' Motion for an Appeal Bond* (Doc. #457) (filed Sept. 29, 2010). Plaintiffs filed this motion asking the Court for an Order requiring five Objectors' attorneys that Plaintiffs alleged are professional objectors—counsel Mark Lindow, Steve A. Miller, Thomas Cox, Jr., J. Scott Kessinger and Clyde Padgett—to post an appeal bond in the amount of $80,000 for each appeal. Plaintiffs argued that "although their clients have the unquestioned right to appeal the Court's Orders, the Court has the power to protect the parties and the class from the damage and delay serial objectors cause." *See supra* note 139 for a description of the costs included in the $80,000 bond amount requested by plaintiffs.

144. *See supra* note 140 for details regarding the court's denial of plaintiffs' motion for an appeal bond in *In re Lawnmower Engine Horsepower Mktg. & Sales Practices Litig.*, No. MDL 08-1999, 2010 WL 4630846 (E.D. Wis. Nov. 2, 2010).

Appendix C

Class Action Objector Appeals in the Ninth Circuit Court of Appeals
January 1, 2008 – July 1, 2013

Class Action Objector Appeals in the Ninth Circuit Court of Appeals from Cases Filed Between January 1, 2008, and July 1, 2013[145]

(not including appeals, if any, originating from the districts of Hawaii, Guam, and the Northern Mariana Islands)

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District Court • MDL/Consolidated Class Action • # Objections Submitted • Date Final Approval of Class Action Settlement Granted	Appellate Court • # Appeals Filed by Objector(s) • Date Notice of Appeal(s) Filed • Identity of Filing Objector(s) & Attorney(s) (if any)	Final Disposition of Objector Appeal(s) • Date & Nature of Final Disposition • Indicate if Appeal is "pending"	FRAP 7 Cost Bond • Motion Filed • Disposition of Motion • Amount Imposed (if granted)
District of Alaska: 0 objector appeals			
District of Arizona: 3 objector appeals			
In re LifeLock, Inc., Marketing and Sales Practices Litigation, No. 2:08-md-1977 (D. Ariz. Oct. 17, 2008) • MDL • 20 Objections Submitted[146] • 8/31/2010: Order and Final Judgment granting (1) joint motion for final approval of class action settlement ; and (2) motion for attorneys' fees, expenses and incentive fees[147]	3 Appeals Filed: • 9/24/2010: Objector Billy Daniels – filed by Darrell Palmer/Law Offices of Darrell Palmer (Solana Beach, CA) • 9/24/2010: Objector James E. Pentz – filed by John J. Pentz/ Class Action Fairness Group (Maynard, MA) • 9/19/2011: Objectors Kris Klinge and Tracey Cox Klinge – filed by Thomas L. Cox, Jr./The Cox Firm (Dallas, TX)	• 1/06/2011: Appeal No. 10-17177—voluntarily dismissed pursuant to Objector's FRAP 42(b) motion[148] • 1/05/2011: Appeal No. 10-17318—voluntarily dismissed pursuant to Objector's FRAP 42(b) motion[149] • 12/30/2010: Appeal No. 10-17180—voluntarily dismissed pursuant to Objector's FRAP 42(b) motion[150]	• No motion for cost bond • No motion for cost bond • No motion for cost bond
Central District of California: 12 objector appeals			
Munoz v. J.C. Penny Corp., Inc., No. 2:09-cv-00833 (C.D Cal. Feb. 3, 2009) • 2 Objections Submitted[151] • 9/22/2010: Final Judgment and Order of Dismissal with prejudice granting final approval of the settlement agreement and awarding attorneys' fees and costs.[152]	1 Appeal Filed: • 10/22/2010: Objector Maria Fernandez – filed by attorney David M. deRubertis/The deRubertis Law Firm, APC (Studio City, CA)	• 12/20/2010: Appeal No. 10-56678—voluntarily dismissed pursuant to Objector's FRAP 42(b) motion[153]	• No motion for cost bond
Frederick v. FIA Card Services, N.A., No. 2:09-cv-03419 (C.D. Cal. May 14, 2009). • 3 Objections Submitted[154] • 8/25/2011: Final Judgment and Order of Dismissal with prejudice; Amended Order granting final approval of class settlement and awarding attorney fees and costs and incentive awards.[155]	2 Appeals Filed: • 9/14/2011: Objector Robert J. Gaudet – filed *pro se* – 8/7/2012: notice of appearance entered by Michael S. Brown/Law Office of Michael S. Brown LLC (Renton, WA) – notice of appeal amended to include Court's 12/5/2011 FRAP 7 Bond Order; Court's 4/12/2012 Order refusing to accept late payment of bond; and 5/21/2012 Order denying Objector's motion for reconsideration	• 09/14/2012: Appeal No. 11-56609—voluntarily dismissed pursuant to Objector's FRAP 42(b) motion[156]	• 11/7/2011: Plaintiffs asked Court to order Objector Gaudet to post an appellate cost bond of $20,000[158] • 12/5/2011: court ordered that Objector Gaudet's right to appeal was conditioned upon his posting a $1,000 appellate bond within 30 days[159]

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	• 9/22/2011: Objectors Karen Chandler and Nikki Johnson – filed *pro se* – 10/12/2011: notice of appearance entered by Thomas L. Cox/The Cox Firm (Dallas, TX) for Appellants Chandler and Johnson	• 11/8/2011: Appeal No. 11-56668—voluntarily dismissed pursuant to Objector's FRAP 42(b) motion[157]	• Appeal No. 11-56668 dismissed prior to Plaintiffs' cost bond motion
Fairchild v. AOL, LLC, No. 2:09-cv-03568 (C.D. Cal. May 19, 2009) • Consolidated class action • 2 Objections Submitted[160] • 12/31/2009: Order and Final Judgment granting motion by settlement class plaintiffs for final approval of class action settlement[161] • 1/4/2010: Order granting motion for attorney fees[162]	1 Appeal Filed: • 1/26/2010: Objector Darren McKinney – filed by Theodore H. Frank/ Center for Class Action Fairness (Washington, DC)	• 9/20/2012: Appeal No. 10-55129—Judgment of the district court reversed in part, affirmed in part, and remanded per published opinion[163]	• No motion for cost bond
Stern v. Singular Wireless Service, No. 8:09-cv-01112 (C.D. Cal. Dec. 15, 2009) • Consolidated Class Action[164] • 9 Objections Submitted[165] • 11/22/2010: Order granting (1) final approval to the UCC settlement and entering final judgment; and (2) application for award of attorneys' fees and reimbursement of expenses to class counsel, and incentive awards for class representatives[166]	2 Appeals Filed:[167] • 12/9/2010: Objectors Gene Hopkins and Marc Gambello – filed by Darrell Palmer/Law Offices of Darrell Palmer (Solana Beach, CA) • 12/23/2010: Objectors Karin Lynch – filed by J. Garrett Kendrick/ Kendrick & Nutley (Pasadena, CA); John W. Davis/Law Office of John W. Davis (San Diego, CA)	• 6/19/2012: Appeal No. 10-56929—Judgment of the district court affirmed per unpublished opinion[168] • 6/19/2012: Appeal No. 10-57062—Judgment of the district court affirmed per unpublished opinion[169]	• No motion for cost bond • No motion for cost bond
Kambiz Batmanghelich v. Sirius XM Radio Inc., No. 2:09-cv-09190 (C.D. Cal. Sept. 25, 2009) • 3 Objections Submitted[170] • 9/15/2011: Final Order and Judgment granting (1) Plaintiff's motion for final approval of class action settlement; and (2) Plaintiff's unopposed application for attorneys' fees and costs, class representative's service payment, and settlement administration expenses.[171]	2 Appeals Filed: • 10/10/2011: Objector Dave Denny – filed by John W. Davis/Law Office of John W. Davis San Diego, CA). • 10/13/2011: Objectors Michelle Melton and Edmund F. Bandas[172] – filed by Darrell Palmer/Law Offices of Darrell Palmer (Solana Beach, CA).	• 11/10/2011: Appeal No. 11-56756—voluntarily dismissed pursuant to Objector's FRAP 42(b) motion[173] • 11/9/2011: Appeal No. 11-56776—voluntarily dismissed pursuant to Objector's FRAP 42(b) motion[174]	• No motion for cost bond • No motion for cost bond

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Milgram v. Chase Bank USA, N.A., No. 2:10-cv-00336 (C.D. Cal. Jan. 15, 2010) • 8 Objections Submitted[175] • 11/22/2011: Final Approval Order granting final approval to the class action settlement, and awarding attorneys' fees, costs, and class representative's service award[176]	2 Appeals Filed: • 12/22/2011: Objector Andrew Cesare – filed by Darrell Palmer/Law Offices of Darrell Palmer (Solana Beach, CA) • 1/13/2012: Objector Anthony Cannata – filed by Sam P. Cannata/Cannata Phillips LPA, LLC (Cleveland, OH)	• 1/31/2012: Appeal No. 12-55002—voluntarily dismissed pursuant to FRAP 42(b) stipulation of the parties[177] • 2/9/2012: Appeal No. 12-55139—voluntarily dismissed pursuant to FRAP 42(b) stipulation of the parties[178]	• No motion for cost bond • No motion for cost bond
In re Toyota Motor Corporation Securities Litigation, No. 2:10-cv-00922 (C.D. Cal. Feb. 8, 2010) • Consolidated Class Action • 1 Objection Submitted[179] • 3/15/2013: Final Judgment and Order of Dismissal with Prejudice granting motion for final approval of the securities class action settlement; Order approving plan of allocation; and Order granting motion for attorneys' fees and reimbursement of litigation expenses.[180]	1 Appeal Filed: • 4/8/2013: Objector James J. Hayes – filed *pro se*	• 5/3/2013: Appeal No. 13-55613—voluntarily dismissed pursuant to Objector's FRAP 42(b) motion[181]	• No motion for cost bond
Keller v. Gaspari Nutrition, Inc., No. 2:11-cv-06158 (C.D. Cal. July 26, 2011) • 1 Objection Submitted[182] • 3/20/2012: Order granting motion for final approval of the class action settlement, and motion for attorneys' fees, costs and Plaintiff service award.[183]	1 Appeal Filed: • 4/17/2012: Objector Bryan Anderson – filed *pro se*	• 5/2/2012: Appeal No. 12-55737—voluntarily dismissed with prejudice pursuant to FRAP 42(b) stipulation of the parties [184]	• No motion for cost bond
Eastern District of California:	0 objector appeals		

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Northern District of California: 65 objector appeals			
In re: Bextra and Celebrex Marketing Sales Practices and Product Liability Litigation, MDL No. 1699, No. 3:05-md-01699 (N.D. Cal. Sept. 8, 2005) • MDL • 5 Objections Submitted[185] • 9/28/2009: Order and Final Judgment granting motions for (1) final approval of the purchase claims class action settlement, and (2) attorney fees, reimbursement of expenses and compensation to named plaintiffs. • 10/09/2009: Second Revised Order and Final Judgment approving the settlement between purchase claims classes and Defendant Pfizer, Inc. and awarding of attorneys' fees.[186]	2 Appeals Filed: • 10/5/2009: Objectors Barbara Hurst and Diane Gibson – filed by Dennis D. Gibson/Gibson, McClure, Wallace & Daniels, LLP (Dallas, TX); Mary L. Needham/Law Offices of Mary L. Needham (San Rafael, CA) – 10/14/2009: Revised notice of appeal to include the 10/9/2009 Revised Order and Final Judgment • 10/27/2009: Objectors Janice Johnson and Wilma Thompson – filed by Michele Miller/McKague & Tong, LLP (San Francisco, CA); Jeffrey L. Weinstein/ Jeffrey L. Weinstein, P.C. (Athens, TX); Steve A. Miller/ Steve A. Miller, P.C. (Denver, CO)	• 11/12/2009: Appeal No. 09-17284—voluntarily dismissed pursuant to FRAP 42(b) stipulation of the parties[187] • 11/12/2009: Appeal No. 09-17420—voluntarily dismissed pursuant to FRAP 42(b) stipulation of the parties[188]	• No motion for cost bond • No motion for cost bond
In re TFT-LCD (Flat Panel) Antitrust Litigation, MDL No. 1827, No. 3:07-md-1827 (N.D. Cal. Apr. 20, 2007) • MDL Settlement #1 : Settling Plaintiffs (Indirect Purchaser Plaintiffs and 8 Settling States) jointly agree to final settlement with Settling Defendants (7 of the 10 named defendants) • 18 Objections Submitted[189] • 7/11/2012: Final Judgment of dismissal with prejudice and Order granting final approval of combined class, *parens patrie,* and governmental entity settlements.[190]	13 Total Appeals Filed Settlement #1—5 Appeals Filed: • 8/6/2012: Objectors Johnny Kessel and Alison Paul – filed by Joseph Darrell Palmer/Law Offices of Darrell Palmer PC (Solano Beach, CA) • 8/8/2012: Objector Andrea Kane – filed by Grenville Pridham/Law Offices of Grenville Pridham (Tustin, CA) – 09/24/2012: notice of appearance in No. 12-16839 for Andrea Kane filed by Christopher V. Langone/Law Offices of Christopher Langone (Ithaca, NY)	• Appeal No. 12-16830—pending[197] • 6/26/2013: Appeal No. 12-16839—dismissed for failure to prosecute[198]	• No motion for cost bond • No motion for cost bond

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	• 8/10/2012: Objector Ira Conner Erwin – filed *pro se* – 9/10/2012: notice of appearance in Appeal No. 12-16780 filed on behalf of Appellant Ira Erwin by Christopher Andreas Bandas/ Bandas Law Firm, P.C. (Corpus Christi, TX) – 4/29/2013: amended notice of appeal adding relevant orders re April 2013 Settlement #2 (see below)	• Appeal No. 12-16780—pending[199]	• No motion for cost bond
	• 8/10/2012: Objector Luis Mario Santana – filed *pro se* – 9/10/2012: notice of appearance in Appeal No. 12-16782 filed on behalf of Appellant Luis Santano by Christopher Andreas Bandas/ Bandas Law Firm, P.C. (Corpus Christi, TX) – 4/29/2013: amended notice of appeal adding relevant orders re April 2013 Settlement #2 (see below)	• Appeal No. 12-16782—pending[200]	• No motion for cost bond
	• 8/10/2012: Objector Stefan Rest – filed *pro se* – 9/10/2012: notice of appearance in Appeal No. 12-16788 filed on behalf of Appellant Stefan Rest by Christopher Andreas Bandas/ Bandas Law Firm, P.C. (Corpus Christi, TX) – 4/29/2013: amended notice of appeal adding relevant orders re April 2013 Settlement #2 (see below)	• Appeal No. 12-16788—pending[201]	• No motion for cost bond
Settlement #2: Settling Plaintiffs (Indirect Purchaser Plaintiffs and 8 Settling States) jointly agree to final settlement with Settling Defendants (remaining 3 of the 10 original named defendants) • 11 Objections Submitted[191] • 3/29/2013: Order Granting Final Approval Of Combined Class, *Parens Patriae,* And Governmental Entity Settlements With AUO, LG Display, And Toshiba Defendants; Final	Settlement #2—8 Appeals Filed: • 4/26/2013: Objectors Alison Paul, Johnny Kessel and Leveta Chesser – filed by Joseph Darrell Palmer/Law Offices of Darrell Palmer PC (Solano Beach, CA) – 2/22/2013: Objectors Paul and Chesser and their counsel Palmer appealed from the Order of Contempt entered against them on 2/19/2013[196]	• 7/12/2013: Appeal No. 13-15929—dismissed for failure to prosecute[202]	• No motion for cost bond

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Judgment of Dismissal With Prejudice; Award of Attorneys Fees, Expenses, and Incentive Awards[192] • 4/1/2013: Amended Order[193] • 4/1/2013: Final Judgment Re Indirect Purchaser Plaintiff/State Entity Class Actions[194] • 4/3/2013: Second Amended Order[195]	• 4/27/2013: Objector CBC, Inc. – filed by Micah R. Jacobs/Jacobs Law Group SF (San Francisco, CA); Brian M. Torres/ Sheftall & Torres, P.A. (Miami, FL) – 8/5/2013: notice of appearance on behalf of Appellant CBC, Inc. filed by John G. Crabtree/Crabtree & Associates, P.A. (Key Biscayne, FL)	• Appeal No. 13-15920—pending	• No motion for cost bond
	• 4/27/2013: Objector Margo Bradley – filed by Micah R. Jacobs/Jacobs Law Group SF (San Francisco, CA); Brian M. Torres/ Sheftall & Torres, P.A. (Miami, FL) – 8/5/2013: notice of appearance on behalf of Appellant Bradley filed by John G. Crabtree/Crabtree & Associates, P.A. (Key Biscayne, FL)	• Appeal No. 13-15917—pending	• No motion for cost bond
	• 4/27/2013: Objector Alex Martinez – filed by Micah R. Jacobs/Jacobs Law Group SF (San Francisco, CA); Brian M. Torres/ Sheftall & Torres, P.A. (Miami, FL) – 8/5/2013: notice of appearance on behalf of Appellant Bradley filed by John G. Crabtree/Crabtree & Associates, P.A. (Key Biscayne, FL)	• Appeal No. 13-15916—pending	• No motion for cost bond
	• 4/29/2013: Objectors Barbara Cochran, Kevin Luke, Geri Maxwell, Maria Marshall, Wayne Marshall and Gerri Marshall – filed by John J. Pentz/ Class Action Fairness Group (Maynard, MA) (for Objectors Cochran and Luke) – filed by George W. Cochran/ Cochran & Cochran (Louisville, KY) (for Objectors Maxwell, Maria Marshall, Wayne Marshall and Gerri Marshall)	• Appeal No. 13-15930—pending	• No motion for cost bond
	• 4/29/2013: Objectors Shannon Cashion, W. Christopher McDonough, Kelly Kress, and Mark Schulte – filed by Steve A. Miller/Steve A. Miller, PC (Denver, CO) – Jonathan E Fortman/Law Office of Jonathan E. Fortman, LLC (Ellisville,	• Appeal No. 13-15934—pending	• No motion for cost bond

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	MO) (listed for Objector McDonough on appeal) – John C Kress/The Kress Law Firm, LLC(St. Louis, MO) (listed for Objector Kress on appeal) • 5/7/2013: Objector Julius Dunmore – filed by Paul S. Rothstein/ (Gainesville, FL) • 6/13/2013: Objector Keena Dale – filed by N. Albert Bacharach, Jr./Law Offices of N. Albert Bacharach, Jr.(Gainesville, FL)	• Appeal No. 13-15915—pending • Appeal No. 13-16216—pending	• No motion for cost bond • No motion for cost bond
In re: Cathode Ray Tube (CRT) Antitrust Litigation, MDL No. 1917, No. 3:07-cv-05944 (N.D. Cal. Nov. 26, 2007) • MDL • 1 Objection Submitted[203] • 3/22/2012: Order and Final Judgment of Dismissal with Prejudice granting Indirect Purchaser Plaintiffs' motion for final approval of class action settlement with Chunghwa Picture Tubes, Ltd.[204]	1 Appeal Filed: • 3/23/2012: Objector Sean Hall – filed *pro se* – on 6/14/2012, attorney Joseph Darrell Palmer/Law Offices of Darrell Palmer (Solana Beach, CA), filed a notice of appearance with the Clerk of the Ninth Circuit as counsel on Mr. Hull's behalf[205]	• 7/30/2012: Appeal No. 12-17602—voluntarily dismissed pursuant to Objector's FRAP 42(b) motion[206]	• No motion for cost bond
In re Maxim Integrated Products, Inc., Securities Litigation, No. 5:08-cv-00832 (N.D. Cal. Feb. 6, 2008) • Consolidated Class Action • 1 Objection Submitted[207] • 9/29/2010: Final Judgment and Order of Dismissal granting motions for final approval of the securities class action settlement and approving plan of allocation.[208] • 11/1/2010: Order granting motion for attorney fees and reimbursement of litigation expenses.[209]	1 Appeal Filed: • 12/1/2010: Objector National Automatic Sprinkler Industry Pension Fund – filed by Irwin B. Schwartz/BLA Schwartz, PC (Los Angeles, CA)	• 1/4/2011: Appeal No. 10-17756—voluntarily dismissed pursuant to Objector's FRAP 42(b) motion[210]	• No motion for cost bond

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Pecover v. Electronic Arts, Inc., No. 4:08-cv-2820 (N.D. Cal. June 5, 2008) • 9 Objections Submitted[211] • 5/30/2013: Final Judgment and Order of dismissal granting final approval of class action settlement.[212] • 6/19/2013: Order awarding attorneys' fees.[213]	1 Appeal Filed: • 6/28/2013: Objector Aaron Miller – filed by Steve A. Miller/ Steve A. Miller, PC (Denver, CO)	• 8/16/2013: Appeal No. 13-16336—voluntarily dismissed pursuant to FRAP 42(b) stipulation of the parties[214]	• No motion for cost bond
Lane v. Facebook, No. 5:08-cv-03845 (N.D. Cal. Aug. 12, 2008) • 4 Objections Submitted[215] • 3/17/2010: Order granting motion for final approval of class action settlement with Defendant Facebook.[216] • 5/24/2010: Final Judgment and Order of Dismissal approving settlement and motion for attorney fees and costs.[217]	2 Appeals Filed: • 6/22/2010: Objector Ginger McCall – filed by Gregory A. Beck/Public Citizen Litigation Group (Washington, DC); Mark A. Chavez/Chavez & Gertler LLP (Mill Valley, CA); Philip S. Friedman/Friedman Law Offices, PLLC (Washington, DC); Michael Page/Williams & Connolly LLP (Washington, DC) (post appeal) • 6/25/2010: Objectors Megan Marek and Benjamin Trotter – filed by John W. Davis/Law Office of John W. Davis (San Diego, CA); Steven Helfand/Helfand Law Offices (San Francisco, CA) (post appeal)	• 9/20/2012: Appeal No. 10-16380—Judgment of the district court affirmed per published opinion[218] • 9/20/2012: Appeal No. 10-16398—Judgment of the district court affirmed per published opinion[219]	• No motion for cost bond • No motion for cost bond
The NVIDIA GPU Litigation, No. 5:08-cv-04312 (N.D. Cal. Sept. 12, 2008) • Consolidated Class Action • 50 Objections Submitted[220] • 12/20/2010: Final Judgment granting (1) settlement class plaintiffs/owners of class computers motions for final approval of class action settlement with Nvidia Corp., and (2) motion for attorney fees, expenses and reimbursements for plaintiffs.[221]	5 Appeals Filed:[222] • 1/18/2011: Hewlett Packard Consumer Objectors – filed by Michael F. Ram/Ram & Olson LLP (San Francisco, CA); Richard B. Rosenthal/The Law Offices of Richard B. Rosenthal, P.A. (San Rafael, CA); Marc H. Edelson/ Edelson & Associates (Doylestown, PA) • 1/18/2011: Objector Frank Barbara – filed by Darrell Palmer/Law Offices of Darrell Palmer (Solano Beach, CA)	• 3/28/2012: Appeal No. 11-15182—voluntarily dismissed pursuant to Objector's FRAP 42(b) motion[223] • Appeal No. 11-15186—pending[224]	• No motion for cost bond • No motion for cost bond

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	• 1/18/2011: Objector Steven F. Helfand – filed by Marcus Daniel Merchasin/The Law Office of Marcus Daniel Merchasin (San Francisco, CA); John W. Davis/Law Office of John W. Davis (San Diego, CA) (post appeal)	• Appeal No. 11-15190—pending[225]	• No motion for cost bond
	• 1/19/2011: Objector Chase A. Thompson – filed by Steve A. Miller/Steve A. Miller, PC (Denver, CO)	• Appeal No. 11-15191—pending[226]	• No motion for cost bond
	• 1/19/2011: Objector Nikki Johnson – filed *pro se* – 01/31/2011: notice of appearance in No. 11-15192 for Nikki Johnson filed by Thomas L. Cox, Jr./The Cox Firm (Dallas, TX)	• Appeal No. 11-15192—pending[227]	• No motion for cost bond
Ross v. Trex Company, Inc., No. 3:09-cv-00670 (N.D. Cal. Feb. 13, 2009)[228] • Consolidated Class Action • 18 Objections Submitted[229] • 3/16/2010: Order granting (1) motion for final approval of the class action settlement of the surface flaking claims asserted by plaintiffs in the *Ross* action (09-cv-00670) against Defendant Trex Company, Inc.; (2) approval of requested attorneys' fees and expenses to class counsel, and separate incentive awards to named plaintiffs.[230] • 4/7/2010: Final Order approving class action settlement of *Ross* plaintiffs' surface flaking claims, overruling all objections, and dismissing released claims with prejudice.[231]	1 Appeal Filed: • 4/14/2010: Objectors Mark Okano and Sharon Ding – filed by Steve W. Berman/Hagens Berman Sobol Shapiro LLP (Seattle, WA)	• 7/30/2010: Appeal No. 10-15871—voluntarily dismissed pursuant to FRAP 42(b) stipulation of the parties[232]	• No motion for cost bond

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In re Wachovia Corporation "Pick-A-Payment" Mortgage Marketing and Sales Practices Litigation, No. 5:09-md-02015 (N.D. Cal. Mar. 13, 2009) • MDL • 36 Objections Submitted[233] • 5/17/2011: Order and Judgment granting settlement class Plaintiffs' (1) motion for final approval of class action settlement with Defendant Wachovia Corporation; and (2) motion for attorneys' fees and costs and service payments to class representatives.[234]	3 Appeals Filed:[235] • 6/10/2011: Objector Marcella M. Rose – filed by Lawrence J. Salisbury/ Majors & Fox (San Diego, CA); Malinda R. Dickenson/Law Office of Malinda R. Dickenson (San Diego, CA) • 6/13/2011: Objectors Nathaniel C. Dayton, Stephen B. Fine, and Ariel Brookman Fine – filed by William Breck/ The Public Interest Law Firm, Inc. (Reno, NV); Adriana Dominguez/ Dominguez Law Office (Costa Mesa, CA) • 6/15/2011: Objectors Robert E Flores, Sharon L Flores, James Rudolph, and Donald Smith – filed by attorney J. Darrell Palmer/ Law Offices of Darrell Palmer (Solana Beach, CA)	• 8/30/2011: Appeal No. 11-16507—voluntarily dismissed pursuant to Objector's FRAP 42(b) motion[236] • 6/30/2011: Appeal No. 11-16510—voluntarily dismissed pursuant to FRAP 42(b) stipulation of the parties[237] • 7/21/2011: Appeal No. 11-16513—voluntarily dismissed pursuant to FRAP 42(b) stipulation of the parties[238]	• 7/1/2011: Plaintiffs asked the court to order Objector Rose to post an appellate cost bond of $116,250[239] • 8/18/2011: court ordered Objector Rose to post a $15,000 bond by 9/26/2011[240] • Appeal No. 11-16510 dismissed prior to Plaintiffs' appellate cost bond motion • 7/1/2011: Plaintiffs filed a motion asking the court to order Objectors Flores, Rudolph and Smith to post an appellate cost bond of $116,250[241] • Appeal No. 11-16513 dismissed prior to court's ruling on plaintiffs' cost bond motion
Fiori v. Dell, Inc., No. 5:09-cv-01518 (N.D. Cal. Apr. 7, 2009) • Consolidated Class Action • 3 Objections Submitted[242] • 4/1/2011: Final Judgment and Order granting final approval of class action settlement.[243] • 7/6/2011: Order granting motion for attorney fees, costs, and incentive awards.[244]	1 Appeal Filed: • 4/26/2011: Objectors Margaret Munoz and Cery Perle – filed by J. Darrell Palmer/ Law Offices of Darrell Palmer (Solana Beach, CA) – 8/5/2011: appeal amended to add the 07/06/2011 Order granting class counsel's motion for attorney fees	• 9/7/2011: Appeal No. 11-16109—voluntarily dismissed pursuant to FRAP 42(b) stipulation of the parties[245]	• No motion for cost bond

Class Action Objector Appeals in the Ninth Circuit Court of Appeals from Cases Filed Between January 1, 2008, and July 1, 2013[145]

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District Court • MDL/Consolidated Class Action • # Objections Submitted • Date Final Approval of Class Action Settlement Granted	Appellate Court • # Appeals Filed by Objector(s) • Date Notice of Appeal(s) Filed • Identity of Filing Objector(s) & Attorney(s) (if any)	Final Disposition of Objector Appeal(s) • Date & Nature of Final Disposition • Indicate if Appeal is "pending"	FRAP 7 Cost Bond • Motion Filed • Disposition of Motion • Amount Imposed (if granted)
In re: Online DVD Rental Antitrust Litigation, No. 4:09-md-02029 (N.D. Cal. Apr. 13, 2009) • MDL • 30 Objections Submitted[246] • 3/29/2012: Order and Final Judgment granting: (1) motion for final approval of class action settlement between settlement class Plaintiffs and Wal-Mart Stores, Inc. and Walmart.com USA LLC; and (2) class counsel's motion for attorneys' fees, reimbursement of expenses, and payments to class representatives.[247]	6 Appeals Filed:[248] • 3/30/2012: Objector Theodore H. Frank – filed *pro se* – Mr. Frank is an attorney listing the address of the Center for Class Action Fairness on his notice of appeal	• Appeal No. 12-15705—pending	• No motion for cost bond
	• 4/17/2012: Objector Jon M. Zimmerman – filed by Joshua R. Furman/Joshua R. Furman Law Corp. (Sherman Oaks, CA)	• Appeal No. 12-15889—pending	• No motion for cost bond
	• 4/23/2012: Objector Edmund F. Bandas – filed *pro se* – 05/22/2012: notice of appearance in Appeal No. 12-15957 filed on behalf of Appellant Edmund F. Bandas by Christopher Andreas Bandas/ Bandas Law Firm, P.C. (Corpus Christi, TX)	• Appeal No. 12-15957—pending	• No motion for cost bond
	• 4/27/2012: Objector Maria Cope – filed by Joseph Darrell Palmer/ Law Offices of Darrell Palmer (Solana Beach, CA)	• Appeal No. 12-15996—pending	• No motion for cost bond
	• 4/30/2012: Objector John Sullivan – filed by Mark Lavery/The Lavery Law Firm (Des Plaines, IL); Christopher V. Langone/ Law Office of Christopher Langone (Ithaca, NY); Grenville Thomas Pridham/Law Office of Grenville Pridham (Tustin, CA)	• Appeal No. 12-16010—pending	• No motion for cost bond
	• 4/30/2012: Objector Tracey Klinge Cox – filed by Gary W. Sibley & Tracey Klinge Cox/The Sibley Firm (Dallas, TX) – 5/18/2012: notice of appearance in Appeal No. 12-16038 filed on behalf of Appellant Tracey Klinge Cox by Attorney Gary W. Sibley/The Sibley Firm (Dallas, TX)	• Appeal No. 12-16038—pending	• No motion for cost bond

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District Court • MDL/Consolidated Class Action • # Objections Submitted • Date Final Approval of Class Action Settlement Granted	Appellate Court • # Appeals Filed by Objector(s) • Date Notice of Appeal(s) Filed • Identity of Filing Objector(s) & Attorney(s) (if any)	Final Disposition of Objector Appeal(s) • Date & Nature of Final Disposition • Indicate if Appeal is "pending"	FRAP 7 Cost Bond • Motion Filed • Disposition of Motion • Amount Imposed (if granted)
Yingling v. eBay, Inc., No. 5:09-cv-01733 (N.D. Cal. Apr. 21, 2009) • 2 Objections Submitted[249] • 3/31/2011: Final Order and Judgment granting (1) Plaintiffs' motion for final approval of class action settlement with Defendant eBay; and (2) motion for attorney fees and expenses and class representative incentive compensation awards.[250]	1 Appeal Filed: • 4/4/2011: Objector Joseph Balla – filed by Joseph Darrell Palmer/ Law Offices of Darrell Palmer (Solana Beach, CA) – 8/5/2011: filed an amended notice of appeal to appeal from the courts' July 5, 2011 Order requiring Objector Balla to post a $5,000 appeal bond	• 8/12/2011:[251] Appeal No. 11-16033—voluntarily dismissed pursuant to FRAP 42(b) stipulation of the parties[252]	• 4/25/2011: Plaintiffs motioned the court to order Objector Balla to post a $5,000 appeal bond[253] • 7/5/2011: court orders Objector Balla to post an appeal bond in the amount of $5,000 on or before July 25, 2011[254]
Embry v. ACER America Corp., No. 5:09-cv-01808 (N.D. Cal. Apr. 24, 2009) • 2 Objections Submitted[255] • 2/14/2012: Order granting settlement class plaintiffs (1) motion for final approval of the class action settlement; and (2) motion for attorneys fees, costs and incentive to named plaintiff.[256]	2 Appeals Filed: • 3/12/2012: Objector Christopher Bandas – filed by Joseph Darrell Palmer/ Law Offices of Darrell Palmer (Solana Beach, CA) – Appeal No. 12-15555 was dismissed on 04/18/2012 for failure to pay fees, and reinstated on 6/25/12 after Objector Bandas' payment of fees.[257] – Notice of Appeal amended on 8/6/2012 (to include July 31, 2012 Bond Order) & 9/6/2012 (to include Aug. 31, 2012 Contempt Order)[258]	• 10/2/2012: Appeal No. 12-15555—voluntarily dismissed pursuant to Objector's FRAP 42(b) motion[260]	• 7/11/2012: After the Ninth Circuit reinstated Bandas' appeal on June 25, 2012, Plaintiffs filed a motion for reconsideration requesting that the Court's June 5, 2012 Order to post a $70,650 appellate bond be applied, jointly and severally, to Bandas and his attorney Darrell Palmer.[262] • 7/31/2012: court ordered Objector Bandas to post an appellate bond of $70,650 by Aug. 6, 2012, or file a notice of dismissal of his appeal[263]
	• 3/14/2012: Objector Sam P. Cannata[259] – filed *pro se*	• 6/15/2012: Appeal No. 12-15633—voluntarily dismissed pursuant to Objector's FRAP 42(b) motion[261]	• 3/23/2012 & 05/04/2012: Plaintiff requests court to grant its original motion to impose a $346,814.51 bond on Objector Cannata alone[264] • 6/5/2012: Court grants Plaintiffs motion in part and requires Objector Cannata to

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District Court • MDL/Consolidated Class Action • # Objections Submitted • Date Final Approval of Class Action Settlement Granted	Appellate Court • # Appeals Filed by Objector(s) • Date Notice of Appeal(s) Filed • Identity of Filing Objector(s) & Attorney(s) (if any)	Final Disposition of Objector Appeal(s) • Date & Nature of Final Disposition • Indicate if Appeal is "pending"	FRAP 7 Cost Bond • Motion Filed • Disposition of Motion • Amount Imposed (if granted)
			either post an appellate bond of $70,650 within 14 days, or file a notice of dismissal of his appeal[265]
In re: MagSafe Apple Power Adapter Litigation, No. 5:09-cv-01911 (N.D. Cal. May 1, 2009) • Consolidated Class Action • 11 Objections Submitted[266] • 3/8/2012:[267] Judgment and Order granting: (1) motion for final approval of class action settlement between settlement class Plaintiffs and Defendant Apple, Inc.; and (2) plaintiffs' motion for attorneys' fees, reimbursement of expenses, and incentive awards.	5 Appeals Filed:[268] • 3/23/2012: Objector Dale Funk – filed *pro se*	• 6/19/2012: Appeal No. 12-15740—voluntarily dismissed pursuant to Objector's FRAP 42(b) motion[269]	• 4/16/2012: Plaintiffs asked the Court to order Objector Funk to post an appeal bond in the amount of $200,000[274]
	• 4/3/2012: Objector Robert J. Gaudet – filed *pro se*	• Appeal No. 12-15757—pending; notice of appeal amended on 08/29/2012 to include May 29, 2012 Bond Order and Aug. 7, 2012 Contempt Order[270]	• 4/10/2012: Plaintiffs asked the Court to order Objector Gaudet to post an appeal bond in the amount of $200,000[275]
	• 4/6/2012: Objector Marie Gryphon – filed by Theodore H. Frank/Center for Class Action Fairness (Washington, DC); Daniel Greenberg/Greenberg Legal Services (Little Rock, Ark.)	• Appeal No. 12-15782—pending; notice of appeal amended on 06/02/12 to include May 29, 2012 Bond Order[271]	• 4/16/2012: Plaintiffs asked the Court to order Objector Gryphon to post an appeal bond in the amount of $200,000[276]
	• 4/6/2012: Objector Jeremy Lee – filed *pro se* – 06/13/2012: notice of appearance in Appeal No. 12-15816 filed on behalf of Objector/Appellant Jeremy Lee by Joseph Darrell Palmer/ Law Offices of Darrell Palmer (Solana Beach, CA)	• 7/20/2012: Appeal No. 12-15816—voluntarily dismissed pursuant to Objector's FRAP 42(b) motion[272]	• 4/13/2012: Plaintiffs asked the Court to order Objector Lee to post an appeal bond in the amount of $200,000[277] NOTE: On 5/29/2012 for Appeals above, the court ordered each Objector to either post a $15,000 appeal bond or dismiss appeal by June 8, 2012.[278]
	• 5/2/2012: Objector Kerry Ann Sweeney – filed by Joseph Darrell Palmer/ Law Offices of Darrell Palmer (Solana Beach, CA)	• 8/7/2012: Appeal No. 12-16053—voluntarily dismissed pursuant to Objector's FRAP 42(b) motion[273]	• 6/13/2012: Plaintiffs asked the Court to order Objector Sweeney and her attorney Palmer to post a $25,000 appeal bond

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			for anticipated taxable costs[279] • 7/6/2012: Objector Sweeney is ordered on or before July 20, 2012, to post a $15,000 bond or file a notice of dismissal[280]
Ko v. Natura Pet Products, Inc., No. 4:09-cv-02619 (N.D. Cal. June 17, 2009) • 3 Objections Submitted[281] • 9/10/2012: Order granting (1) motion for final approval of the class action settlement with Defendant Natura Pet Products, Inc.; (2) motion for attorneys' fees, costs, and incentive award.[282]	1 Appeal Filed: • 10/11/2012: Objector Alfredo Walsh – filed *pro se* – 11/27/2012: notice of appearance in Appeal No. 12-17296 filed on behalf of Appellant Alfredo Walsh by Christopher Andreas Bandas/ Bandas Law Firm, P.C. (Corpus Christi, TX)	• 4/24/2013: Appeal No. 12-17296—dismissed for failure to prosecute[283]	• No motion for cost bond
Schulken v. Washington Mutual Bank, No. 5:09-cv-02708 (N.D. Cal. June 18, 2009). • 1 Objections Submitted[284] • 11/13/2012: Order granting (1) motion for final approval of the class action settlement with Defendant JP Morgan Chase Bank; (2) motion for attorneys' fees, expenses and incentive award.[285]	1 Appeal Filed: • 1/30/2013: Objector Donald R. Earl[286] – filed *pro se*	• Appeal No. 13-15191—pending	• 2/15/2013: Plaintiffs asked court to order Objector Earl to immediately post a $20,000 appeal bond[287] • 4/2/2013: The court ordered Objector Earl to post a $5,000 appeal bond[288]
Lemus v. H&R Block Tax and Business Services, Inc., No. 3:09-cv-03179 (N.D. Cal. July 13, 2009) • 4 Objections Submitted[289] • 8/22/2012: Judgment and Order granting final approval of class action settlement and awarding attorneys' fees, expenses and incentive award.[290] • 9/10/2012: Order granting Plaintiffs' motion for reconsideration and modifying Order granting final approval of settlement and award of attorneys' fees.[291]	1 Appeal Filed:[292] • 9/21/2012: Objector Maria D. Merlan – filed by Douglas Caiafa/Douglas Caiafa, A Professional Law Corporation (Los Angeles, CA)	• 9/28/2012: Appeal No. 13-16628—voluntarily dismissed pursuant to FRAP 42(b) stipulation of the parties[293]	• No motion for cost bond

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In re: Google Buzz Privacy Litigation, No. 5:10-cv-00672 (N.D. Cal. Feb. 17, 2010) • Consolidated Class Action • 47 Objections Submitted[294] • 5/31/2011: Order granting final approval of class action settlement, approval of cy pres awards, and awarding attorney fees.[295] • 6/2/2011: Amended Order granting final approval of class action settlement, approval of cy pres awards, and awarding attorney fees.[296] • 6/17/2011: Order granting final application for reimbursement of expenses.[297]	5 Appeals Filed:[298] • 6/16/2011: Objector Kervin Walsh – filed by Martin Murphy/ (San Francisco, CA) (attorney identified on the notice of appeal) – 07/06/2011: notice of appearance in Appeal No. 11-16587 filed on behalf of Appellant Kervin Walsh by Christopher Andreas Bandas/ Bandas Law Firm, P.C. (Corpus Christi, TX)	• 11/21/2011: Appeal No. 11-16587—voluntarily dismissed pursuant to FRAP 42(b) stipulation of the parties[299]	• No motion for cost bond
	• 6/28/2011: Objector Megan Marek – filed by C. Benjamin Nutley/Kendrick & Nutley (Pasadena, CA); John W. Davis/Law Office of John W. Davis (San Diego, CA)	• 11/21/2011: Appeal No. 11-16638—voluntarily dismissed pursuant to FRAP 42(b) stipulation of the parties[300]	• No motion for cost bond
	• 6/30/2011: Objector Steven Cope – filed by Joseph Darrell Palmer/ Law Offices of Darrell Palmer (Solana Beach, CA)	• 11/21/2011: Appeal No. 11-16639—voluntarily dismissed pursuant to FRAP 42(b) stipulation of the parties[301]	• No motion for cost bond
	• 6/30/2011: Objectors Brent Clifton and Warren Sibley – filed *pro se* – 07/13/2011: notice of appearance in No. 11-16640 for Brent Clifton and Warren Sibley filed by Thomas L. Cox, Jr./The Cox Firm (Dallas, TX)	• 11/21/2011: Appeal No. 11-16640—voluntarily dismissed pursuant to FRAP 42(b) stipulation of the parties[302]	• No motion for cost bond
	• 7/1/2011: Objectors Jon M. Zimmerman, Alison Jackson, and Tanya Rudgayzer – filed by Joshua R. Furman/Joshua R. Furman Law Corp.(Sherman Oaks, CA) (for Objector Zimmerman) – filed by Jeffrey P. Harris & Alan J. Statman/Harris, Statman & Eyrich, LLC (Cinncinati, OH) (for Objector Jackson) – filed by Daniel A. Osborn/Osborn Law, PC (New York, NY)(for Objector Rudgayzer)	• 11/21/2011: Appeal No. 11-16642—voluntarily dismissed pursuant to FRAP 42(b) stipulation of the parties[303]	• No motion for cost bond

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Nguyen v. BMW of North America, LLC, No. 3:10-cv-02257 (N.D. Cal. May 25, 2010) • Consolidated Class Action • 11 Objections Submitted[304] • 4/20/2012: Order granting final approval of joint motion for class action settlement[305] • 4/20/2012: Order awarding attorneys' fees and costs.[306] • 5/08/2012: Final Judgment dismissing Defendant with prejudice.[307]	1 Appeal Filed:[308] • 5/21/2012: Objectors Devesh M. Nirmul, Lawrence C. Weiner, and Michael B. Winn – filed by Jennifer Sarnelli/Gardy & Notis, LLP (Englewood Cliffs, NJ); William B. Federman/Federman & Sherwood (Oklahoma City, OK)	• 7/11/2012: Appeal No. 12-16210—voluntarily dismissed pursuant to FRAP 42(b) stipulation of the parties[309]	• No motion for cost bond
In re Apple iPhone 4 Products Liability Litigation, No. 5:10-md-02188 (N.D. Cal. Nov. 9, 2010). • MDL • 21 Objections Submitted[310] • 8/10/2012: Order granting motion for final settlement approval and motion for attorneys' fees and costs.[311]	3 Appeals Filed:[312] • 9/7/2012: Objector Alison Paul – filed by Joseph Darrell Palmer/ Law Offices of Darrell Palmer (Solana Beach, CA) • 9/10/2012: Objector Michael J. Schulz – filed *pro se* – 09/28/2012: notice of appearance in Appeal No. 12-17004 filed on behalf of Appellant Michael J. Schulz by Christopher Andreas Bandas/ Bandas Law Firm, P.C. (Corpus Christi, TX) • 9/10/2012: Objector Burt Chapa – filed *pro se* – 09/28/2012: notice of appearance in Appeal No. 12-17005 filed on behalf of Appellant Bert Chapa by Christopher Andreas Bandas/ Bandas Law Firm, P.C. (Corpus Christi, TX)	• 1/11/2013: Appeal No. 12-16994—voluntarily dismissed pursuant to FRAP 42(b) stipulation of the parties[313] • 1/11/2013: Appeal No. 12-17004—voluntarily dismissed pursuant to FRAP 42(b) stipulation of the parties[314] • 1/11/2013: Appeal No. 12-17005—voluntarily dismissed pursuant to FRAP 42(b) stipulation of the parties[315]	• No motion for cost bond • No motion for cost bond • No motion for cost bond

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In re: Netflix Privacy Litigation, No. 5:11-cv-00379 (N.D. Cal. Jan. 26, 2011) • Consolidated Class Action • 100 Objections Submitted[316] • 3/18/2013: Final Judgment and Order of dismissal with prejudice granting: (1) motion for final approval of class action settlement; and (2) motion for attorneys' fees, expenses and incentive award.[317]	6 Appeals Filed:[318] • 4/12/2013: Objector Gary Wilens – filed by Jaffrey Wilens/Lakeshore Law Center (Yorba Linda, CA)	• Appeal No. 13-15723—pending	• 5/31/2013: Plaintiffs Asked Court to order each Objector to post a $21,519 appeal bond[319] • Status: Hearing on motion set for Aug. 23, 2013 vacated; court has taken bond motion under submission without oral argument on 08/19/2013 with order to follow
	• 4/15/2013: Objector Matthew D. Tanner – filed by Clinton A. Krislov/ Krislov & Associates, Ltd. (Chicago, IL)	• Appeal No. 13-15733—pending	• Motion pending (see above)
	• 4/15/2013: Objectors Stephen C. Griffis & Hugh Ramsey – filed by Steve A. Miller/ Steve A. Miller, PC (Denver, CO) – 07/22/2013: notice of appearance in Appeal No. 13-15734 for Appellants Griffis and Ramsey by John Jacob Pentz/Class Action Fairness Group (Maynard, MA)	• Appeal No. 13-15734—pending	• Motion pending (see above)
	• 4/16/2013: Objector Bradley Schulz – filed by Christopher Andreas Bandas/ Bandas Law Firm, P.C. (Corpus Christi, TX); Timothy R. Hanigan/ (Woodland Hills, CA)	• Appeal No. 13-15751—pending	• Motion pending (see above)
	• 4/16/2013: Objectors Andrew Cesare, William Ford, & Katherine Strohlein – filed by Joseph Darrell Palmer/ Law Offices of Darrell Palmer PC (Solana Beach, CA)	• Appeal No. 13-15754—pending	• Motion pending (see above)
	• 4/17/2013: Objector Tracey C. Klinge – filed by Thomas L. Cox, Jr./The Cox Firm (Dallas, TX)	• Appeal No. 13-15759—pending	• Motion pending (see above)

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Farrell v. OpenTable, Inc., No. 3:11-cv-01785 (N.D. Cal. Apr. 12, 2011). • 3 Objections Submitted[320] • 1/30/2012: Order granting (1) motion for final approval of class action settlement, and (2) motion for attorney fees, expenses and incentive award.[321]	1 Appeal Filed: • 2/21/2012: Objector Fred Sondheimer – filed by Lawrence W. Schonbrun/Law Office of Lawrence W. Schonbrun (Berkeley, CA)	• 5/3/2012: Appeal No. 12-15370—voluntarily dismissed pursuant to Objector's FRAP 42(b) motion in compliance with a court-approved stipulation of the parties[322]	• No motion for cost bond
In re Bank of America Credit Protection Marketing & Sales Practices Litigation, No. 3:11-md-02269 (N.D. Cal. Sept. 14, 2011). • MDL • 13 Objections Submitted[323] • 1/16/2013: Order granting (1) motion for final approval of class action settlement; and (2) motion for attorney fees, reimbursement of expenses, and service awards.[324]	2 Appeals Filed: • 1/24/2013: Objector Beau Lochridge – filed by attorney Timothy R. Hanigan/Lang, Haingnan & Carvalho (Woodland Hills, CA) (identified as counsel for appellant on notice of appeal) – 1/31/2013: notice of appearance in Appeal No. 13-15170 filed on behalf of Appellant Beau Lochridge by Christopher Andreas Bandas/ Bandas Law Firm, P.C. (Corpus Christi, TX) (appellate record indicates "Attorney Timothy R. Hanigan substituted by Attorney Christopher Andres Bandas"). • 2/8/2013: Objector Adina Wasserman – filed *pro se* – 03/07/2013: notice of appearance in Appeal No. 13-15276 filed on behalf of Appellant Adina Wasserman by Allen G. Weinberg/Law Offices of Allen G. Weinberg (Beverly Hills, CA)	• 4/10/2013: Appeal No. 13-15170—voluntarily dismissed pursuant to objector's FRAP 42(b) motion[325] • 3/29/2013: Appeal No. 13-15276—voluntarily dismissed pursuant to FRAP 42(b) stipulation of the parties[326]	• No motion for cost bond • No motion for cost bond
Southern District of California: 16 objector appeals			
Adams v. AllianceOne Receivables Management, Inc., No. 3:08-cv-00248 (S.D. Cal. Feb. 8, 2008). • 6 Objections Submitted[327] • 9/28/2012: Order (1) granting joint motion for final approval of class action settlement; (2) granting class counsel's motion for attorneys' fees, costs, and service awards.[328]	2 Appeals Filed: • 10/25/2012: Objector Gordon B. Morgan – filed *pro se* – 12/04/2012: notice of appearance in Appeal No. 12-56957 filed on behalf of Appellant Morgan by Attorney Christopher Andreas Bandas/ Bandas Law Firm, P.C. (Corpus Christi, TX)	• 2/4/2013: Appeal No. 12-56957—voluntarily dismissed pursuant to objector's FRAP 42(b) motion[329]	• 11/8/2012: Plaintiffs asked the Court to impose a $64,536. 69 appeal bond upon Smith, Nelson and Morgan, jointly and severally;[331] grant Plaintiffs permission to depose and seek

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	– 12/4/2012: notice of appearance filed on behalf of Appellant Morgan in the district court by Attorney Joseph Darrell Palmer/ Law Offices of Darrell Palmer PC (Solana Beach, CA)		documents from Objectors' counsel Bandas and Palmer;[332] and strike the objection and notice of appeal fraudulently signed by Objector Morgan.[333] • 6/20/2013: Plaintiffs' motions were denied as moot due to Objectors' voluntary dismissal of their claims
	• 10/26/2012: Objectors Eric B Nelson, Mary Margaret Smith – filed *pro se* – 01/31/2013: notice of appearance filed on behalf of Appellants Nelson & Smith by Joseph Darrell Palmer/ Law Offices of Darrell Palmer (Solana Beach, CA)	• 2/5/2013: Appeal No. 12-56970—voluntarily dismissed pursuant to Objector's FRAP 42(b) motion[330]	• See above
Dennis v. Kellogg Co., No. 3:09-cv-01786 (S.D. Cal. Aug. 17, 2009) • 2 Objections Submitted[334] • 4/5/2011: Order Granting (1) Final Approval of Class Action Settlement; (2) Award of Attorney's Fees; and (3) Judgment of Dismissal.[335]	2 Appeals Filed:[336] • 4/22/2011: Objector Stephanie Berg – filed by Joseph Darrell Palmer/ Law Offices of Darrell Palmer PC (Solana Beach, CA)	• 9/4/2012: Appeal No. 11-55674—Judgment of the district court reversed in part, affirmed in part, and remanded per published opinion[337]	• 7/8/2011: Plaintiffs' ask for an order requiring Objectors Rivero and Berg to jointly and severally post an appeal bond in the amount of $3,000 to cover appellees' costs on appeal[339] • 8/10/2011: Court ordered Rivero and Berg to jointly and severally post an appeal bond in the amount of $3,000[340]
	• 4/29/2011: Objector Omar Rivero – filed *pro se* – 5/20/2011: notice of appearance in Appeal No. 11-55706 filed on behalf of Appellant Rivero by Christopher Andreas Bandas/ Bandas Law Firm, P.C. (Corpus Christi, TX)	• 9/4/2012: Appeal No. 11-55706—Judgment of the district court reversed in part, affirmed in part, and remanded per published opinion[338]	• See above

Class Action Objector Appeals in the Ninth Circuit Court of Appeals from Cases Filed Between January 1, 2008, and July 1, 2013[145]

(not including appeals, if any, originating from the districts of Hawaii, Guam, and the Northern Mariana Islands)

108 Total Objector Appeals Filed

District Court • MDL/Consolidated Class Action • # Objections Submitted • Date Final Approval of Class Action Settlement Granted	Appellate Court • # Appeals Filed by Objector(s) • Date Notice of Appeal(s) Filed • Identity of Filing Objector(s) & Attorney(s) (if any)	Final Disposition of Objector Appeal(s) • Date & Nature of Final Disposition • Indicate if Appeal is "pending"	FRAP 7 Cost Bond • Motion Filed • Disposition of Motion • Amount Imposed (if granted)
In re: Easysaver Rewards Litigation, No. 3:09-cv-02094 (S.D. Cal. Sept. 24, 2009) • Consolidated Class Action • 1 Objection Submitted[341] • 2/4/2013: Final Order Approving Class Settlement; granting Plaintiffs' Motion for Attorneys' Fees, Costs, and Incentive Awards.[342] • 2/21/2013: Final Judgment in favor of Settlement Class against Defendants, and dismissing the action with prejudice.[343]	1 Appeal Filed:[344] • 3/4/2013: Objector Brian Perryman – filed by Theodore H. Frank/ Center for Class Action Fairness (Washington, DC) – 6/5/2013: notice of appeal amended to include May 5, 2013 Order Granting Motion for Appeal Bond	• Appeal No. 13-55373—pending.	• 3/14/2013: Plaintiffs' ask that the court require Objector Perrymn to post an appellate cost bond of at least $15,000[345] • 5/6/2013: Court ordered that on or before May 31, 2013, Objector Perryman must either post a $15,000 bond or file a notice of dismissal of his appeal[346]
Cohorst v. BRE Properties, Inc., No. 3:10-cv-02666 (S.D. Cal. Dec. 27, 2010) • 2 Objections Submitted[347] • 4/13/2012: Final Judgment and Order granting final approval of the class action settlement and awarding costs and incentive awards.[348] • 6/5/2012: Order awarding attorneys' fees to class counsel and Objector's counsel[349]	1 Appeal Filed: • 7/5/2012: Objector Susan Kreidler – filed by Paul R. Kiesel/Kiesel Boucher Larrson LLP(Beverly Hills, CA)	• 9/5/2012: Appeal No. 12-56256—voluntarily dismissed with prejudice pursuant to FRAP 42(b) stipulation of the parties and Objector/ Appellant's withdrawal of objections to the court-approved class action settlement[350]	• No motion for cost bond

Class Action Objector Appeals in the Ninth Circuit Court of Appeals from Cases Filed Between January 1, 2008, and July 1, 2013[145]

(not including appeals, if any, originating from the districts of Hawaii, Guam, and the Northern Mariana Islands)

108 Total Objector Appeals Filed

District Court • MDL/Consolidated Class Action • # Objections Submitted • Date Final Approval of Class Action Settlement Granted	Appellate Court • # Appeals Filed by Objector(s) • Date Notice of Appeal(s) Filed • Identity of Filing Objector(s) & Attorney(s) (if any)	Final Disposition of Objector Appeal(s) • Date & Nature of Final Disposition • Indicate if Appeal is "pending"	FRAP 7 Cost Bond • Motion Filed • Disposition of Motion • Amount Imposed (if granted)
In re Ferrero Litigation, No. 3:11-cv-00205 (S.D. Cal. Feb. 1, 2011). • Consolidated Class Action • 2 Objections Submitted[351] • 7/9/2012: Final Judgment and Order granting final approval of the class action settlement; granting plaintiffs' motion for attorney fees and costs; and incentive awards.[352]	2 Appeals Filed:[353] • 8/7/2012: Objectors Courtney Drey and Andrea Pridham – filed by attorney Grenville Pridham/ Law Office of Grenville Pridham (Tustin, CA) – 9/7/2012: notice of appearance in No. 12-56469 by Christopher V. Langone for Appellants Drey and Pridham	• Appeal No. 12-56469—pending[354]	• 10/11/2012: Plaintiffs ask court to impose a $21,970.72 appeal bond, jointly and severally, on Objectors Drey, Pridham and Hale[355] • 11/9/2012: Court denied Plaintiffs' request to impose an appeal bond on Objectors[356]
	• 8/9/2012: Objector Michael Hale – filed *pro se* – 10/03/2012: notice of appearance in Appeal No. 12-56478 filed on behalf of Appellant Hale by Attorney Christopher Andreas Bandas/ Bandas Law Firm, P.C. (Corpus Christi, TX)	• Appeal No. 12-56478—pending	• See above
In re: Groupon, Inc., Marketing and Sales Practices Litigation, No. 3:11-md-02238 (S.D. Cal. June 2, 2011). • MDL • 18 Objections Submitted[357] • 12/18/2012: Order and Final Judgment approving the class action settlement and awarding class counsel an amount deemed as reasonable attorneys' fees and expenses. Objector's motion for attorneys' fees and costs denied.[358]	4 Appeals Filed: • 1/17/2013: Objector Padraigin Browne – filed by attorney Brett L. Gibbs/ (Mill Valley, CA) – 4/5/2013: notice of appearance in Appeal No. 13-55118 on behalf of Appellant Browne filed by Attorney Paul Robert Hansmeier/Class Action Justice Institute LLC (Minneapolis, MN) – 5/31/2013: Attorney Hansmeier files notice of withdrawal from Appeal No. 13-55118 as ordered by the Court[359] – 5/31/2013: Attorney Nathan Alexander Wersal/Class Action Justice Institute LLC (Minneapolis, MN) files notice of appearance on behalf of Appellant Browne	• Appeal No. 13-55118—pending	• No motion for cost bond
	• 1/17/2013: Objector Andrea Pridham – filed by Grenville Thomas Pridham/Law Office of Grenville Pridham (Tustin, CA); Christopher V. Langone/ Law Office of Christopher Langone (Ithaca, NY)	• 2/28/2013: Appeal No. 13-55119—dismissed for failure to pay docketing/filing fee	• No motion for cost bond

Class Action Objector Appeals in the Ninth Circuit Court of Appeals from Cases Filed Between January 1, 2008, and July 1, 2013[145]

(not including appeals, if any, originating from the districts of Hawaii, Guam, and the Northern Mariana Islands)

108 Total Objector Appeals Filed

District Court • MDL/Consolidated Class Action • # Objections Submitted • Date Final Approval of Class Action Settlement Granted	Appellate Court • # Appeals Filed by Objector(s) • Date Notice of Appeal(s) Filed • Identity of Filing Objector(s) & Attorney(s) (if any)	Final Disposition of Objector Appeal(s) • Date & Nature of Final Disposition • Indicate if Appeal is "pending"	FRAP 7 Cost Bond • Motion Filed • Disposition of Motion • Amount Imposed (if granted)
	• 1/17/2013: Objectors Chris Brown and Maggie Strohlein – filed by Joseph Darrell Palmer/ Law Offices of Darrell Palmer (Solana Beach, CA)	• Appeal No. 13-55120—pending	• No motion for cost bond
	• 1/17/2013: Objector Sean Hull – filed *pro se* – 2/8/2013: notice of appearance in Appeal No. 13-55128 filed on behalf of Appellant Sean Hull by Christopher Andreas Bandas/ Bandas Law Firm, P.C. (Corpus Christi, TX)	• Appeal No. 13-55128—pending	• No motion for cost bond
Gallucci v. Boiron, Inc., No. 3:11-cv-02039 (S.D. Cal. Sept. 2, 2011). • 3 Objections Submitted[360] • 10/31/2012: Final Judgment and Order granting Motion for approval of Class Action Settlement, awarding Class Counsel fees and expenses, awarding Class Representatives incentives, permanently enjoining parallel proceedings, and dismissing action with prejudice.[361]	3 Appeals Filed: • 11/14/2012: Objectors David Johnson and Maria Carapia – filed by Joseph Darrell Palmer/ Law Offices of Darrell Palmer (Solana Beach, CA)	• 6/11/2013: Appeal No. 12-57074—dismissed for failure to prosecute[362]	• 12/20/2012: Pursuant to the court's orders in the Final Judgment, Settling Plaintiffs and Defendant jointly requested the court to order Objectors to post an appeal bond in the amount of $235,500.66[365] • 6/6/2013: Court ordered appealing Objectors to collectively post an appeal bond of $5,000 no later than July 19, 2013 or file a notice of dismissal[366]
	• 11/15/2012: Objector Henry Gonzalez – filed by Scott J. Ferrell/ Newport Trial Group (Newport Beach, CA)	• Appeal No. 12-57081—pending[363]	• See above
	• 11/29/2012: Objector Israel Elizondo – filed *pro se* – 1/7/2013: notice of appearance in Appeal No. 12-57184 filed on behalf of Appellant Elizondo by Christopher Andreas Bandas/ Bandas Law Firm, P.C. (Corpus Christi, TX)	• 6/3/2013: Appeal No. 12-57184—dismissed for failure to prosecute[364]	• See above

Class Action Objector Appeals in the Ninth Circuit Court of Appeals from Cases Filed Between January 1, 2008, and July 1, 2013[145]

(not including appeals, if any, originating from the districts of Hawaii, Guam, and the Northern Mariana Islands)

108 Total Objector Appeals Filed

District Court • MDL/Consolidated Class Action • # Objections Submitted • Date Final Approval of Class Action Settlement Granted	Appellate Court • # Appeals Filed by Objector(s) • Date Notice of Appeal(s) Filed • Identity of Filing Objector(s) & Attorney(s) (if any)	Final Disposition of Objector Appeal(s) • Date & Nature of Final Disposition • Indicate if Appeal is "pending"	FRAP 7 Cost Bond • Motion Filed • Disposition of Motion • Amount Imposed (if granted)
Foos v. Ann, Inc., No. 3:11-cv-02794 (S.D. Cal. Dec. 1, 2011) • 1 Objection Submitted[367] • 12/10/2012: Order granting Motion for Final Approval of Class Settlement and granting in part Motion for Attorneys' Fees.[368]	1 Appeal Filed: • 1/9/2013: Objector Sarah McDonald – filed by John W. Davis/ Law Office of John W. Davis (San Diego, CA)	• Appeal No. 13-55059—pending[369]	• 1/22/2013: Plaintiff asks court to enter an Order requiring Objector McDonald and/or her counsel to post a $5,000 appellate bond[370] • 5/20/2013: Court ordered Objector Sarah McDonald to post a $1,000 bond or file a notice of dismissal of her appeal within 10 days[371]
District of Idaho: 0 objector appeals			
District of Montana: 0 objector appeals			
District of Nevada: 1 objector appeal			
International Brotherhood of Electrical Workers Local 697 Pension Fund v. International Game Technology, No. 3:09-cv-00419 (D. Nev. July 30, 2009) • 1 Objection Submitted • 10/19/2012: Final Judgment and Order of Dismissal with Prejudice granting (1) motions for final approval of the securities class action settlement; (2) approval of plan of allocation for settlement proceeds; (3) application for attorneys' fees and expenses and Plaintiffs' expenses.[372]	1 Appeal Filed: • 11/16/2012: Objector Ian Kideys – filed *pro se*	• 4/5/2013: Appeal No. 12-17602—dismissed for failure to prosecute[373]	• No motion for cost bond
District of Oregon: 0 objector appeals			
Eastern District of Washington: 0 objector appeals			

Class Action Objector Appeals in the Ninth Circuit Court of Appeals from Cases Filed Between January 1, 2008, and July 1, 2013[145]

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108 Total Objector Appeals Filed

District Court • MDL/Consolidated Class Action • # Objections Submitted • Date Final Approval of Class Action Settlement Granted	Appellate Court • # Appeals Filed by Objector(s) • Date Notice of Appeal(s) Filed • Identity of Filing Objector(s) & Attorney(s) (if any)	Final Disposition of Objector Appeal(s) • Date & Nature of Final Disposition • Indicate if Appeal is "pending"	FRAP 7 Cost Bond • Motion Filed • Disposition of Motion • Amount Imposed (if granted)
Western District of Washington: 11 objector appeals			
In re: General Motors Corporation Speedometer Products Liability Litigation, MDL No. 1896, No. 2:07-cv-00291 (W.D. Wash. Feb. 23, 2007). • MDL • 32 Objections Submitted[374] • 11/7/2008: Order and Final Judgment granting motion for final approval of class action settlement; motion for attorney fees and costs; and dismissing claims with prejudice.[375]	2 Appeals Filed: • 12/1/2008: Objector Clyde Farrel Padgett – filed *pro se* • 12/8/2008: Objectors William P. Jehle and Tom Richeson – filed by attorneys Kearney Dee Hutsler & Richard G. Baker/ The Hutsler Law Firm (Birmingham Alabama)[376]	• 3/2/2009: Appeal No. 08-36005—voluntarily dismissed with prejudice pursuant to FRAP 42(b) stipulation of the parties[377] • 3/2/2009: Appeal No. 08-36028—voluntarily dismissed with prejudice pursuant to FRAP 42(b) stipulation of the parties[378]	• 12/5/2008: Plaintiffs filed a motion for Objector Padgett to post an appellate cost bond of $40,811.20 within 2 weeks of the court order • 12/11/2008: Plaintiffs filed an amended motion for each objector filing an appeal in the case to be jointly and severally liable for an appellate cost bond of $40,811.20 within 2 weeks of the court order[379] • 1/15/2009: the Objectors were held jointly and severally responsible to post a $1,000 appeal bond within 2 weeks of the Order[380]
Shin v. Esurance Inc., No. 3:08-cv-05626 (W.D. Wash. Oct. 15, 2008) • 1 Objection Submitted[381] • 1/29/2010, *vacated and re-entered*, 04/02/2010: Final Judgment granting motion for final approval of class action settlement; motion for attorneys' fees, expenses and incentive award; and dismissing claims with prejudice.[382]	1 Appeal Filed: • 1/29/2010 & Amended 4/22/2010:[383] Objector Su Shin – filed by Attorney Alana K. Bullis/Law Offices of Alana K. Bullis, PLLC (DuPont, WA)	• 5/24/2010: Appeal No. 10-35113—voluntarily dismissed with prejudice pursuant to FRAP 42(b) stipulation of the parties[384]	• No motion for cost bond

Class Action Objector Appeals in the Ninth Circuit Court of Appeals from Cases Filed Between January 1, 2008, and July 1, 2013[145]

(not including appeals, if any, originating from the districts of Hawaii, Guam, and the Northern Mariana Islands)

108 Total Objector Appeals Filed

District Court • MDL/Consolidated Class Action • # Objections Submitted • Date Final Approval of Class Action Settlement Granted	Appellate Court • # Appeals Filed by Objector(s) • Date Notice of Appeal(s) Filed • Identity of Filing Objector(s) & Attorney(s) (if any)	Final Disposition of Objector Appeal(s) • Date & Nature of Final Disposition • Indicate if Appeal is "pending"	FRAP 7 Cost Bond • Motion Filed • Disposition of Motion • Amount Imposed (if granted)
In re Classmates.com Consolidated Litigation, No. 2:09-cv-00045 (W.D. Wash. Jan. 13, 2009). • Consolidated Class Action • 370 Objections Submitted[385] • 06/15/2012: Order granting (1) motion for final approval of class action settlement; (2) motion for attorney fees, costs, and participation awards to class representatives; and (3) Order certifying settlement class; and (4) Judgment dismissing the case and entering the two year injunction.[386]	3 Appeals Filed:[387] • 7/12/2012: Objector Michael J Schulz – notice of appeal filed *pro se* – on 8/14/12 Christopher A. Bandas filed a notice of appearance to serve as counsel on behalf of Objector-Appellant Schulz/Bandas Law Firm, P.C. (Corpus Christi, TX) • 7/13/2012: Objector Brent Clifton – original Notice of Appeal filed by Gary Sibley/The Sibley Firm (Dallas, TX) – amended notice of appeal filed on 7/18/2012 by Objector Clifton *pro se* • 7/16/2012: Objector Christopher Langone – filed by Christina Henry/Seattle Debt Law, LLC (Seattle/ Washington)	• 8/27/2012: Appeal No. 12-35593—voluntarily dismissed pursuant to Objector's FRAP 42(b) motion[388] • 8/28/2012: Appeal No. 12-35604—voluntarily dismissed pursuant to Objector's FRAP 42(b) motion[389] • 8/27/2012: Appeal No. 12-35595—voluntarily dismissed pursuant to Objector's FRAP 42(b) motion[390]	• No motion for cost bond • No motion for cost bond • No motion for cost bond
Palmer v. Sprint Solutions, Inc., No. 2:09-cv-01211 (W.D. Wash. Aug. 25, 2009) • 2 Objections Submitted[391] • 10/21/2011: Judgment and Order granting final approval of class action settlement and motion for attorney fees, costs and incentive award.[392]	1 Appeal Filed: • 11/28/2011: Objector Ricardo H. Nigaglioni[393] – filed *pro se*	• 2/14/2013: Appeal No. 11-35991—judgment of the district court affirmed per unpublished opinion[394]	• No motion for cost bond
Arthur v. Sallie Mae, Inc., No. 2:10-cv-198 (W.D. Wash. Feb. 2, 2010). • 26 Objections Submitted[395] • 9/17/2012: Order and Final Judgment granting (1) motion for final approval of amended class action settlement; and (2) motion for attorney fees, costs and service awards.[396]	1 Appeal Filed: • 10/17/2012: Objectors Sara Sibley and Judith Brown – filed by Attorney Thomas L. Cox, Jr./ (Dallas, TX)[397]	• 12/5/2012: Appeal No. 12-35860—voluntarily dismissed pursuant to Objector's FRAP 42(b) motion[398]	• 10/25/2012: Class Plaintiffs filed a motion to require Objectors to post an appeal bond of $189,344[399] • 12/4/2012: Class Plaintiffs withdrew their pending motion for an appeal bond in response to Objectors' motion to voluntarily dismiss their appeal pursuant to FRAP 42(b).

Class Action Objector Appeals in the Ninth Circuit Court of Appeals from Cases Filed Between January 1, 2008, and July 1, 2013[145]

(not including appeals, if any, originating from the districts of Hawaii, Guam, and the Northern Mariana Islands)

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District Court • MDL/Consolidated Class Action • # Objections Submitted • Date Final Approval of Class Action Settlement Granted	Appellate Court • # Appeals Filed by Objector(s) • Date Notice of Appeal(s) Filed • Identity of Filing Objector(s) & Attorney(s) (if any)	Final Disposition of Objector Appeal(s) • Date & Nature of Final Disposition • Indicate if Appeal is "pending"	FRAP 7 Cost Bond • Motion Filed • Disposition of Motion • Amount Imposed (if granted)
Dennings v. Clearwire Corp., No. 2:10-cv-01859 (W.D. Wash. Nov. 15, 2010)[400] • 8 Objections Submitted[401] • 12/20/2012: Settlement Order and Final Judgment granting motion for final approval of class action settlement.[402] • 5/3/2013: Order granting motion for attorneys' fees and expenses.[403]	2 Appeals Filed: • 1/18/2013: Objectors Mr. Gordon Morgan and Mr. Jeremy De La Garza appealed the *Settlement Order* (filed 12/20/2012) – filed by Christopher Bandas/ Bandas Law Firm, P.C. (Corpus Christi, TX)	• 4/22/2013: Appeal No. 13-35038—Judgment of the district court affirmed per summary order[404]	• 2/20/2013: Plaintiffs filed a motion requesting that the Court order Objectors, jointly and severally, to post an appellate cost bond of $41,150[406] • 3/11/2013: Court ordered Objectors Morgan and De La Garza to either post a bond in the amount of $41,150 or dismiss their notice of appeal[407]
	• 6/3/2013: Objectors Mr. Gordon Morgan and Mr. Jeremy De La Garza appealed the *Order Granting Motion for Attorney's Fees and Expenses* (filed 5/3/2013) – filed by Christopher Bandas/ Bandas Law Firm, P.C. (Corpus Christi, TX)	• Appeal No. 13-35491—pending[405]	• 6/3/2013: With respect to Objector's second appeal, Plaintiffs filed a similar motion requesting that the Court order Objectors, jointly and severally, to post an appellate cost bond of $41,150[408] • 7/9/2013: Finding that the same arguments applied and that $41,150 is again an appropriate amount, the Court ordered Objectors Morgan and De La Garza to either post the bond or withdraw their appeal within 5 days of the date of the order. Failure to comply would result in Objectors and Objectors' counsel held subject to sanctions by the court[409]

Class Action Objector Appeals in the Ninth Circuit Court of Appeals from Cases Filed Between January 1, 2008, and July 1, 2013[145]

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District Court • MDL/Consolidated Class Action • # Objections Submitted • Date Final Approval of Class Action Settlement Granted	Appellate Court • # Appeals Filed by Objector(s) • Date Notice of Appeal(s) Filed • Identity of Filing Objector(s) & Attorney(s) (if any)	Final Disposition of Objector Appeal(s) • Date & Nature of Final Disposition • Indicate if Appeal is "pending"	FRAP 7 Cost Bond • Motion Filed • Disposition of Motion • Amount Imposed (if granted)
Herfert v. Crayola, LLC, No. 2:11-cv-01301 (W.D. Wash. Aug. 5, 2011) • 1 Objection Submitted[410] • 4/27/2012: Final Order granting joint motion for final approval of class action settlement and motion for attorney fees, expenses and representative plaintiff award.[411]	1 Appeal Filed: • 5/14/2012: Objector Amber Pederson – filed *pro se* – on 5/24/2012, Class Counsel was informed that Objector-Appellant Pederson would be represented by Mr. Christopher Bandas/ Bandas Law Firm, P.C. (Corpus Christi, TX)[412] – on 7/5/2012, attorney Darrell Palmer/Law Offices of Darrell Palmer (Solano Beach CA) filed Objector-Appellant's Response to the Parties' Motion for an appeal bond, and filed an application to appear *pro hac vice* on behalf of Objector-Appellant Amber Pederson.[413] Mr. Palmer's application was denied on 8/17/2012.[414]	• 9/26/2012: Appeal No. 12-35393—voluntarily dismissed[415] pursuant to Objector's FRAP 42(b) motion[416]	• 6/21/2012: Class Plaintiffs and Defendants filed a joint motion requesting that Objector Pederson and her counsel, Mr. Bandas, be jointly and severally liable to post an appeal bond of $20,000[417] • 7/31/2012: Following oralargument at which neither Objector-Appellant nor her counsel appeared, Court granted the parties' joint motion and ordered Appellant Pederson and her attorney Christopher Bandas to file an appeal bond of $20,000[418] • 8/10/2012: Court amended its 7/31/2012 order to require that the appeal bond be filed no later than August 31, 2012[419]

145. Includes class action objector appeals from class action cases that were filed in the district courts on or after January 1, 2008 in which final approval of a Rule 23-certified class action settlement was granted and appealed from between January 1, 2008, through July 1, 2013. The total number of objector appeals filed in the Ninth Circuit Court of Appeals does not include objector appeals, if any, that may have originated from the Districts of Hawaii, Guam and the Northern Mariana Islands due to time constraints.

146. Two objections were filed by counsel and 18 objections were submitted *pro se*. *See Motion for Final Approval of Class Action Settlement and Entry of Final Judgment and Order of Dismissal* (Doc. # 199) (filed July 30, 2010) and *Settlement Class Representatives' Response to Objections* (Doc. #207) (filed July 30, 2010).

147. *See In re LifeLock, Inc. Marketing and Sales Practices Litigation,* No. MDL 08-1977, 2010 WL 3715138 (D. Ariz. Aug. 31, 2010).

148. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Mediation Form; motion to dismiss case voluntarily pursuant to FRAP 42(b).

149. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Mediation Form; motion to dismiss case voluntarily pursuant to FRAP 42(b).

150. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Mediation Form; motion to dismiss case voluntarily pursuant to FRAP 42(b).

151. *See* Doc. #65 (filed Apr. 30, 2010) & Doc. #80 (filed Aug. 31, 2010) (original and resubmitted objections from Objector Figueroa). *See* Doc. #86 (filed Sept. 9, 2010) (objections from Objector Maria Fernandez).

152. *See Final Judgment and Order of Dismissal with Prejudice* (Doc. #93) (filed Sept. 14, 2010).

153. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Mediation Form; motion to dismiss case voluntarily pursuant to FRAP 42(b).

154. *See Plaintiffs' Responses to Objections to Proposed Settlement, Fees and Incentives* (Doc. #88) (filed May 23, 2011).

155. *See Amended Order by Judge Andrew J. Guilford Granting Final Approval of Class Settlement and Granting Application for Attorney Fees and Costs and Incentive* Awards (Doc. #104) (filed Aug. 25, 2011).

156. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Objector/ Appellant Gaudet's motion to proceed *in forma pauperis* (denied by the district court Dec. 13, 2011 and denied by the Ninth Circuit on Mar. 13, 2012). The district court refused to accept Objector Gaudet's attempt to post the $1,000 FRAP 7 bond on April 12, 2012 (more than 3 months past the deadline set in the court's Dec. 5, 2011 Order) (Doc. #122, Minute Order of 04/12/2012). On June 13, 2012, the Ninth Circuit denied appellees' motion to dismiss, and ordered Appellant Gaudet to post the $1,000 bond and the district court to accept it if it was posted within 21 days. Appellant Gaudet complied. *See Order*, No. 11-56609 (9th Cir. June 13, 2012)(Doc. #17). On July 26, 2012, Attorney Michael Brown files a notice of appearance for Appellant Gaudet, and after two telephonic mediation conferences, Gaudet files a motion to voluntarily dismiss his appeal pursuant to FRAP 42(b) on Sept. 14, 2012.

157. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Mediation Form; appellant's motion to dismiss the case voluntarily pursuant to FRAP 42(b).

158. *See Class Counsel's Notice Of Motion And Motion For Order Requiring Objector/Appellant Robert Gaudet To Post Bond Pursuant To F.R.A.P. 7* (Doc. #111) (filed Nov. 7, 2011)(class counsel estimates that if the appeal is fully briefed by all sides then appellees will incur at least $20,000 in recoverable costs, including the costs of preparing copies of briefs and excerpts of record).

159. *See Order Setting Bond at $1,000* (Doc. #116) (filed Dec. 5, 2011) (Court found that $1,000 was a reasonable amount to cover anticipated copying costs given Objector's financial status). The Court denied Objector Gaudet's motion to sanction and remove Plaintiff's counsel from his role as class counsel.

160. *See Plaintiffs' Response to Objections to the Proposed Settlement* (Doc. #39) (filed Dec. 14, 2009).

161. *See Order Granting Plaintiffs' Motion for Award of Attorneys' Fees (*Doc. #49) (filed Jan. 4, 2010).

162. *See Lane v. Facebook, Inc.,* No. 08-3845, 2010 WL 2076916 (N.D. Cal. May 24, 2010).

163. *See Nachshin v. AOL, LLC, 663 F.3d 1034* (9th Cir. Nov. 21, 2011). On appeal, Objector/appellant McKinney through his counsel Theodore Frank raised the same objections pertaining to the Settlements *cy pres* distributions that were overruled in the district court. The Court concluded that the *cy pres* distributions approved by the district court as part of the overall settlement approval did not meet with *cy pres* standards as interpreted by the Ninth Circuit because the donations were made on behalf of a nationwide plaintiff class, thus the district court abused its discretion approving *cy pres* awards that would be distributed to geographically isolated and substantively unrelated charities. *Id.* On July 31, 2013, Plaintiffs filed their motion for preliminary approval of a revised class action settlement scheduled to be heard on August 26, 2013. *See* Doc. #66 (filed July 31, 2013).

164. The Court consolidated three pending class actions against Defendants for settlement purposes only, pursuant to Federal Rule of Civil Procedure 42: (a) *Stern v. AT&T Mobility Corp. f/k/a Cingular Wireless Corp.*, Case No. 05-8842 ("*Stern I*"); (b) *Lozano v. New Cingular Wireless f/k/a AT&T Wireless Corp.*, Case No. 02-00090 ("*Lozano*"); and (c) *Stern v. New Cingular Wireless Servs., Inc. f/k/a AT&T Wireless Servs., Inc.*, Case No. 09-1112 ("*Stern II*"). *Stern I* was designated as the lead case, and the Court clarified that it would enter separate preliminary approval orders and final judgments in each of the three consolidated cases. *See* Doc. #25 (filed Apr. 13, 2010).

165. *See Order Granting Final Approval to the UCC Settlement and Entering Final Judgment* (Doc. #81) (filed No. 22, 2010). Although the court found that four objectors were not members of the UCC Settlement Class and, thus, lacked standing to object to the UCC Settlement, the Court addressed all 9 objections specifically stating the reasons for overruling each objection. *Id*.

166. *See Order Granting Final Approval to the UCC Settlement and Entering Final Judgment* (Doc. #81) (filed No. 22, 2010). *See Order Granting Application for Award of Attorneys' Fees and Reimbursement of Expenses to Class Counsel and Incentive Awards For Class Representatives* (Doc. #80) (filed Nov. 22, 2010).

167. Appellants' opposed motion to consolidate Appeal Nos. 10-56929 and 10-57062 was granted on Aug. 5, 2011. Order, Nos. 10-56929, 10-57062 (9th Cir. Aug. 5, 2011) (Doc. #20).

168. *See Stern v. Gambello*, Nos. 10-56929, 10-57062, 2012 WL 1744453 (9th Cir. May 17, 2012) (Rejecting Objector/Appellants argument that the district court did not adequately scrutinize either the proposed settlement or the fee petition, the court found that the district court's decision to approve the settlement, the claims procedure, and its decision to decline a more intensive inquiry before granted the requested fees and expenses was not a clear abuse of discretion.) On May 25, 2012, the Court granted Objector/Appellant Lynch's motion to extend time to file a petition for rehearing or rehearing en banc until June 7, 2012. Order, Nos. 10-56929, 10-57062 (9th Cir. May 25, 2012)(Doc. #73). It appears that Appellant Lynch chose not to file a petition for rehearing as on June 19, 2012 the mandate was issued as to the courts May 17, 2012 decision affirming the district court.

169. *See supra* note 168.

170. *See Plaintiff's Response to Objections to Class Action Settlement* (Doc. #81) (filed Aug. 22, 2011).

171. *See Final Order Approving Class Action Settlement and Judgment* (Doc. #89) (filed Sept. 15, 2011).

172. Objector Edmund F. Bandas' original objection letter dated Aug. 4, 2011 was originally received by the Court on August 5, 2011, but was rejected as an inappropriate communication pursuant to Local Rule 83-2.11 and returned to counsel. On October 18, 2011, Edmund Bandas submitted a letter seeking to reinstate his objection to the class action settlement. The Court ordered the Clerk to file Class member Bandas' objection, but it went on to conclude that the objection would not have altered the Court's decision to grant final approval of the settlement. *See* Doc. #98 (filed Oct. 18, 2011).

173. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Mediation Questionnaire; Appellant Denny's motion to dismiss case voluntarily pursuant to FRAP 42(b).

174. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Mediation Questionnaire; notice of appearance of Attorney Christopher Bandas for Appellants Michelle Melton and Edmund F. Bandas; Appellant's joint motion to dismiss case voluntarily pursuant to FRAP 42(b).

175. *See Response by Plaintiff to Objections to Approval of Settlement, Certification of Class, and Application for Attorneys' Fees* (Doc. #62) (filed Nov. 15, 2011).

176. *See Final Approval Order* (Doc. #65) (filed Nov. 22, 2011).

177. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Mediation Questionnaire; parties stipulated motion to dismiss case voluntarily pursuant to FRAP 42(b).

178. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Mediation Questionnaire; parties stipulated motion to dismiss case voluntarily pursuant to FRAP 42(b).

179. *See Lead Plaintiff's Supplemental Submission in Response to the Court's March 4, 2013 Order and in Further Support of the Proposed Settlement* (Doc. #310) (filed Mar. 7, 2013).

180. *See* Docs. #322 (Order Approving Plan of Allocation), 323 (Final Judgment and Dismissal with Prejudice) & 324 (Order granting Motion for Attorneys' Fees and Reimbursement of Expenses) (filed Mar. 15, 2013).

181. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Objector/Appellant Hayes' motion to dismiss case voluntarily pursuant to FRAP 42(b).

182. *See Memorandum & Order Regarding Motions for Final Approval of Class Action Settlement, Award of Attorneys' Fees, Costs and Plaintiff Service Award* (Doc. #23) (filed Mar. 20, 2012).

183. *See Memorandum and Order Regarding Motion for Final Approval of Class Action Settlement and Award of Attorneys' Fees, Costs and Plaintiff Service Award* (Doc. #23)(filed Mar. 20, 2012).

184. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: parties' stipulated motion to dismiss case voluntarily with prejudice pursuant to FRAP 42(b).

185. Purchaser class plaintiffs reported that only five total objections to the settlement were filed and one had already been resolved. *See Motion for Final Approval of Settlement* (Doc. #3121) (filed Aug. 14, 2009).

186. *See* Doc. #3206 (filed Sept. 28, 2009) & Doc. #3222 (filed Oct. 9, 2009). MDL 1699 was assigned to the N.D. Cal in September 2005. Prior to this September 2009 settlement of the purchaser claim class actions from which objectors appealed, Defendant Pfizer Inc. had resolved thousands of product liability cases. After the settlement of the purchaser claim class actions, a number of product liability cases remained for resolution and the docket remained active up until March 2013. After dismissal of the final product liability plaintiff from the proceedings, Judge Breyer recommended to the JPML that MDL 1699 be terminated. *See Order Recommending Termination of Multidistrict Litigation Proceeding to Judicial Panel on Multidistrict Litigation* (Doc. #3640) (filed Mar. 29, 2013).

187. Ten days after filing their notice of appeal, Objectors/Appellants Barbara Hurst and Diane Gibson were notified per Order from the Clerk of the Ninth Circuit that they had 21 days to either dismiss their appeal (since the district courts' orders from which they appealed did not dispose of the case as to all claims and all parties) or show cause as to why their appeal should not be dismissed for lack of jurisdiction. *See Order*, No. 09-17284 (9th Cir. Oct. 26, 2009) (Doc. #5) (citing Fed. R. Civ. P. 54(b) and *Chacon v. Babcock,* 640 F.2d 221 (9th Cir. 1981)). Noncompliance would result in dismissal of the appeal pursuant to Ninth Circuit Rule 42-1. Appellants filed their stipulated motion to dismiss the case on Nov. 11, 2009.

188. Ten days after filing their notice of appeal, Objectors/Appellants Janice Johnson and Wilma Thompson were notified per Order from the Clerk of the Ninth Circuit that they had 21 days to either dismiss their appeal (since the district courts' orders from which they appealed did not dispose of the case as to all claims and all parties) or show cause as to why their appeal should not be dismissed for lack of jurisdiction. *See Order*, No. 09-17420 (9th Cir. Nov. 10, 2009) (Doc. #2) (citing Fed. R. Civ. P. 54(b) and *Chacon v. Babcock,* 640 F.2d 221 (9th Cir. 1981). Noncompliance would result in dismissal of the appeal pursuant to Ninth Circuit Rule 42-1. Appellants filed their stipulated motion to dismiss the case on Nov. 11, 2009.

189. *See Indirect-Purchaser Plaintiffs' and Settling States' Joint Response to Objections to Combined Class, Parens Patriae, and Governmental Entity Settlements* (Doc. #5601) (filed May 4, 2012) (describing the 18 objections brought by 28 objectors).

190. *See Order Granting Final Approval Of Combined Class, Parens Patriae, and Governmental Entity Settlements; Final Judgment of Dismissal With Prejudice* (Doc. #6130) (filed July 11, 2012).

191. *See Indirect-Purchaser Plaintiffs' and Settling States' Joint Response to Objections to Combined Class, Parens Patriae, and Governmental Entity Settlements With AUO, LG Display and Toshiba Defendants* (Doc. #7162) (filed Nov. 15, 2012) (describing the 11 documents that could be construed as objections, noting that three of the four objectors represented in the single objection submitted by Attorney George W. Cochran have formally withdrawn their objections).

192. See *In re TFT-LCD (Flat Panel) Antitrust Litig.*, MDL 1827, 3:07-md-1827, 2013 WL 1319653 (N.D. Cal. March 29, 2013).

193. *See Amended Order Granting Final Approval of Combined Class, Parens Patriae, And Governmental Entity Settlements with AUO, LG Display, And Toshiba Defendants; Ordering Final Judgment of Dismissal with Prejudice; Award of Attorneys Fees, Expenses, and Incentive Awards* (Doc. #7688) (filed Apr. 1, 2013).

194. *See Final Judgment Re Indirect Purchaser Plaintiff/State Entity Class Actions* (Doc. #7690) (filed Apr. 1, 2013).

195. *See In re TFT-LCD (Flat Panel) Antitrust Litig.,* MDL 1827, 3:07-md-1827, 2013 WL 1365900 (N.D. Cal., April 03, 2013).

196. *See Order Re Civil Contempt and Award of Sanctions Against Objectors Alison Paul, Leveta Chesser, and Their Counsel Joseph Darrell Palmer* (Doc. #7618) (filed Feb. 19, 2013) for a detailed history of the events that led up to the Court's decision to hold Objector Alison Paul (Attorney Palmer's wife), Objector Leveta Chesser (Attorney Palmer's aunt) and Attorney Joseph Darrell Palmer in contempt for failure to comply with the courts' orders to appear for a deposition. Although the Court declined to strike the objections of Paul and Chesser, the court awarded monetary sanctions to compensate Plaintiffs' class counsel for fees incurred pursuing the depositions in the amount of $9,254.11. Id. Objectors Paul and Chesser and their counsel Palmer appealed from the Order of Civil Contempt. Appeal No. 13-15365 (9th Cir. Feb. 22, 2013). Appeal No. 13-16216 was dismissed for failure to prosecute on July 5, 2013, but reinstated on Aug. 13, 2013 and Appellants opening brief was filed the same day. *See Order,* No. 13-15365 (9th Cir. Aug. 13, 2013) (Doc. #14).

197. On April 12, 2013, the Ninth Circuit denied Plaintiffs/Appellees' motion for summary affirmance of the district court's judgment stating that "the arguments raised in the opening brief are sufficiently substantive as to warrant further consideration by a merits panel." *See Order,* No. 12-16830 (9th Cir. Apr. 12, 2013) (Doc. #49). In addition, appellees' motion to designate the appeal as frivolous and their motion for damages was referred to the assigned merits panel for whatever consideration the panel deems appropriate. *Id.*

198. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: notice of appearance of Christopher V. Langone for Appellant Andrea Kane; Required Mediation Questionnaire; appellant's motion to dismiss case voluntarily pursuant to FRAP 42(b) (denied). On January 9, 2013, Objector/Appellant filed a motion to dismiss her appeal voluntarily pursuant to FRAP 42(b) and an alternative motion to remand to which Plaintiffs objected. On March 1, 2013, the Ninth Circuit denied appellant's motion to dismiss without prejudice and appellant's alternative motion to remand. Objector/Appellant Kane was given 21 days to either file a renewed motion to dismiss the appeal voluntarily with prejudice or file her opening brief by April 1, 2013. *See Order,* No. 12-16839 (9th Cir. Mar. 1, 2013) (Doc. #34). On June 28, 2013, noting that Appellant Kane did not file an opening brief, Appeal No. 12-16839 was dismissed for failure to prosecute. *See Order,* No. 12-16839 (9th Cir. June 28, 2013) (Doc. #37).

199. Attorney Bandas filed his notice of appearance on behalf of Objector/Appellant Conner on Sept. 10, 2012 in Appeal No. 12-16780. On Dec. 5, 2012, the Court granted Attorney Bandas' motion on behalf of Objector/Appellant Connor to consolidate appeals Nos. 12-16780, 12-16782, and 12-16788. On March 1, 2013, the Ninth Circuit denied appellants' motion to remand and motion for sanctions under 28 USC 1927. *See Order,* Nos. 12-16780, 12-16782, and 12-16788 (9th Cir. Mar. 1, 2013) (Doc. #27). Plaintiffs/Appellees motion to dismiss for failure to prosecute and for determination of frivolous appeal was denied. *Id*. Appellants submitted their opening briefs on April 1, 2013.

200. Attorney Bandas filed his notice of appearance on behalf of Objector/Appellant Luis Santana on Sept. 10, 2012 in Appeal No. 12-16782. On Dec. 5, 2012, the Court granted Attorney Bandas' motion on behalf of Objector/Appellant Santana to consolidate appeals Nos. 12-16780, 12-16782, and 12-16788. On March 1, 2013, the Ninth Circuit denied appellants' motion to remand and motion for sanctions under 28 USC 1927. *See Order,* Nos. 12-16780, 12-16782, and 12-16788 (9th Cir. Mar. 1, 2013)(Doc. #27).Plaintiffs/Appellees motion to dismiss for failure to prosecute and for determination of frivolous appeal was denied. *Id*. Appellants submitted their opening briefs on April 1, 2013.

201. Attorney Bandas filed his notice of appearance on behalf of Objector/Appellant Stefan Rest on Sept. 10, 2012 in Appeal No. 12-16788. On Dec. 5, 2012, the Court granted Attorney Bandas' motion on behalf of Objector/Appellant Rest to consolidate appeals Nos. 12-16780, 12-16782, and 12-16788. On March 1, 2013, the Ninth Circuit denied appellants' motion to remand and motion for sanctions under 28 USC 1927. *See Order,* Nos. 12-16780, 12-16782, and 12-16788 (9th Cir. Mar. 1, 2013) (Doc. #27). Plaintiffs/Appellees' motion to dismiss for failure to prosecute and for determination of frivolous appeal was denied. *Id*. Appellants submitted their opening briefs on April 1, 2013.

202. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Objectors were notified on June 13, 2013 of their failure to file the Mediation Questionnaire as required under circuit rules; they were given 7 days to either file the Questionnaire, a motion to dismiss the appeal voluntarily under FRAP 42(b), or show cause why their appeal should not be dismissed. *See Order,* No. 13-15929 (9th Cir. June 12, 2013)(Doc. #5). On July 2, 2013, Objectors/Appellants were given an additional 7 days to comply. Finding continued failure to comply with the courts orders, Appeal No. 13-15929 was dismissed on July 12, 2013 for failure to prosecute. *See Order,* No. 13-15929 (9th Cir. July 12, 2013)(Doc. #8).

203. Sean Hull filed his original objection as a *Pro Se* Objector from Denver, Colorado where he lives and works, although Indirect Purchaser Plaintiffs submitted evidence that his objection letter was postmarked in Corpus Christi, Texas and mailed by attorney Christopher Bandas. *See Decl. of Mario N. Alioto* (Doc. #1062-1, Ex. 1) (filed Mar. 1, 2012). Indirect Purchaser Plaintiffs were unsuccessful in their attempts to ascertain whether Mr. Hull was a member of the settlement class with standing to object to the settlement prior to the final approval hearing. (Doc. #1062) (filed Mar. 1, 2012) & (Doc. 1116) (filed Mar. 27, 2012). In addition to finding that his objection was without merit, Judge Samuel Conti overruled Mr. Hall's objection "on the grounds that the objector has failed to submit proof or otherwise establish that he is a member of the Class, and therefore lacks standing to challenge the Settlement." *See Order Granting Final Approval of Settlement with Chunghwa Picture Tubes, Ltd.* (Doc. #1103) (filed Mar. 22, 2012).

204. *See* Docs. # 1105, 1106 (filed Mar. 22, 2012). Following the initial settlement between Indirect Purchaser Plaintiffs and defendant Chunghwa Picture Tubes, Ltd., five additional settlements have been approved between a class of Direct Purchaser Plaintiffs and named defendants, most recently being the settlement between Direct Purchaser Plaintiffs and Toshiba defendants. *See Order granting Final Approval of Class Action Settlement with Toshiba* (Doc. #1791) (filed July 23, 2013). To date, there have been no objector appeals resulting from these settlements. Litigation continues in MDL 1917 and the issue of attorney fees will not arise until all remaining claims have been addressed.

205. Citing the Court's continuing jurisdiction under the Final Judgment entered on March 22, 2012 in conjunction with the Order granting final approval of the settlement with Chunghwa Picture Tubes, Ltd., Judge Conti granted the Indirect Purchaser Plaintiffs' motion to compel discovery and ordered objector Hull to appear for a deposition and produce requested documents by May 11, 2012. *See Order Granting Indirect Purchaser Plaintiffs' Motion to Compel Discovery From Objector* (Doc. # 1155) (filed Apr. 16, 2012). Judge Conti concluded that because the requests for documents and information sought by the Indirect Purchaser Plaintiffs focused "solely on the objector's standing, the bases for his current objections, his role in objecting to this and other class settlements, and his relationships with the counsel that are believed to be behind the scenes manipulating him," the requested information and documents are relevant, needed and reasonably narrowly tailored. *Id.* In response to Objector Hull's refusal to appear for a deposition or produce documents by the Court's May 11, 2012 deadline and failure to provide any valid reason or justification for not doing so, Indirect Purchaser Plaintiffs filed a motion requesting the Court to order Hull to show cause why he should not be found in civil contempt and sanctioned in the amount of $5,000 in attorney's fees and $1,166.95 in costs for his failure to comply with the Court's direct order. (Doc. #1199) (filed May 18, 2012). On May 25, 2012, Special Master Legge granted the Indirect Purchaser Plaintiffs' motion and ordered Objector Hull to show cause why he should not be held in contempt for violating the Court's order compelling his deposition and response to discovery documents (Doc. #1210) (filed May 25, 2012). On June 1, 2012, Joseph Darrell Palmer entered his appearance as counsel on behalf of Objector Sean Hull (Doc.#1222) (filed June 1, 2012), and filed a Response to Plaintiffs motion for contempt arguing that plaintiffs' motion should be denied, the order for a deposition should be vacated as without jurisdiction and moot, and sanctions should be denied in their entirety. (Doc. #1223) (filed June 1, 2012). On June 20, 2012, Special Master Legge filed his Proposed Order Finding Objector Sean Hull in Civil Contempt and Awarding Sanctions to Indirect Purchaser Plaintiffs. (Doc. #1234) (filed June 20, 2012). However, it appears that before Judge Conti either adopted or rejected Special Master Legge's Proposed Order, Objector/Appellant Hull voluntarily dismissed his appeal pursuant to FRAP 42(b) on August 9, 2012.

206. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: notice of appearance of Joseph Darrell Palmer for Appellant Sean Hull; motion to dismiss case voluntarily pursuant to FRAP 42(b).

207. The sole objector National Automatic Sprinkler Industry Pension Fund ("NASI") represented by attorney Irwin Schwartz only objected to the attorneys fee award as presented in the Settlement Notice. Objectors supported the settlement and plan of allocation. Following the September 27, 2010, hearing on Final Approval of Class Settlement. the Court concluded that a supplemental hearing on the Application for Attorney Fees warranted in light of a recent Ninth Circuit's decision. A Supplemental Final Settlement Hearing on Plaintiffs' Application for Attorney Fees was set for November 1, 2010, and additional objections could be filed up until October 26, 2010. Objector NASI remaining the only objector to the fee award, filed a supplemental objection and response which were overruled by the court's Order Granting Lead Plaintiffs Motion for Attorney Fees and Reimbursement of Litigation Expenses. (Doc. # 312) (filed Nov. 1, 2010).

208. *See* Docs. #293 & 294 (filed Sept. 29, 2010).

209. *See* Doc. #312 (filed Nov. 1, 2010).

210. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Mediation Form; motion to dismiss case voluntarily pursuant to FRAP 42(b). Prior to dismissing its appeal, Objector Pension Fund also withdrew its motion for attorney fees and expenses pursuant to Fed. R. Civ. P. 54(d). (Doc. #320) (filed Dec. 21, 2010).

211. *See Plaintiffs' Response to Objections to Class Counsel Settlement* (Doc. #421) (filed Jan. 3, 2013) (describing the 9 objections; two additional objections were submitted 14 days past the deadline). Class plaintiffs were given an additional 30 day period to submit objections to Plaintiffs' modified plan of distribution of the settlement funds. Three objectors filed renewed objections during this period. *See Status Report* (Doc. #462)(filed May 20, 2013).

212. *See Final Judgment and Order of Dismissal with Prejudice* (Doc. #465) (filed May 30, 2013).

213. *See Order* (Doc. #467) (filed June 19, 2013).

214. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Mediation Form; objector/appellant's stipulated motion to dismiss case voluntarily pursuant to FRAP 42(b).

215. *See Plaintiffs Proposed Findings of Fact and Conclusions of Law and Order Thereon* (Doc. #118) (filed Mar. 3, 2010).

216. *See Lane v. Facebook, Inc.,* No. 08-3845, 2010 WL 9013059 (N.D. Cal. Mar. 17, 2010).

217. *See Lane v. Facebook, Inc.,* No. 08-3845, 2010 WL 2076916 (N.D. Cal. May 24, 2010).

218. *Lane v. Facebook, Inc.,* 696 F.3d 811 (9th Cir. 2012) (holding that the district court did not abuse its discretion in approving the parties' $9.5 million settlement agreement as "fair, reasonable and adequate" finding the settlement amount was not too low and not disqualified because a Facebook employee sits on the board of the organization distributing *cy pres* funds). Objector/appellant McCall's Petition for rehearing *en banc* and Objectors Marek and Trotter's petition for rehearing were denied. *Lane v. Facebook, Inc.,* 709 F.3d 791 (9th Cir. 2013). Objectors' petition for certiorari was recently granted on July 31, 2013. *Marek v. Lane, et al.,* (U.S. July 31, 2013) (No. 13-136).

219. *See supra* note 156.

220. Although 50 objections appear to have been timely filed objecting to the terms of the proposed settlement or the fees and expenses requested by class counsel, the court reports in order granting final approval that only 27 objections were filed by members of the Settlement Class as defined in the Notice. (Doc. #319) (filed Dec. 20, 2010) Thus only 27 objectors had standing to object to the settlement. *See also Pls. Reply Mem. in Supp. of Mot. for Final Approval of Settlement* (Doc. #302) (filed Dec. 6, 2010).

221. *See* Docs. #319, 320 (filed Dec. 20, 2010).

222. The Ninth Circuit *sua sponte* consolidated Appeal Nos. 11-15182, 11-15186, 11-15190, 11-15191, and 11-15192 on Feb. 1, 2011.

223. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Mediation Form; motions to extend time to file opening brief and record on appeal(granted); motion to supplement the record on appeal (denied); motion to

file opening brief and certain excerpts of record under seal(granted); opening brief filed; response to appellees' motion to strike; motion for extension of time to file reply brief (granted); motion to dismiss case voluntarily pursuant to FRAP 42(b).

224. Oral argument was held in San Francisco on August 13, 2013 for consolidated appeals 11-15186, 11-15190, 11-15191, 11-15192.

225. Oral argument was held in San Francisco on August 13, 2013 for consolidated appeals 11-15186, 11-15190, 11-15191, 11-15192.

226. Oral argument was held in San Francisco on August 13, 2013 for consolidated appeals 11-15186, 11-15190, 11-15191, 11-15192.

227. Oral argument was held in San Francisco on August 13, 2013 for consolidated appeals 11-15186, 11-15190, 11-15191, 11-15192.

228. Although 9th Circuit Objector Appeal No. 10-15871 listed here resulted from the final approval of the settlement of surface flaking claims by plaintiffs in *Ross v. Trex* Company, *Inc.,* No. 3:09-670 (N.D. Cal. Feb. 13, 2009), the settlement also consolidated *Ross* with *Okano v. Trex Company, Inc.,* No. 09-1878 (N.D. Cal. Apr. 14, 2009) for purposes of pursuing mold claims against Defendant Trex. *See Order* (Doc. # 152) (filed Mar. 16, 2010). Plaintiffs on behalf of a nationwide class filed a motion seeking preliminary approval of a settlement of their mold claims against Defendant Trex on April 5, 2013, and a hearing on the motion is scheduled for Aug. 23, 2013. (Doc. # 258) (filed Apr. 5, 2013).

229. Preliminary approval of the class action Settlement Agreement between class members and Defendant Trex Co. was granted on July 30, 2009; the final fairness hearing was held on October 30, 2009. Fifteen objections were submitted prior to the fairness hearing and an additional 3 objections were submitted afterwards. Despite the fact that four of the 18 total objections were untimely and a fifth suffered from other procedural deficiencies, the court considered all of them, addressing the arguments raised prior to overruling all objections and granting final approval, finding the settlement to be fair, adequate and free from collusion. *See Second Revised Final Order Approving Class Action Settlement and Dismissing Released Claims with Prejudice* (Doc. #154)(filed Apr. 7, 2010)(*nunc pro tunc* to March 15, 2010).

230. *See* Doc. #152 (filed Mar. 16, 2010).

231. *See* Doc. #154 (filed Apr. 7, 2010).

232. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: It appears that the parties decided to participate in the Ninth Circuit Mediation Program (facilitates settlement while appeals are pending). On June 30, 2010, the parties informed the court that they had reached a settlement and they were ordered to either file a motion or stipulation to dismiss the appeal pursuant to FRAP 42(b) or contact the Circuit Mediator within 30 days. Objectors/Appellants filed their stipulated motion to dismiss the case voluntarily pursuant to FRAP 42(b) on July 9, 2010, and the court dismissed the appeal on July 12, 2010.

233. Although the court considered all 36 objections, the court pointed out that 5 of the 36 objections were received from individuals who also opted out of the settlement which technically mooted their objections as class members who opt out lack standing to object to a settlement. *See Order (1) Granting Final Approval of Class Action Settlement etc.* (Doc. # 207) (filed May 17, 2011).

234. *See In re Wachovia Corp. "Pick–A–Payment" Mortgage Mktg. & Sales Practices Litig.*, 2011 WL 1877630 (N.D. Cal. May 17, 2011).

235. An additional appeal was filed by lead plaintiffs Anthony Michaels and David Catapano, appealing on behalf of themselves and the class, most likely from the court's decision to award class counsel only $800,000 of the $1.05 million it requested for attorney fees, and to award class representatives Michaels and Catapana only $2,000 of the $5,000 they requested. *See Notice of Appeal* (Doc. # 226) (filed July 27, 2012). Appeal No. 12-35631 was dismissed on Aug. 30, 2012, pursuant to appellants' FRAP 42(b) motion for voluntary dismissal.

236. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Mediation Form; motion to proceed *in forma pauperis* (denied by the district court Aug. 18, 2011); motion to extend time to file response to appellees motion to dismiss for lack of jurisdiction (granted in part); motion to dismiss case voluntarily pursuant to FRAP 42(b).

237. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Mediation Form; parties' stipulation to dismiss the case voluntarily pursuant to FRAP 42(b).

238. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Mediation Form; parties' stipulation to dismiss the case voluntarily pursuant to FRAP 42(b).

239. Plaintiffs asked the court to require a total appeal bond of $240,000 divided equally among the 2 Objectors ($116,250 each) to ensure payment of appellate costs that consisted of: (1) $15,000 per appeal for the expenses incurred opposing these appeals, which are recoverable costs under Fed. R. App. P. 39(e); and (2) $101,250 for the interest on the unpaid settlement amount and attorneys' fees through resolution of the appeals (plaintiffs calculated by multiplying the cash component of the settlement amount and the attorneys' fees awarded by the Court ($75 million) by the current applicable interest rate of 0.18% for 18 months, which plaintiffs identified as a conservative estimate of the length of time it will take to resolve the appeals.) *See Plaintiffs' Memorandum of Points and Authorities in Support of Motion Requiring Objector-Appellants to Post Appeal Bond* (Doc. # 235, Attach. 1) (filed July 1, 2011).

240. Citing *Azizian v. Federated Dep't Stores, Inc.*, 499 F.3d 950, 961 (9th Cir. 2007), the court balanced the appellant's ability to pay a bond, the risk that the appellant would not pay costs if unsuccessful, the merits of the appeal, and whether the appellant has shown bad faith or vexatious conduct, and ordered Rose to post an appellate bond in the amount of $15,000 concluding that the "amount is significantly less than the requested amount of $ 116,250, but will offer Plaintiffs some assurance that they will recover their costs in the event that Rose's appeal is unsuccessful." *See Order* (Doc. #249) (filed Aug. 18, 2011) & *Order Setting Deadline for Marcella Rose to Post Appeal Bond* (Doc. #252) (filed Aug. 26, 2011). Appeal No. 11-16507 was voluntarily dismissed on Aug. 30, 2011 prior to the Sept. 26, 2011 deadline for posting the cost bond.

241. Plaintiffs asked the court to require a total appeal bond of $240,000 divided equally among the 2 Objectors ($116,250 each) to ensure payment of appellate costs that consisted of: (1) $15,000 per appeal for the expenses incurred opposing these appeals, which are recoverable costs under Fed. R. App. P. 39(e); and (2) $101,250 for the interest on the unpaid settlement amount and attorneys' fees through resolution of the appeals (plaintiffs calculated by multiplying the cash component of the settlement amount and the attorneys' fees awarded by the Court ($75 million) by the current applicable interest rate of 0.18% for 18 months, which plaintiffs identified as a conservative estimate of the length of time it will take to resolve the appeals.) *See Plaintiffs' Memorandum of Points and Authorities in Support of Motion Requiring Objector-Appellants to Post Appeal Bond* (Doc. # 235, Attach. 1) (filed July 1, 2011). Although Objectors Attorney Darrell Palmer filed an 11-page Response to Plaintiff's motion arguing that

it should be overruled or the bond should only be set for $1,000, Appeal No. 11-16513 was voluntarily dismissed on July 21, 2011 prior to the court's ruling on the Plaintiffs' cost bond motion. *See Response Objectors Opposition to Plaintiffs' Motion for an Appeal Bond* (Doc. #239) (filed July 15, 2011).

242. *Plaintiffs' Consolidated Response to Objections to Final Approval of Class Action Settlement and Request for Attorneys' Fees* (Doc. #205) (filed Mar. 7, 2011) (plaintiffs argue that the objections asserted on behalf of four class members by three well known professional objectors—Attorneys Howard Strong, Joseph Darrell Palmer, and Charles Chalmers—should be overruled because they have all been rejected by other courts including the district court for the N.D. Cal).

243. *See* Doc. #216 (filed Apr. 1, 2011).

244. On April 1, 2011, the Court granted Final Approval of the Settlement, but delayed consideration of Class Counsel's Motion for Attorney Fees until after the May 20, 2011 deadline for filing a claim. On June 7, 2011, a Joint Report in Response to the Court's Order Re Number of Claims was filed by class counsel detailing the number of claims submitted. On June 9, 2011, Attorney Chalmers on behalf of Objector Neil Scheiman moved for Leave to File a Response to the Report, which he filed on June 29, 2011. The court overruled Objector Scheiman's supplemental objections and approved Class Counsel's Motion for an Award of Attorney Fees, Costs, and Incentive Awards. (Doc. #232) (filed July 6, 2011).

245. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Mediation Form; late-filed motion for an extension of time to file opening brief (granted); parties' stipulated motion to dismiss the case voluntarily pursuant to FRAP 42(b).

246. Plaintiffs' Reply Memorandum in Support of Motion for Final Approval of Settlement (Doc. #583)(filed Feb. 28, 2012)(Plaintiffs addressed the substance of the twenty-six objections to the proposed Settlement that were timely lodged.) Upon receipt of four additional objections, Plaintiffs amended and filed an updated version of a chart that catalogued all of the 30 timely filed objections. (Doc. #590) (filed March 5, 2012).

247. *See* Docs. #607, 608 & 609 (filed Mar. 29, 2012).

248. The Ninth Circuit granted appellees' motion to consolidate Appeal Nos. 12-15705, 12-15889, 12-15957, 12-15996, 12-16010, and 12-16038 on March 8, 2012.

249. *Response to Objections to Proposed Settlement* (Doc. #214) (filed Mar. 7, 2011).

250. *See* Doc. #218 (filed Mar. 31, 2011).

251. *See infra* note 254 for explanation of a noted discrepancy regarding date of dismissal.

252. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Mediation Form; motion for an extension of time to file opening brief (granted); amended notice of appeal; parties' stipulated motion to dismiss the case voluntarily pursuant to FRAP 42(b).

253. Class counsel explained that in accordance with the terms of the judgment and the Settlement Agreement, the Settlement Administrator would be proceeding with the distribution of the Settlement Fund despite Objector Balla's attempted appeal. Thus, Plaintiffs would seek a bond amount only with respect to the more limited costs of appeal recoverable under Federal Rule of Appellate Procedure 39. Estimating that the costs associated with the appellate record, court reporter transcriptions, and printing to be approximately $4,000–$6,000, Plaintiffs chose to request that the court set the amount of the appeal bond at the midpoint of the estimated appellate costs or $5,000. *See Motion for Appeal Bond* (Doc. #220) (filed Apr. 25, 2011).

254. *See Yingling v. eBay, Inc.,* No. 5:09-1733, 2011 WL 2790181 (N.D. Cal. July 5, 2011). It appears that Objector Balla and his attorney Mr. Palmer chose not to post the bond, but instead to amend the notice of appeal on August 5, 2011, thus notifying the court of their intention to appeal from the courts July 5, 2011 Order requiring the bond. The appellate docket for Appeal No. 11-16033 indicates that Appellant Balla filed a stipulated motion to dismiss the appeal voluntarily pursuant to FRAP 42(b) on August 11, 2011. Although the appellate docket appears to indicate that the court granted Objector Balla's FRAP 42(b) motion to dismiss on Aug. 12, 2011, the mandate is not entered on the district court docket until September 14, 2011. See Doc. #232 (filed Sept. 14, 2011).

255. Only 2 objections were filed. On Jan. 23, 2012, attorney Sam P. Cannata submitted objections on behalf of his minor children Objectors Enzo R. and Mia G. Cannata. (Doc. #199) (filed Jan. 23, 2012). Attorney Joseph Darrell Palmer filed objections on behalf of another attorney, Objector Christopher Bandas. (Doc. #200) (filed Jan. 23, 2012) In addition to submitting their arguments for why the Palmer/Bandas and Cannata Objections should be overruled, Plaintiffs motioned the court to strike the Objection of Mia and Enzo Cannata because since neither of the Cannata objectors are purchasers of the computers as required to be members of the class (their objection states they received their computers as gifts), they do not have standing to object. *See Plaintiffs' Reply Memorandum* (Doc. #202) (filed Jan. 30, 2012). On Feb. 1, 2012, Samuel Cannata filed a motion to withdraw his minor children as objectors and substitute himself, on the ground that he purchased the computers for his children, and thus he was the true class member at issue. Doc. #213 (filed Feb. 1, 2012) Although the Court granted Mr. Cannata's motion to withdraw his children as the named Objectors and substitute himself as the Objector of record, the Court found Mr. Cannata's objections to be without merit, overruled them and granted final approval of the settlement. *See Order* (Doc. #217) (filed Feb. 14, 2012).

256. *See* Doc. #218 (filed Feb. 14, 2012).

257. After receiving notice on March 28, 2012 that the appeal would be dismissed within 21 days unless the docketing and filing fees were paid [Doc. #233 (filed Mar. 23, 2012)], the Ninth Circuit dismissed Objector Bandas' Appeal No. 12-15555 on April 18, 2012. *See* Doc. #241 (filed Apr. 18, 2012). After payment of the docketing fee, Objector Bandas' Appeal No. 12-15555 was reinstated on June 25, 2012. (Doc. #259) (filed June 25, 2012).

258. Following the July 31, 2012 Order for Mr. Bandas to post an appeal bond by Aug. 6, 2012, Attorney Palmer and Objector Bandas filed a motion to stay (Doc. #267)(filed Aug. 6, 2012) and amended their notice of appeal to include the July 31, 2012 Bond Order (Doc. #268)(filed Aug. 6, 2012). Judge James Ware denied Palmer/Bandas' motion to stay, ordering Bandas' to either post the appellate bond by Aug. 24, 2012 or dismiss his appeal with failure to comply possibly resulting in a finding of civil contempt and imposition of sanctions (Doc. #272)(filed Aug. 22, 2012). On

Aug. 29, 2012, Judge Ware granted Plaintiffs' motion for sanctions finding that Objector Bandas' failure to comply with the Court's July 31 Order and August 22 Order warranted a finding that Objector Bandas was in contempt, and the Court imposed the sanction of striking Objector's objection to the Final Settlement "which means that the Objection has no force or effect on the Final Settlement." See *Embry v. ACER Am. Corp.*, No. 09-01808, 2012 WL 3777163 (N.D. Cal. Aug. 29, 2012). On Sept. 6, 2012, Objector Bandas amended his notice of appeal a second time to add the courts Aug. 29, 2012 Contempt Order. See Doc. #276 (filed Sept. 6, 2012). On Sept. 28, 2012, Plaintiffs filed a motion requesting Objector Bandas to be found in contempt of court a second time and imposition of further sanctions. (Doc. #277) (filed 9/28/2012). On October 1, 2012, a hearing on the motion for further sanctions was set for Oct. 26, 2012 in San Francisco. On October 2, 2012, the Ninth Circuit granted Appellant Bandas' motion to dismiss the case voluntarily pursuant to FRAP 42(b). (Doc. #280) (filed Oct. 2, 2012).

259. Although Mr. Cannata was originally counsel to the original Objectors, Sam P. Cannata was substituted as the Objector of record prior to final approval of the settlement. *See supra* note 255.

260. *See supra* note 258. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Mediation Form; Appellant Bandas' motions to reinstate case after FRAP 42-1 dismissal (second motion granted after payment of fees); motion to extend time to file opening brief (granted); amended notice of appeal (first and second); motion to stay lower court action; reply and response to appellees' motion to dismiss appeal following district court's contempt order; appellant Bandas' motion to dismiss case voluntarily pursuant to FRAP 42(b).

261. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: late payment of docket fee; objector/appellant Cannata's motion to dismiss the case voluntarily pursuant to FRAP 42(b).

262. *See Plaintiffs' Motion for Reconsideration* (Doc. #257) (filed June 26, 2012).

263. *See Order granting Plaintiffs' Motion for Reconsideration* (Doc. #265) (filed July 31, 2012).

264. *See Plaintiff's Supplemental Brief in Support of Motions for Discovery and Appeal Bond* (Doc. #251) (filed May 4, 2012). Following dismissal of Objector Bandas' appeal, Plaintiffs asked the court to grant its original motion filed on March 23, 2012 to require Objector Cannata to post a cost bond in the amount of $346,814.51 or such lesser amount as the Court sees fit. Plaintiffs asserted that an appeal bond in the amount of $346,814.51 is necessary to ensure payment of : (1) costs incurred in opposing the appeal ($15,000); administrative costs of keeping in contact with claimants about the status of their claim pending appeal ($55,650); and (3) delay damages likely to be awarded to class members on appeal under 28 U.S.C. 1912 because of delay in distribution of settlement benefits ($276,164.51). *Plaintiff's Motion for Appeal Bond* (Doc #232) (filed March 23, 2012).

265. Although the court found that a bond was warranted, the Court refused to include anticipated damages in the value of a FRAP 7 cost bond, thus because Plaintiff only anticipated incurring $70,650 in actual costs, the Court found that a bond of $70,650 was appropriate. See *Embry v. ACER Am. Corp.*, No. 09-01808, 2012 WL 2055030 (N.D. Cal. June 05, 2012). It appears that Objector Cannata chose the option of dismissing his appeal within the 14-day deadline instead of posting the $70,650 appellate cost bond. (Doc. #254) (filed June 15, 2012).

266. *Response in Opposition to Objections to the Proposed Settlement* (Doc. #98) (filed Jan 27, 2012).

267. *Order Granting Final Approval of Settlement and Release and Granting Plaintiffs' Motion for An Award of Attorneys' Fees, Reimbursement of Expenses and Incentive Awards* (Doc. #107) (filed Mar. 8, 2012) (Notice given per Doc. #118 on April 5, 2012); and *Judgment* (Doc. #110) (filed Apr. 2, 2012) (Notice given per Doc. #116 on April 4, 2012).

268. The Ninth Circuit granted appellees' motion to consolidate Appeal Nos. 12-15740, 12-15757, 12-15782, and 12-15816 on May 7, 2012.

269. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: objector/appellant's motion to dismiss the case voluntarily pursuant to FRAP 42(b). Objector Funk dismissed his appeal and did not post the required appellate cost bond.

270. The Ninth Circuit denied Objector/Appellant Gaudet's motion to stay the district courts' May 29, 2012 bond order. (Doc. #172)(filed June 7, 2012). Objector Gaudet amended his notice of appeal to include the May 29, 2012 Bond Order. (Doc. #164)(filed June 6, 2012). On June 22, 2012, Plaintiffs filed a motion to hold Objector Gaudet in contempt for failing to post a bond by June 8, 2012, not dismissing his appeal, and after being served with Plaintiffs' notice of deposition, Gaudet failed to appear. (Doc. # 179)(filed June 22, 2012). On July 6, 2012, Judge Ware denied Plaintiffs' motion for contempt as premature, but ordered Objector Gaudet to post the required appellate bond on or before July 13, 2012 or dismiss his appeal. Furthermore, the court placed Objector Gaudet on notice that failure to immediately comply with the Court's May 29 Order may result in a finding of civil contempt and the imposition of appropriate sanctions. (Doc. #195)(July 6, 2012) On August 1, Plaintiffs renewed their motion for contempt, and on August 22, 2012 the Court found that Objector's failure to comply with the Court's May 29 Order warranted a finding that Objector Gaudet is in contempt, and imposed the sanction of striking his objection to the Final Settlement which means that Objector Gaudet's objection has no force or effect on the final settlement. *See In re Magsafe Apple Power Adapter Litigation,* No. 09-01911, 2012 WL 3686783 (N.D. Cal. Aug. 22, 2012). On August 29, 2012, Objector Gaudet amended his notice of appeal in No. 12-15757 to add the Courts May 29, 2012 Bond Order and the courts' August 22, 2012 Contempt Order. (Doc. #206) (filed Aug. 29, 2012). As of August 2013, Objector/Appellant Gaudet has filed his opening brief and reply brief in pending appeal No. 12-15757, which remains consolidated with appeal No. 12-15782.

271. Objector Gryphon and her attorney Theodore Frank responded to Plaintiffs' bond motion by asking the court to deny the motion and impose Rule 11 sanctions on Plaintiffs' counsel. (Doc. #137)(Apr. 30, 2012). After being ordered on May 29, 2012, to post a $15,000 appeal bond and be available for deposition questioning on the ability to post a larger bond of $25,000, counsel for Objector Gryphon attempted to post a $25,000 bond on June 8, 2012 which the Clerk of Court was unable to post because Objector Gryphon was not ordered or granted leave to post a bond in that amount. See Doc. #176 (filed June 20, 2012). Objector Gryphon and her counsel were ordered to post the required $15,000 bond on or before June 22, 2012 which they did. *See* Doc. 179 (filed June 22, 2012). In Appeal No. 12-15782, Appellant Gryphon and her counsel filed a motion to vacate or modify the district court's May 29, 2012 Bond Order. Appeal No. 12-15782 (9th Cir. June 8, 2012) (Doc. #16). On Sept. 5, 2012, the Ninth Circuit denied Plaintiff/Appellees' motion to dismiss Appeal No. 12-15782, and denied Appellant Gryphon's motion to vacate the appeal bond order without prejudice to renewing the argument in her opening brief. *See Order*, No. 12-15782 (9th Cir. Sept. 5, 2012) (Doc. #40). As of

August 2013, Objector/Appellant Gryphon has filed her opening brief and reply brief in pending appeal No. 12-15782, which remains consolidated with appeal No. 12-15757.

272. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: notice of appearance by attorney Joseph Darrell Palmer for Objector Lee, objector/appellant's motion to dismiss the case voluntarily pursuant to FRAP 42(b).

273. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: required Mediation Form, objector/appellant's motion to dismiss the case voluntarily pursuant to FRAP 42(b).

274. *See Motion for Bond* (Doc. #133) (filed Apr. 16, 2012). For each bond request, Plaintiffs' requested an appeal bond in the amount of $200,000 consisting of $25,000 in anticipated taxable costs and $175,000 in anticipated attorneys' fees Plaintiffs would incur in defending against each of the Objectors' appeals. Plaintiffs also sought an Order granting Plaintiffs limited expedited discovery to establish whether the Objectors' appeals lacked merit, whether each Objector was capable of paying the cost of the requested bond, and whether each Objector would pay the appellees' costs if they lost their appeal.

275. *See Motion for Bond* (Doc. #127) (filed Apr. 10, 2012). *See supra* note 274 for details of bond request.

276. *See Motion for Bond* (Doc. #132) (filed Apr. 16, 2012). *See supra* note 274 for details of bond request. Objector Lee filed a motion to stay the courts May 29, 2012 bond order on June 7, which the Court denied. (Doc. #174) (filed June 20, 2012). On June 22, 2012, Plaintiffs filed a motion to hold Objector Lee in contempt for failing to post a bond by June 8, 2012, not dismissing his appeal, and after being served with Plaintiffs' notice of deposition, Lee failed to appear. (Doc. # 181) (filed June 22, 2012). On July 6, 2012, Judge Ware denied Plaintiffs' motion for contempt as premature, but ordered Objector Lee to post the required appellate bond on or before July 13, 2012 or dismiss his appeal. Furthermore, the court placed Objector Lee on notice that failure to immediately comply with the Court's May 29 Order may result in a finding of civil contempt and the imposition of appropriate sanctions. (Doc. #195) (July 6, 2012) Objector Lee voluntarily dismissed his appeal on July 20, 2012. (Doc. #196) (filed July 20, 2012).

277. *See Motion for Bond* (Doc. #131) (filed Apr. 13, 2012). *See supra* note 274 for details of bond request.

278. *See In re MagSafe Apple Power Adapter Litig.,* No, 09-01911, 2012 WL 2339721 (N.D. Cal. May 29, 2012). Because the Court concluded that Objectors were highly unlikely to prevail in their appeals, and because there was a significant risk of non-payment following appeal, the Court found that a bond was warranted, but the bond would only be required in an amount sufficient to cover Plaintiffs' anticipated costs, and not Plaintiffs' projected attorney fees. Thus, on or before June 8, 2012, the Court required each Objector to either post a $15,000 bond or file a notice of dismissal of their respective appeals. In addition, the Court granted Plaintiffs' Motion to conduct limited discovery and ordered that on or before June 18, 2012, each Objector must be available for one in-person deposition regarding his or her ability to post a bond in the amount of $25,000. Upon completion of the depositions, Plaintiffs could file a single supplemental Motion seeking a higher bond per Objector based on financial information gathered from the deposition. *Id.* at *2.

279. Doc. #168 (filed June 13, 2012).

280. Objector Sweeney was also ordered to appear for an in-person deposition regarding her status as a class member on or before July 27, 2012. (Doc. #194) (filed July 6, 2012). Objector Sweeney voluntarily dismissed her appeal on August 7, 2012. (Doc. #201) (filed Aug. 7, 2012).

281. *Plaintiffs' Motion for Final Approval of Class Action Settlement* (Doc. #88-1) (filed Jan. 20, 2012).

282. *See Ko v. Natura Pet Products, Inc.,* No. 09-02619, 2012 WL 3945541 (N.D. Cal. Sept. 10, 2012).

283. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Mediation Questionnaire; notice of appearance of Christopher A. Bandas for Appellant Walsh on Nov. 27, 2012. Objector/Appellant failed to file his opening brief by April 5, 2013 as required, and did not seek an extension of time to file. Appeal 12-17296 was dismissed under Ninth Cir. R. 42-1 for failure to prosecute. Order, No. 12-17296 (9th Cir. Apr. 24, 2013) (Doc. #17).

284. *Plaintiffs' Response and Motion to Overrule Purported Class Member Donald R Earl's Objections* (Doc. #219) (filed Nov. 2, 2012).

285. *See Order* (Doc. #223) (filed Nov. 13, 2012). The Court specifically overruled Objector Earl's objections and extended the opt-out deadline for Mr. Earl to Dec. 10, 2012 so he could exclude himself from the settlement if he chose. *Id.* After the Court granted final approval of the Settlement after a hearing which Objector Earl did not attend, Objector Earl filed a motion to vacate the court's Nov. 13 Order granting final approval and awarding attorneys' fees. *See* Doc. #225 (filed Nov. 21, 2012) Plaintiffs' filed a motion to impose sanctions on Objector Earl for filing a frivolous Motion to Vacate that they alleged both repeated his failed attacks on the class notice (while admitting that his prior objections were made without even having read the notice in full) and raised new, baseless accusations of fraud against Class Counsel. *See Motion for Sanctions* (Doc. #230) (filed Dec. 3, 2012). The Court denied Objector Earl's motion to set aside the judgment pursuant to Rule 60(b), and denied Plaintiffs' motion for sanctions in the absence of clear evidence that Objector Earl's intentions were in bad faith. However, the court warned of future sanctions for continuing to file pleadings raising theories that the court has previously rejected. *See Schulken v. Washington Muitual Bank,* No. 09-027080, 2013 WL 11568 (N.D. Cal. Jan 1, 2013). Objector Earl filed his notice of appeal on Jan. 30, 2013 (Doc. #238).

286. Objector/Appellant Earl appealed the Court's Orders: (1) granting in part and denying in part class certification (Doc. # 184), granting preliminary approval to the Parties' class action settlement (Doc. #210), granting final approval to the settlement (Doc. # 223), and denying Earl's motion to vacate the judgment. (Doc. #237)

287. *Motion for Bond* (Doc. #240) (filed Feb. 15, 2013). Plaintiffs' request for a $20,000 appeal bond includes: $10,000 for estimated taxable costs (filing fees, printing and copying costs, cost of transcripts), and $10,000 for administrative costs of addressing the settlement class delay during the pendency of the appeal. *Id.*

288. *Order* (Doc. #259) (filed Apr. 2, 2013). Finding Plaintiffs estimate of taxable costs associated with preparing and transmitting the record of the case to be over-inclusive and presuming Objector Earl will pay for the transcripts, the Court reduced the bond amount requested for taxable costs from $10,000 to $5,000, and denied the request for $10,000 for administrative costs of addressing settlement delay as Plaintiffs were unable to identify any precedent or statutes authorizing administrative expenses as "costs," nor clearly distinguish the projected costs from those that could be claimed as attorney's fees. *Id.* Objector/Appellant Earl's emergency motion to stay the district court's bond order was denied by the Ninth Circuit

on May 30, 2013. *Order*, No. 13-15191 (9th Cir. May 31, 2013) (Doc. #9). Objector Earl was ordered to pay for the cost of the necessary transcripts needed on appeal. *See* Doc. #263 (filed May 31, 2013).

289. *Plaintiffs' Motion for Final Approval of Class Action Settlement* (Doc. #143) (filed Mar. 8, 2012). Plaintiffs assert that of the four objections, one objector had sought permission to withdraw his objection. *Id.*

290. *See Lemus v. H & R Block Enterprises LLC.,* No. 09-3179, 2012 WL 3638550 (N.D. Cal. Aug. 22, 2012).

291. *See Order,* Doc. #166 (filed Sept. 10, 2012*).*

292. Appeal No. 13-16628 was filed on Aug. 7, 2013 by class member Paul Madar from the court's denial of his motion to permit a late filed claim to the settlement funds and denial of his motion to reconsider the court's final approval of the settlement. Class member Madar did not object to the settlement thus his appeal is not considered an Objector appeal.

293. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: parties' stipulated motion to dismiss the case voluntarily pursuant to FRAP 42(b).

294. *See Exhibit A Index of Objections Received by Class Counsel* (Doc. #104-1) (filed Feb. 2, 2011).

295. *See Order* (Doc. #128)(filed May 31, 2011).

296. *See In re Google Buzz Privacy Litigation,* No. 10-00672, 2011 WL 7460099 (N.D. Cal. June 02, 2011).

297. *See Order* (Doc. #136) (filed June 17, 2011).

298. The Ninth Circuit filed an Order on Oct. 21, 2011 notifying Objector/Appellants in Appeal Nos. 11-16587, 11-16638, 11-16639, 11-16640, and 11-16642 that they were selected for inclusion in the Mediation Program. An in-person mediation/settlement conference was scheduled for Nov. 17, 2011 in San Francisco. *See Mediation Order*, Appeal No. 11-16587 (9th Cir. Oct. 21, 2011) (Doc. #12). The parties filed their stipulated motion to dismiss the appeals voluntarily pursuant to FRAP 42(b) on Nov. 18, 2011 and the Ninth Circuit dismissed the appeals on Nov. 21, 2011.

299. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: notice of appearance of Christopher Bandas for Appellant Kervin Walsh; Required Mediation Questionnaire; parties' stipulated motion to dismiss the case voluntarily pursuant to FRAP 42(b).

300. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Mediation Questionnaire; parties' stipulated motion to dismiss the case voluntarily pursuant to FRAP 42(b).

301. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Mediation Questionnaire; parties' stipulated motion to dismiss the case voluntarily pursuant to FRAP 42(b).

302. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: notice of appearance of Thomas L. Cox Jr. for Appellants Brent Clifton and Warren Sibley; Required Mediation Questionnaire; parties' stipulated motion to dismiss the case voluntarily pursuant to FRAP 42(b).

303. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Mediation Questionnaire; parties' stipulated motion to dismiss the case voluntarily pursuant to FRAP 42(b).

304. *See Nguyen v. BMW List of Objections Received From Class Members* (Doc. #102-1) (filed Feb. 27, 2012).

305. *See Nguyen v. BMW of North America LLC,* No. 10-02257, 2012 WL 1677054 (N.D. Cal. April 20, 2012).

306. *Id.*

307. *See Judgment* (Doc. #121) (May 8, 2012).

308. Appeal No. 13-16628 was filed on Aug. 7, 2013 by class member Paul Madar from the court's denial of his motion to permit a late filed claim to the settlement funds and denial of his motion to reconsider the court's final approval of the settlement. Class member Madar did not object to the settlement thus his appeal is not considered an Objector appeal.

309. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Mediation Questionnaire; parties' stipulated motion to dismiss the case voluntarily pursuant to FRAP 42(b).

310. *Response in Opposition to Objections to Proposed Settlement* (Doc. #59) (filed June 29, 2012).

311. *See In re Apple iPhone 4 Products Liability Litigation,* No. 5:10-md-02188, 2012 WL 3283432 (N.D. Cal. Aug. 10, 2012).

312. An additional appeal was filed by lead plaintiffs Anthony Michaels and David Catapano, appealing on behalf of themselves and the class, most likely from the court's decision to award class counsel only $800,000 of the $1.05 million it requested for attorney fees, and to award class representatives Michaels and Catapana only $2,000 of the $5,000 they requested. *See Notice of Appeal* (Doc. # 226) (filed July 27, 2012). Appeal No. 12-35631 was dismissed on Aug. 30, 2012, pursuant to appellants' FRAP 42(b) motion for voluntary dismissal.

313. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Mediation Form; motion to extend time to file opening brief (mooted); parties' stipulation to dismiss the case voluntarily pursuant to FRAP 42(b).

314. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: notice of appearance of Christopher Bandas on behalf of Appellant Michael Schulz; Required Mediation Form; motion to extend time to file opening brief (granted); parties' stipulation to dismiss the case voluntarily pursuant to FRAP 42(b).

315. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: notice of appearance of Christopher Bandas on behalf of Appellant Burt Chapa; Required Mediation Form; motion to extend time to file opening brief (granted); parties' stipulation to dismiss the case voluntarily pursuant to FRAP 42(b).

316. *Plaintiffs' Reply Memorandum in Support of Motion for Final Approval of Settlement* (Doc. #226) (filed Nov. 28, 2012). Plaintiffs assert that while there were 119 docketed items styled as "objections," only 100 were "proper objections" due to substance (5 expressed approval for the settlement), objections that also requested exclusion from the settlement class, failure to meet objection deadline and procedural defects. *Id.*

317. *See In re Netflix Privacy Litig.*, No. 5:11-CV-00379, 2013 WL 1120801 (N.D. Cal. March 18, 2013).

318. The Ninth Circuit granted appellees' motion to consolidate Appeal Nos. 13-15723, 13-15733, 13-15734, 13-15751, 13-15754, and 13-15759 on July 1, 2013.

319. The bond amount requested includes printing and administrative costs associated with responding to each appellate brief (estimated at $175 on each appeal), and administrative costs of continued settlement administration during the length of the appeal period. *See Motion for Bond on Appeal* (Doc. #281) (filed May 31, 2013). In addition to the bond motion, Plaintiffs have filed a motion requesting an opportunity to conduct limited discovery with respect to the Objectors regarding the merits of their appeals, their motivations and interests in appealing, objection histories, and their financial arrangements with their counsel relevant to the appeal. *See Motion for Extension of Time to Complete Discovery* (Doc. #282) (filed May 31, 2013). Both of Plaintiffs motions are scheduled for hearing on Aug. 23, 2013 in San Jose before Judge Edward Davila.

320. *See Plaintiff's Motion for Final Approval of Class Action Settlement* (Doc. #33) (filed Dec. 16, 2011). Plaintiffs filed a separate 20 page response to objections filed by one of the three objectors in this case. *See Plaintiff's Reply in Support of Final Approval and Response to Objection of Fred Sondheimer* (Doc. #38) (filed Jan. 6, 2012).

321. *See Farrell v. OpenTable, Inc.*, No. 11-1785, 2012 WL 1379661 (N.D. Cal. Jan. 30, 2012).

322. One of the grounds of Objector Fred Sondhiemer's original objection was that the Settlement Agreement contained no reporting requirement on the number of class members receiving a refund or credit. On April 27, 2012 (3 months after Objector Sondhiemer filed his appeal), Plaintiff class members and Defendant OpenTable, Inc. agreed to amend the Settlement Agreement by including a stipulation in which the Defendant agreed to maintain reasonable records of any refunds or credits paid to settlement class members for a one year period and file this information with the court; Objector Sondheimer agreed to dismiss his appeal within 24 hours; and Plaintiffs' class counsel agreed to pay Mr. Sondheimer and his counsel $7,000 within 14 days of Defendants' payment to class counsel pursuant to the terms of their agreement. *See Stipulation for Defendant to Collect Refund Information and Payment to Objector's Counsel* (Doc. #58) (filed Apr. 27, 2012). The court signed and granted the stipulation on May 2, 2012. (Doc. #58) (filed May 2, 2012) Objector Sondheimer voluntarily dismissed his Appeal 12-15370 the same day and mandate was filed in the district court on May 3, 2012. (Doc. #59) (filed May 3, 2012).

323. *See Plaintiffs Reply* (Doc. #89) (filed Dec. 21, 2012) (discussing the 13 objections submitted, 5 of which were allegedly untimely and/or otherwise procedurally improper).

324. *See In re Bank of Am. Credit Protection Mktg. & Sales Practices Litig.*, No. 3:11-md-2269, 2013 WL 174056 (N.D. Cal. January 16, 2013).

325. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: notice of appearance of Attorney Christopher A. Bandas for Appellant Beau Lochridge; Required Mediation Form; appellant's motion to dismiss the case voluntarily pursuant to FRAP 42(b).

326. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: notice of appearance of Allen G. Weinberg on behalf of Appellant Adina Wasserman; parties' stipulation to dismiss the case voluntarily pursuant to FRAP 42(b).

327. *See Class Counsel's Opposition to Objections to Final Approval of Class Action Settlement (*Doc. #125) (filed Aug. 22, 2012) & *Decl. of Tricia M. Solorzano on Behalf of Settlement Administrator Regarding Notice and Claims Process in Support of Motion for Final Approval of Class Action Settlement, Ex. G* (Doc. #128-7) (filed Aug. 22, 2012) (one objector could not be identified as a class member).

328. *Order Granting Joint Motion for Final Approval of Class Action Settlement; Granting Class Counsel's Motion for Attorneys' Fees, Costs, and Service Awards* (Doc. # 137) (Sept. 28, 2012).

329. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: notice of appearance of Attorney Christopher A. Bandas for Appellant Gordon Morgan; Required Mediation Form; appellant's motion to dismiss the case voluntarily pursuant to FRAP 42(b).

330. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: notice of appearance of Attorney Joseph Darrell Palmer for Appellants Nelson and Smith; Required Mediation Form; appellants' motion to dismiss the case voluntarily pursuant to FRAP 42(b).

331. *See Motion for Appeal Bond* (Doc. #148)(filed Nov. 8, 2012). Plaintiffs contend that an appeal bond of $64,536.69 is necessary to ensure payment of appellate costs including (1) the estimated cost to the class of $15,000 in connection with preparation of the record on appeal and transcript costs; (2) estimated cost to the class of $6,536.69 in lost interest resulting from the delay caused by the appeal(based on an 18-month appeal period and the interest rate prescribed for judgments); and (3) estimated additional claims administrator costs of $56,500 that will be incurred as a result of the appeal. *Id.*

332. *See Class Plaintiffs' Motion for Administrative Relief* (Doc. #158-1) (filed Dec. 10, 2012) Plaintiffs allege that Objectors Smith, Morgan and Nelson filed their original objections "*pro se,*" then filed their notices of appeal "*pro se*", and only when Plaintiffs filed their motion for an appeal bond did Attorneys Bandas and Palmer file their notices of appearance on behalf of Objectors. Plaintiffs' counsel asserts that while the appeal bond motion is pending they seek from the court an order to allow the necessary discovery to establish that Palmer's and Bandas' appeal are 1) frivolous, and 2) support a pattern and practice of extracting money from Class Counsel or face a frivolous appeal. *Id.*

333. *See Plaintiffs' Motion to Strike Objection and Notice of Appeal of Gordon B. Morgan* (Doc. #167-1) (filed Dec. 28, 2012). Plaintiffs allege that the fact that Morgan did not sign his objection nor did he sign his notice of appeal, but then represented to the court that he did, by filing them *pro se*, when in actuality Attorney Bandas drafted, signed and filed the objection and notice of appeal for Morgan, violated F.R.C.P. 11(a) and thus both the objection and notice of appeal must be struck. *Id.*

334. *See Plaintiffs' Reply to Motion for Final Approval of Class Action Settlement (Doc. #46)(filed Feb. 7, 2011); and [Defendants'] Reply in Support of Motion for Final Approval of Class Action Settlement* (Doc. #45) (filed Feb. 7, 2011).

335. *See Order Granting (1) Final Approval to Class Action Settlement; (2) Award of Attorney's Fees; and (3) Judgment of Dismissal.* (Doc. #49) (filed Apr. 5, 2011).

336. The Ninth Circuit granted Appellants' motion to consolidate Appeal Nos. 11-55674 and 11-55706. *See Order* (9th Cir. July 19, 2011) (Doc. #12).

337. *See Dennis v. Kellogg Co.*, 697 F.3d 858 (9th Cir. Sept. 04, 2012). After a careful review of the class settlement, the Ninth Circuit concluded that the "district court did not apply the correct legal standards governing *cy pres* distributions and thus abused its discretion in approving the settlement. The settlement neither identifies the ultimate recipients of the product and cash *cy pres* awards nor sets forth any limiting restriction on those recipients, other than characterizing them as charities that feed the indigent." *Id*. at 861. On remand, the court granted the parties' joint motion for preliminary approval of the second revised negotiated settlement. (Doc. #95) (filed May 5, 2013). The final approval hearing is scheduled for Sept. 9, 2013. Several objections have been filed prior to the August 9, 2013, deadline for objections, including an objection filed by Attorney Joseph Darrell Palmer on behalf of Objectors Kendal Mark Jan, and Toni Ozen [(Doc. #103) (filed on Aug. 10, 2013)] and an objection filed by attorney Theodore Frank on behalf of Objector M. Todd Henderson [(Doc. #102) (filed Aug. 9, 2013)].

338. *See id.*

339. *See Plaintiffs' Motion for Rule 7 Appeal Bond* (Doc. #61) (filed July 8, 2011). Although Plaintiffs stated that since there were two separate objector appeals, "an appeal bond of $3,000 to cover costs on appeal is reasonable," they reserved the right to seek an increase if necessary. *Id.*

340. *See Order Granting Plaintiffs Motion for a Rule 7 Appeal Bond* (Doc. #65) (filed Aug. 10, 2011) (neither Objector filed a timely opposition to the bond and Objector Rivero's counsel Christopher Bandas indicated Objector Rivero did not oppose a Rule 7 bond).

341. *See Plaintiffs' Memorandum of Points and Authorities In Support of Final Approval Of Class Action Settlement and Plaintiffs' Unopposed Motion for Attorneys' Fees And Costs and Incentive Awards* (Doc. #262) (filed Jan. 18, 2013) (arguing that the sole objection submitted by Attorney Theodore Frank on behalf of nominal Objector Brian Perryman should be dismissed because Objector Perryman lacks Article III standing to object to the proposed settlement). *See also Defendant's Statement of Non-Opposition to Plaintiffs' Motion for Final Approval of Class Action Settlement* (Doc. #265) (filed Jan. 22, 2013) (discussing Perryman objection). On Feb. 13, 2013, Objector Perryman filed a motion requesting the court impose Rule 11 sanctions against class counsel for filing a Memorandum in Support of Final Approval that contains claims, factual contentions and allegations which have no evidentiary support and are not warranted by existing law. (*See* Doc. #272) (filed Feb. 13, 2013). The court denied Objector Perryman's motion for Rule 11 sanctions. (Doc. #290) (filed May 6, 2013).

342. *See In re EasySaver Rewards Litig.*, 921 F.Supp. 2d 1040 (S.D. Cal. Feb. 4, 2013).

343. *See Final Judgment* (Doc. #277) (filed Feb. 21, 2013).

344. Appeal No. 13-16628 was filed on Aug. 7, 2013 by class member Paul Madar from the court's denial of his motion to permit a late filed claim to the settlement funds and denial of his motion to reconsider the court's final approval of the settlement. Class member Madar did not object to the settlement thus his appeal is not considered an Objector appeal.

345. *See Motion for Bond on Appeal* (Doc. # 284-1) (filed 03/14/2013). Plaintiffs asserted that although they would be justified in seeking a bond in excess of $96,000 to cover interest on the cash fund and administrative costs, they only sought a modest bond of $15,000 for traditional FRAP 39(e) costs. *Id.*

346. *See Order Granting Motion for Appellate Bond* (Doc. #291) (filed May 6, 2013).

347. *See Order Adopting Report and Recommendation, as Modified, Re Approval of Final Settlement; Denying in Part and Granting in Part Objections* (Doc. # 88) (filed Jan. 18, 2012).

348. *See Final Judgment and Order* (Doc. #109) (filed Apr. 13, 2012). The Court overruled the objections except for the argument made by Objectors Charmaine Griffith, Deidre Quenell, Rosemary Cohorst filed by Susan Kreidler that individual notice should be sent to class members with known addresses. Due to the request for attorneys' fees and costs by Objectors' counsel, the final decision on the distribution of the fee award to Class and Objectors counsel was postponed until after the May 7, 2012 hearing on Objectors' motion for attorney's fees and costs.

349. *See Cohorst v. BRE Props., Inc.,* No. 10-2666, 2012 WL 2001754 (S.D. Cal. June 05, 2012) (the court denied the motion for attorneys' fees by Attorneys for Objectors Yanique Dias and Gilliane Graber and granted counsel for Objector Susan Kreidler's motion for attorney's fees and costs in the amount of $69,641).

350. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Mediation Questionnaire; stipulated motion to voluntarily dismiss case with prejudice pursuant to FRAP 42(b). In addition to stipulating to the dismissal of her appeal pursuant to FRAP 42(b), Objector Kreidler filed a motion to withdraw all objections made to the settlement approved by the court. (Doc. #126)(filed Aug. 28, 2012).

351. *See Plaintiffs' Response to Objections* (Doc. #125) (filed July 2, 2012) (asserting that one of the two objections should not be considered because it did not comply with the Court's preliminary approval order or the S.D. Cal.'s Local Rules and Electronic Case Filing Administrative Policies and Procedures Manual, and was filed by two attorneys not authorized to practice law in the district).

352. *See In re Ferrero Litig.*, No. 11-cv-00205, 2012 WL 2802051 (S.D. Cal. July 9, 2012).

353. The Ninth Circuit *sua sponte* consolidated Appeal Nos. 12-56469 and 12-56478 on Sept. 5, 2012.

354. On Dec. 3, 2012, the district court denied a motion, filed by Objectors Courtney Drey and Andrea Pridham on November 5, 2012, to vacate the Court's order approving the class settlement pursuant to Federal Rule of Civil Procedure 60(b). *See* Doc. #154 (filed Dec. 3, 2012).

355. Plaintiff's request for an appellate bond in the amount of $21,970.72 included: $15,000.000 for costs incurred in opposing the appeal; $5,573.80 for administrative costs of keeping in contact with claimants about the status of their claim pending appeal; and $1,396.92 for post judgment interest. *See Plaintiffs' Motion for Appeal Bond* (Doc. 140-1) (filed Oct. 11, 2012).

356. *See Order Denying Plaintiffs' Request for an Appeal Bond* (Doc. #150) (filed Nov. 9, 2012). The Court concluded that an appeal bond was not necessary because Plaintiffs provided insufficient evidence to establish that there was a risk of nonpayment by Objectors should Plaintiffs be awarded costs on appeal.

357. *See Order Denying Joint Motion for Final Approval of Class Action Settlement* (Doc. #97) (filed Sept. 28, 2012). After considering all 18 objections to the settlement, the Court overruled all objections except for two objections to the *cy pres* award. Unable to strike down only the *cy pres* portion of the settlement, the court denied the joint motion for final approval of the class action settlement. On October 5, 2012, Plaintiffs and Defendants filed a revised stipulation of settlement which directly addressed the Court's concerns by striking the *cy pres* provisions in their entirety while keeping the settlement unchanged in all other respects.

358. *See Order Approving Class Action Settlement* (Doc. #108) (filed Dec. 12, 2012) and *Final Judgment* (Doc. # 109) (filed Dec. 18, 2012).

359. On May 17, 2013, the Ninth Circuit issued an Order informing Attorney Paul Hansmeier that he must withdraw as counsel of record for Objector/Appellant Browne within 14 days because he was not eligible to represent parties in the appeal due to the fact that on May 15, 2013, the court ordered Hansmeier's application for admission to the bar of the Ninth Circuit held in abeyance pending the outcome of his referral to the Minnesota State Bar and the Central District of California Standing Committee on Discipline for sanctions imposed in an appeal pending in the Central District of California. *See Order*, No. 13-55118 (9th Cir. May 17, 2013)(Doc. #16).

360. *See Joint Response to Objections to Final Approval of Class Action Settlement* (Doc. #107) (filed Aug. 13, 2012).

361. *See Gallucci v. Boiron, Inc.*, No. 3:11-cv-2039, 2012 WL 5359485 (S.D. Cal. Oct. 31).

362. Originally due on Feb. 22, 2013, Objectors Carapia and Johnson were granted two requested 30-day extensions to file their appellant brief. *See Orders,* No. 12-57074 (9th Cir. Feb. 22, 2013 & Apr. 9, 2013) (Docs. #10, #12). Objector/appellants did not file their opening brief by April 22, 2013. On June 11, 2013, Appeal No. 12-57074 was dismissed for failure to prosecute pursuant to Ninth Circuit Rule 42-1.

363. The Ninth Circuit, on May 7, 2013, stayed the appellate proceedings filed by Henry Gonzales until July 23, 2013, or until the bond amount at issue was resolved. *Order*, No. 12-57081 (9th Cir. May 7, 2013) (Doc. #24). Following the court's June 6, 2013 Bond Order, Objector/Appellant Gonzalez posted a $5,000 bond with the district court. (Doc. #150) (filed July 11, 2013).

364. Originally due on March 11, 2013, Objector Elizondo was granted a requested 30-day extension to file his appellant brief. *See Order,* No. 12-57184 (9th Cir. Mar. 8, 2013) (Doc. #7). Objector/appellant did not file his opening brief by April 10, 2013. On June 3, 2013, Appeal No. 12-57184 was dismissed for failure to prosecute pursuant to Ninth Circuit Rule 42-1.

365. *See Joint Motion to Set Bond Amount* (Doc. #138) (filed Dec. 20, 2012). The Court imposed an appeal-bond requirement in its final approval order. Specifically, the Court ordered that "[a]ny Class Member seeking to appeal . . . must . . . post an appropriate bond" to cover costs on appeal. *See Gallucci v. Boiron, Inc.*, No. 3:11-cv-2039, 2012 WL 5359485 (S.D. Cal. Oct. 31), at ¶ 10. The parties pointed out that despite this requirement, the three groups of objectors who filed notices of appeal did so without even seeking a determination of the bond amount they were required to post. Settling Plaintiffs and Defendent requested that the appeal bond be set at $235,500.66, asserting this amount as "a conservative estimate of the damages, costs, and interests that will result from the appeal." Specifically, the parties estimate that the bond is necessary to cover: $3,660 to print, file, and serve all the necessary ninth circuit papers; $12,000 for administrative costs that will be incurred in order "to continue to service and respond to class members' needs pending the appeal; $203,650 in attorney fees to defend the appeals; $16,190.66 for post-judgment interest (calculated using 622 day average appeal period and a .19% interest rate on the $5 million settlement fund). *See Joint Motion*, *supra*.

366. *See Order Granting in Part Joint Motion to Set Bond Amount (*Doc. #147) (filed June 6, 2013). The Court concluded that because it had already considered and overruled the objections, it was unlikely the objectors would prevail on appeal, thus it was appropriate to require the posting of an appeal bond. However, the Court refused to award the amount ($235,500.66) sought by the parties finding that only the parties' request for appellate costs was warranted in this case (finding the parties failed to establish that the claim was brought under a fee-shifting statute allowing recovery of attorneys' fees from an objecting class member, and the court declined to impose post-judgment interest and administrative costs, deeming them to be delay costs, and finding that such anticipated damages were not required.) The Court agreed with the objectors' assessment that a low bond amount was sufficient in this case and set the appeal bond amount at $5,000.00 to be posted collectively by all objector-appellants.

367. *See Plaintiff's Memorandum of Points & Authorities in Support of Unopposed Motion for Final Approval of Proposed Class Settlement* (Doc. #34-1) (filed Dec. 3, 2012).

368. *See Order Granting Motion for Final Approval of Class Settlement and Granting in Part Motion For Attorneys' Fees* (Doc. #39) (filed Dec. 10, 2012). The court determined that an award of not more than $192,000 in attorneys' fees and costs to class counsel would be entered upon submission of sufficient documentation that permits the Court to find that class counsel's hours and expenses were reasonable and whether a multiplier should be applied.

369. Objector McDonald posted the $1,000 appeal bond on May 28, 2013. (Doc. #72) (filed May 28, 2013). The Court granted Objector McDonald's ex parte motion for the disclosure of the data showing how many class members requested a coupon under the settlement agreement. (Doc. #71) (filed May 20, 2013) The Ninth Circuit, on July 22, 2013, construed McDonald's late motion for a further extension of time to file her appellate brief as a motion to stay proceedings until Oct. 17, 2013. *Order*, No. 13-55059 (9th Cir. July 22, 2013) (Doc. #12).

370. *See Plaintiff's Memorandum of Points & Authorities in Support of Motion for Appeal Bond* (Doc. #52-1) (filed Jan. 22, 2013). Plaintiff requested that McDonald and/or her counsel be required to post a bond of $5,000.00 based on a reasonable estimate of the taxable costs that were likely to be incurred in defending the case throughout the appeal.

371. *See Order in part Granting Motion for Appeal Bond* (Doc. #70) (May 20, 2013). Court concluded that since each objection was without merit, the posting of an appeal bond was warranted, but the amount of the appeal bond was found to be excessive because the Plaintiff provided no detail as to why a $5,000.00 bond would be appropriate. Even allowing for significant potential administrative costs while the case was on appeal, the Court found that $1,000.00 was a reasonable appeal bond amount.

372. *See Int'l Broth. of Elec. Workers Local 697 Pension Fund v. Int'l Game Tech., Inc.*, No. 3:09-cv-00419, 2012 WL 5199742 (D. Nev. Oct. 19, 2012).

373. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Objector/ appellant failed to file his opening brief by Feb. 25, 2013 as required, did not seek an extension of time to file, and failed to order transcripts pursuant to court order and Circuit Rules.

374. The 32 separate objections represented a total of 35 class members (1 objection was filed by counsel representing two objectors and remaining 31 objections were brought *pro se*). *See Plaintiffs' Reply Brief in Support of Motions for Final Approval and Attorneys' Fees and Costs* (Doc. # 163) (filed Oct. 31, 2008).

375. *See Order granting Class Counsel's Motion for Attorney Fees and Costs* (Doc. #177) (filed Nov. 7, 2008) and *Final Judgment* (Doc. #176) (filed Nov. 7, 2008).

376. Plaintiffs filed a Motion to Strike the Notice of Appeal filed by Objectors Jehle and Richeson alleging that their attorneys, Kearney Dee Hutsler and Richard G. Baker, were not members of the bar of the Western District of Washington and they did not seek admission *pro hac vice* prior to filing the Notice of Appeal on Dec. 8, 2008. *See Motion to Strike Appeal* (Doc. # 194) (filed Dec. 24, 2008). The Court refused to strike the Objectors' notice of appeal since Attorneys Hutsler and Baker were under the impression that the Rules of Procedure of the JPMDL did not require objectors' attorneys to seek admission *pro hac vice*, and they associated with local counsel and were admitted *pro hac vice* in January 2009. *See Order Denying Plaintiffs' Motion to Strike Notice of Appeal* (Doc. # 208) (filed Jan. 15, 2009).

377. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: stipulated motion to voluntarily dismiss case with prejudice pursuant to FRAP 42(b).

378. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Docketing Statement and Mediation Form; stipulated motion to voluntarily dismiss case with prejudice pursuant to FRAP 42(b).

379. Plaintiffs asked the court to require a total appeal bond of $40,811.20 consisting of: (1) $1,000 for the cost of the appeal for filing and brief preparation costs; (2) $30,000 for estimated appellate attorneys' fees the class would incur on appeal; and (3) interest on unpaid attorney's fees, estimated at $9,811.20 assuming the case took only 1 year to go through the appellate process. *See Plaintiffs' Motion for Appeal Bond* (Doc. # 184) (filed Dec. 5, 2008).

380. The Court was not persuaded that including attorneys' fees or interest on unpaid attorneys' fees on appeal was appropriate in setting the amount of the cost bond in this case. *See Order Granting In Part and Denying In Part Plaintiffs' Motion for Appeal Bond* (Doc. # 207) (filed Jan. 15, 2009). It appears that the full amount of $1,000 for the appeal bond was posted by Attorney Hutsler on behalf of Objector/Appellants Jehle and Richeson on Jan. 30, 2009. (Doc. # 209) Following voluntary dismissal of their appeal, the court granted the Objectors motion to exonerate the appeal bond and return it to counsel for the Objectors. (Doc. # 213) (filed Apr. 10, 2009).

381. *See Class Plaintiffs' Opposition to Memorandum of Authorities to Postpone Class Plaintiff's Motion for Final Approval of Class Action Settlement and Settlement Class Certification* (Doc. #60) (filed Jan. 22, 2010). Class plaintiffs pointed out that pursuant to the Court's Order preliminarily approving the proposed Settlement, anyone with any objection to the Settlement or who wished not to participate in the Settlement could file an objection or opt out of the Class by filing appropriate documentation on or before December 29, 2009, and no one did so.

382. The final fairness hearing on class settlement was held on Jan. 15, 2010 during which Original Class Representative Su Shin and one of her counsel of record, Alana Bullis, whom both had initially approved the Settlement and did not submit an objection prior to the Dec. 29, 2009 deadline, raised objections to the settlement which they assert they only recently became aware of. The court ordered Class Counsel to address the issues raised. On Jan. 29, 2010, the Court rejected the objections to the settlement filed by Ms. Shin's counsel Bullis, denied their motion to postpone the final hearing, granted Class Counsel's motion to substitute Karen Seger as the named-plaintiff and class representative, and granted Final Judgment and Order approving the class action settlement and request for attorney fees. (Doc. # 67) (filed Jan. 29, 2010). Realizing that Defendants were not in compliance with the reporting requirements under CAFA 28 USC §1715(d), on Feb. 2, 2010, the district court re-opened the case and vacated the Final Judgment, and re-noted the hearing date for entry of its final order certifying the settlement class and approving the settlement until March 29, 2010, after the 90-day period required by §1715(d) had expired. Thus, on April 2, 2010, the court re-entered the Final Judgment and Order Approving the Settlement and Dismissing the Claims of Class Members with Prejudice. (Doc. #75) (filed Apr. 2, 2010).

383. Objector-Appellant Shin filed the initial notice of appeal on Jan. 29, 2010 following the initial Final Judgment and Approval of Settlement issued on Jan. 29, 2010 which was subsequently vacated and re-entered on April 2, 2010. Objector Shin filed an Amended Notice of Appeal on April 22, 2010. *See* discussion *supra* note 382.

384. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Docketing Statement and Mediation Form; Response to Rule 54(b) Order to Show Cause (requiring Appellant to show cause why the Ninth Circuit should retain jurisdiction of the appeal after the district court vacated the initial judgment); amended notice of appeal; stipulated motion to voluntarily dismiss case with prejudice pursuant to FRAP 42(b).

385. The court worked with the parties to create a class notice that permitted class members to participate online, including the ability to object to the settlement via an online submission. Class counsel reported that prior to the Nov. 18, 2011 cut-off date for filing objections, 370 objections were submitted to either Class Counsel, the Court, or the Settlement Administrator including 206 objections received via email and the remaining via US mail. *See Plaintiffs' Motion for Final Approval of Revised Class Action Settlement* (Doc. # 176) (filed Dec. 7, 2011).

386. Judge Richard A. Jones expressed gratitude towards the many class members who filed objections which he credits as helping him to reject the parties' first settlement in February 2011 as unfair, not reasonable, and inadequate. *See In re Classmates.com Consol. Litig., No. 2:09-cv-00045, 2011 WL 744664 (W.D. Wash. Feb. 23, 2011)*. Class Counsel and Defendants negotiated a new settlement which the court characterized as "underwhelming" but a dramatic improvement over the 2010 version. *See In re Classmates.com Consol. Litig., No. 2:09-cv-00045, 2012 WL 3854501 (W.D. Wash. June 15, 2012)*. In the final *Order*, the court rejected claims for attorneys' fees submitted by two objectors (Christopher Langone and California attorney Charles Chalmers representing two California objectors), but agreed to grant Objector Michael Krauss's request to forgo his motion for attorney fees and instead sanction class counsel for their decision to issue legally invalid and wholly improper subpoenas against Objector Krauss's counsel (Krauss was represented by attorneys for the Center for Class Action Fairness). The Court reduced Class Counsels' attorney fee award by $100,000 to be distributed to class members who had submitted claims.

387. An additional appeal was filed by lead plaintiffs Anthony Michaels and David Catapano, appealing on behalf of themselves and the class, most likely from the court's decision to award class counsel only $800,000 of the $1.05 million it requested for attorney fees, and to award class

representatives Michaels and Catapana only $2,000 of the $5,000 they requested. *See Notice of Appeal* (Doc. # 226) (filed July 27, 2012). Appeal No. 12-35631 was dismissed on Aug. 30, 2012, pursuant to appellants' FRAP 42(b) motion for voluntary dismissal.

388. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Mediation Form; Notice of Appearance of Attorney Christopher Bandas; unopposed motion to dismiss case voluntarily pursuant to FRAP 42(b).

389. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Mediation Form; unopposed motion to dismiss case voluntarily pursuant to FRAP 42(b).

390. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Mediation Form; unopposed motion to dismiss case voluntarily pursuant to FRAP 42(b).

391. *See Motion Final Approval of Class Action Settlement and Response to Objections by Plaintiff* (Doc. #84) (filed Oct. 6, 2011).

392. *See Judgment and Order of Final Approval* (Doc. #91) (filed Oct. 21, 2011).

393. Because Objector-Appellant Nigaglioni's Nov. 28, 2011 Notice of Appeal was not filed within 30 days from entry of the Oct. 21, 2011 Judgment, on Dec. 15, 2011 Objector-Appellant filed a timely motion for an extension of time to appeal pursuant to FRAP 4(a)(5). (Doc. # 93)(filed Dec. 15, 2011). The Court granted Objector Nigaglioni an 8-day extension of time to file his notice of appeal, thus the district court considered his Nov. 28, 2011 notice of appeal to have been timely filed. (Doc. # 98) (filed Jan. 17, 2012).

394. *Palmer v. Nigaglioni.,* No. 11-35991, 2013 WL 542852 (9th Cir. Feb. 14, 2012) (Judgment Mandate issued Mar. 11, 2013).

395. In the Sept. 17, 2012 *Settlement Order and Final Judgment*, the Court stated that all objections to the Original Settlement (rejected by the Court in Jan. 2011) and to the Amended Settlement had been considered, listing the 26 objections that were filed on behalf of 34 class members. *Arthur v. Sallie Mae, Inc.,* No. 10-cv-198, 2012 WL 4075238 (W.D. Wash. Sept. 17, 2012). Twenty-one of the 26 objections were brought by *pro se* objectors, and the remaining 5 objections were brought by attorneys on behalf of 13 objectors: Attorney Thomas L. Cox filed objections twice on behalf of Objectors Sara Sibley and Judith Brown (filed Dec. 13, 2010 & July 19, 2012); Attorney Donald Yarbough filed objections twice on behalf of 9 named Objectors/class members (filed Dec. 16, 2010 & July 9, 2012); Attorney Darrell Palmer filed an objection on behalf of Objectors Patrick Sweeney & Sasha McBean (filed Dec. 13, 2010). On Sept. 14, 2012, the Court granted Class Plaintiffs' motion for revocation of the Court's order granting admission *pro hac vice* to Attorney Darrell Palmer, (Doc. # 251, filed Aug. 20, 2012), brought in response to discovering that Mr. Palmer's *pro hac vice* application in another case before the District Court had been denied because Mr. Palmer had made false statements in his application by failing to mention that as a result of a Colorado felony conviction he had been suspended from three state bar associations. *See infra* discussion of *Herfert v. Crayola, LLC*, No. 11-1301 (W.D. Wash Aug. 5, 2011).

396. *See Arthur v. Sallie Mae, Inc.,* No. 10-cv-198, 2012 WL 4075238 (W.D. Wash. Sept. 17, 2012) (Settlement Order and Final Judgment); *Arthur v. Sallie Mae, Inc.*, No. 10-cv-198, 2012 WL 4076119 (W.D. Wash. Sept. 17, 2012) (Order Approving Class Counsels' Motion For Award Of Attorneys' Fees And Costs And Service Awards In Connection With Amended Settlement).

397. Class Plaintiffs filed a motion seeking an order requiring Objectors' counsel Thomas L. Cox to show cause for why he should not be sanctioned for appearing before the district court three times in this case (filed objections to the original settlement and to the amended settlement and filed the October 17 Notice of Appeal on behalf of Objectors Sibley and Brown) without seeking *pro hac vice* admission to the W.D. Washington district court and for failing to join local counsel to sign his filings, both of which are required by Local Rule. (Doc. #276) (filed Oct. 19, 2012). After failing to respond by the deadline established, the court ordered Mr. Cox to show cause why he should not be sanctioned for failure to apply for leave to appear *pro hac vice*. (Doc. #287) (filed Nov. 21, 2012). Mr. Cox filed his Response to Show Cause on November 28, 2012. The court did not have the opportunity to rule on Class Plaintiffs' motion because Class Plaintiffs' withdrew their pending motion to Show Cause in response to Objectors motion to voluntarily dismiss their appeal pursuant to FRAP 42(b). (Doc. # 292) (filed Dec. 4, 2012).

398. Significant documents and/or motions filed by the objector(s)/appellant(s) prior to final disposition of the appeal: Required Mediation Form; unopposed motion to dismiss case voluntarily pursuant to FRAP 42(b).

399. Included in Class Plaintiffs' requested bond amount of $189,344 were the estimated cost of $15,000 for preparation of the record on appeal and transcript costs; estimated cost to class of $34,344 in lost interest resulting from the delay caused by the appeal (based on an 18-month appeal period); and an estimated additional claims administrator cost of $140,000 that will be incurred due to the appeal. *See Class Plaintiffs' Motion for Appeal Bond* (Doc. #279) (filed Oct. 25, 2010). Due to Objectors Sibley and Brown and their counsel Thomas Cox's failure to respond by the required deadline to Class Plaintiff's motion for an appeal bond, the court ordered Objectors to show cause why an appeal bond should not issue in the amount requested by Class Plaintiffs. (Doc. #287) (filed Nov. 21, 2012). Objector Brown filed her opposition on November 28, 2012. (Doc. #289) (filed Nov. 28, 2012) The court did not rule on Class Plaintiffs' motion before the Objectors dismissed their appeal pursuant to FRAP 42(b) on December 5, 2012.

400. Although not officially consolidated, the Settlement approved in *Dennings v. Clearwater Corp.* represents a final adjudication on the merits of all claims of the Settlement Class with respect to matters alleged, or that could have been alleged, in three separate cases filed as class actions: this case, *Dennings v. Clearwater,* No. 10-01859; *Minnick v. Clearwire US, LLC*, No. 2:09-cv-00912 (W.D. Wash. July 2, 2009), *stayed pending resolution of appeal*, No. 10-35228 (9th Cir. March 8, 2010); and *Newton v. Clearwire Corp*., No. 2:11-cv-00783 (E.D. Cal. 2011).

401. Seven objections were filed *pro se*, and a final objection was filed on behalf of 2 objectors by their counsel Christopher Bandas. Plaintiffs motioned the court for permission to serve subpoenas and take the depositions of Objectors Mr. Gordon Morgan and Mr. Jeremy De La Garza, on whose behalf their counsel Mr. Christopher Bandas filed a joint objection to the proposed settlement. (Doc. #78) (filed Dec. 6, 2012). Determining that Plaintiffs had raised "legitimate concerns regarding whether the objections . . . [were] serious and whether their attorney is a so-called 'professional objector,'" the Court granted Plaintiffs' motion to depose the Objectors. (Doc. #84) (filed Dec. 11, 2012). The Court summarized in the introductory remarks to several court orders in this case that the "depositions revealed that Mr. Morgan had no personal objection to the settlement, neither of them had read the settlement agreement or their own objections to it, and both had worked with the same attorney on other class action cases." *See, e.g., Order Denying Motion to Stay* (Doc. # 152) (filed July 11, 2013) referencing *Plaintiffs Memorandum* (Doc. #97) (filed Dec. 18, 2012), Exs. A, B (depositions of Mr. Morgan and Mr. De La Garza).

402. *See Settlement Order and Final Judgment* (Doc. #99) (filed Dec. 20, 2012).

403. *See Dennings v. Clearwire Corp*., No. 10-cv-1859, 2013 WL 1858797 (W.D. Wash. May 03, 2013) (Order Granting Motion For Attorney's Fees And Expenses).

404. The Ninth Circuit granted Plaintiffs'/Appellees' motion for summary affirmance of the district court's Dec. 20, 2012 *Settlement Order and Final Judgment* finding that the "questions raised in this appeal are so insubstantial as not to require further argument." Order, *Dennings v. Clearwire,* No. 13-35038 (9th Cir. Apr. 22, 2013) (Judgment Mandate issued June 3, 2013). The Objectors ignored the Court's March 11, 2013 Bond Order and petitioned for rehearing in the Ninth Circuit. *See* Petition for Rehearing, *Dennings v. Clearwire,* No. 13-35038 (9th Cir. May 6, 2013). Class Plaintiffs moved to hold the Objectors in contempt for ignoring the Court's March 11, 2013 Order to post an appeal bond. (Doc. #128)(filed May 9, 2013). In response, on May 15, 2013, the Objectors moved to dismiss their appeal voluntarily pursuant to FRAP 42(b), and the Ninth Circuit construed this as a motion to voluntarily withdraw the objectors' request for a rehearing and granted the motion. *See* Order, *Dennings v. Clearwire*, No. 13-35038 (9th Cir. May 24, 2013). Judge Robart denied Class Plaintiff's motion for contempt finding that although the "objectors still have not posted an appeal bond, they have effectively complied with the court's order by dismissing their notice of appeal." (Doc. # 130) (filed June 3, 2013).

405. On July 9, 2013, Attorney Christopher Bandas filed an amended notice of appeal to inform the court that Objector-Appellants Morgan and De La Garza also intended to appeal from the Court's Amended Order Granting Motion for Appeal Bond entered on July 9, 2013, and from "any order or judgment approving the class settlement, class counsel's attorneys' fees or expenses, and/or incentive awards to class representatives, and any order or judgment naming or identifying this objector or the objection filed by this objector, including any entered or signed subsequent to this notice of appeal." (Doc. # 150) (filed July 9, 2013). In addition, on July 9, 2013, relying on Ninth Circuit law indicating that $39,150 of the $41,150 bond was comprised of impermissible costs, Objectors sent to the district court a check in the amount of $2,000 to timely post what Objectors believed to be the undisputed amount of the $41,150 appeal bond under Ninth Circuit law. The Court rejected Objectors' good faith attempt to post a $2,000 bond and returned the $2,000 check. (Doc. # 155) (filed July 25, 2013). Also on July 9, 2013, Mr. Bandas filed an Emergency Motion to Stay the District Court's July 9, 2013 Order requiring Objectors to post an appeal bond before proceeding with their appeal to allow the Ninth Circuit to decide the validity of the remaining portion of the bond amounting to $39, 150. (Doc. # 151)(filed July 9, 2013). The emergency motion was denied on July 11, 2013 (Doc. #152) (filed July 11, 2013), and on that same day Objectors filed a Rule 27-3 motion for emergency review with the Ninth Circuit requesting a stay of the District Court's appeal bond order. On July 15, 2013, the Ninth Circuit summarily rejected Objectors' arguments and denied Objectors' Emergency Motion to Stay the Appeal Bond. *See Order*, *Dennings v. Clearwire*, No. 13-35491 (9th Cir. July 15, 2013). On July 19, 2013, the District Court issued an order for Objectors' counsel to appear on August 1 and show cause why they and their clients should not be sanctioned for failing to comply with a court order to post the $41,150 appeal bond. (Doc. #154)(filed July 19, 2013). On July 23, 2013, Objectors posted the appeal bond in full in the requested amount of $41,150 with the Court and Mr. Bandas requested that the Court vacate the order to appear and show cause arguing that sanctions are now unnecessary. (Doc. # 155) (filed July 25, 2013). On July 26, 2013, Judge Robart denied Objectors' motion to vacate the show cause order finding that the "fact that Objectors posted bond after being ordered to appear and face sanctions does not exonerate Objectors any more than it would exonerate a criminal defendant to return stolen property after being charged with theft. The punishable conduct has already occurred and cannot be taken back. Accordingly Objectors' counsel have been ordered to appear in court, explain their actions, and face sanctions should the court decide to impose them." (Doc. # 156) (filed July 26, 2013). In addition, the court denied Mr. Bandas' request to appear by telephone stating that if "Objectors' counsel intends to litigate in the State of Washington, he must be prepared to appear in Washington when ordered to do so by the court. The nature of Objectors' behavior in these proceedings makes this sanctions hearing more appropriate for in-person resolution." *Id.* On July 30, 2013, Judge Robart issued an order to provide counsel for Objectors "notice of the legal rule on which sanctions would be based, the form of the potential sanctions, and to notify Objectors and their counsel that they stand accused of bad faith conduct—namely, willful disobedience of a court order." (Doc. # 158) (filed July 30, 2013). On July 31, 2013, the Court denied Christopher Bandas' motion (Doc. # 159) (filed July 31, 2013) to continue his show cause hearing, pointing out that Mr. Bandas is mistaken to conclude that this is a criminal (or even a civil) contempt proceeding for which he is entitled to due process protections that he has not been afforded pursuant to the Courts' July 30, 2013 Order. Judge Robart clarified that this is not a contempt proceeding at all, but a sanctions hearing and the law that applies is the law of sanctions under the court's inherent authority, not the law of contempt. (Doc. # 160) (filed July 31, 2013). However, even though the sanctions hearing was ordered to take place on Aug. 1, 2013 as scheduled, Judge Robart did agree to provide Mr. Bandas with additional procedural protections and opportunities to be heard. *See Order Denying Motion to Continue* (Doc. # 160)(filed July 31, 2013). The Show Cause hearing was held on Aug. 1, 2013 and continued to Aug. 20, 2013 with additional briefing due by Aug. 16, 2013. (Doc. #162)(Minute Entry for proceedings held on Aug. 1, 2013). Following the show cause hearing held on Aug. 20, 2013, the court heard from counsel regarding sanctions and concluded that the "appropriate sanction is to revoke Mr. Bandas' authorization to practice in the Western District of Washington." (Doc. #166) (Minute Entry for proceedings held on Aug. 20, 2013).

406. Plaintiffs asked the court to require a total appeal bond of $41,150 to ensure payment of appellate costs that consisted of: (1) $2,000 in costs for ordering a transcript, preparation of excerpts of record, copying or printing, binding, filing, service, and delivery of the necessary copies of a brief, appendix, and record; and (2) $39,150 in incremental settlement administration charges likely to be incurred as a result of the appeal (calculated by multiplying estimated monthly increase in settlement administration costs of $2,250 by the median length of a Ninth Circuit appeal (17.4 months)). *See Plaintiffs' Motion for Appeal Bond* (Doc. # 107) (filed Feb. 20, 2013). Defendant Clearwater joined in Plaintiffs' motion for an appeal bond. (Doc. # 110) (filed Feb. 21, 2013).

407. The Court ordered the Objectors to post an appeal bond of $41,150 or dismiss their appeal because (1) the objectors' underlying objections were without merit; (2) there was a "risk of non-payment of appeal costs given that both objectors live in Texas, and it may therefore be difficult to enforce a cost order imposed upon them"; (3) the objectors appeared to have the ability to pay an appeal bond; and (4) there was evidence presented that the objectors "had vexatious intent in filing their notice of appeal . . ." *Bond Order* (Doc. #117) (filed Mar. 11, 2013).

408. *Class Plaintiffs' Motion for Appeal Bond in Connection with Objectors' Second Appeal* (Doc. #134) (filed June 13, 2012). *See supra* note 406 for original description of items included within Plaintiff's request for a total appeal bond of $41,150.

409. *Amended Order Granting Motion for Appeal Bond* (Doc. # 149) (filed July 8, 2013). *See supra* note 407 for court's reasons for imposing the original March 13, 2013 Bond Order.

410. Although the sole Objector Amber Pederson filed her objection *pro se*, Class Plaintiffs point out that the affidavit accompanying the objection was notarized by Margot Valdez, who was the legal secretary of attorney Christopher Bandas. *See Objection to Settlement filed by Claimant Amber Pederson* (Doc. #47) (filed April 2, 2012) & *Declaration of Lynn Lincoln Sarko*, Ex. 1 (Doc. #57) (filed June 21, 2012). Objector Pederson did not appear at the Final Approval hearing. (Doc. #50, Minute Entry April 24, 2012).

411. *See Final Order* (Doc. #51) (filed Apr. 27, 2012).

412. Although Objector Pederson filed a notice of appeal *pro se* on May 14, 2012, when lead class counsel attempted to contact Objector Pederson on May 24, 2012 by calling the phone number she listed on her objection, Christopher Bandas, an attorney at the Bandas Law Firm in Corpus Christi, Texas, returned the call and informed class counsel that he was representing Amber Pederson. See *Declaration of Lynn Lincoln Sarko* (Doc. #57) (filed June 21, 2012). Lead class counsel pointed out that Attorney Bandas had not filed a notice of appearance on Objector Pederson's behalf in the district court, nor had he done so with respect to Objector Pederson's appeal to the Ninth Circuit. *Id.*

413. *See infra* note 417.

414. *See infra* notes 418–19.

415. On Sept. 17, 2012, the Court denied Objector-Appellant's motion to stay the posting of a $20,000 appellate bond pending the outcome of her appeal of the Court's July 31, 2012 Order. In addition, given that the Objector-Appellant did not comply with the court's Aug. 31, 2012 deadline for filing the appeal bond, the Court ordered that the Objector-Appellant either immediately comply with the Court's July 31, 2012 Order requiring the posting of a $20,000 appellate bond, or file a notice of dismissal of her appeal. Furthermore, the Court added: "Failure to take one of these two actions by Thursday, September 20, 2012 may result in a finding of civil contempt and the imposition of appropriate sanctions, such as the striking of Claimant's objection to the Final Settlement." *See Order Re: Motion to Stay the Posting of an Appeal Bond* (Doc. # 79) (filed Sept. 17, 2012). On Sept. 22, 2012, Objector-Appellant filed a Notice informing the court that she wished to withdraw her objection to the settlement pursuant to Civil Rule 23(e)(5). (Doc. # 80) (filed Sept. 22, 2012). On Sept. 26, the Ninth Circuit granted Appellant's motion for voluntary dismissal pursuant to FRAP 42(b).

416. Significant documents and/or motions filed by objector(s)/appellant(s) prior to final disposition of the appeal: notice of appearance of attorney Joseph Darrell Palmer for Appellant Pederson; motion to extend time to file opening brief (granted; opening brief due Sept. 21, 2012); motion to stay district court action and replies to responses by appellees; motion to dismiss case voluntarily pursuant to FRAP 42(b).

417. Included in Class Plaintiffs and Defendants joint request for a bond amount of $20,000 is a "reasonable estimate of costs permitted under Federal Rule of Appellate Procedure 39(e); it also includes attorney fees and accounts for the lack of merit of the appeal and the involvement of professional objector Christopher Bandas." *See Declaration of Lynn Lincoln Sarko in Support of Joint Motion to Require Attorney Christopher Bandas and Objector Amber Pederson to Post Appeal Bond, and Seeking Any Other Appropriate Relief to Protect the Class* (Doc. #57) (filed June 21, 2012). On July 5, 2012, Objector-Appellant's Response in Opposition to Class Counsel's Motion for Appeal Bond was filed by Attorney Darrell Palmer, Law Offices of Darrell Palmer PC located in Solana Beach, CA. (Doc. #60) (filed July 5, 2012). On July 5, 2012, Attorney Darrell Palmer filed an application for leave to appear *pro hac vice*. On July 16, 2012, the Court admitted attorney Darrell Palmer on behalf of Objector Amber Pederson. (Doc. #59) (filed July 5, 2012) & (Doc. # 64) (filed July 16, 2012).

418. After analyzing the factors recently set out *in In re Wells Fargo Loan Processor Overtime Pay Litig.*, No. 07-1841, 2011 WL 3352460, at *10 (N.D. Cal. Aug. 2, 2011) to arrive at the $20,000 bond amount, the Court found that imposition of the bond was warranted because Ms. Pederson is the only objector out of millions of claimants, the appeal appears to be vexatious and frivolous, there is a serious risk that Ms. Pederson will not be available to pay any costs in the event she loses an appeal, and the apparent ability of her attorney to post the bond. *See Joint Opposition to Objector Pederson's Motion to Stay Posting of Appeal Bond and Related Discovery* (Doc. # 75)(filed Aug. 29, 2012). On August 7, 2012, Attorney Darrell Palmer filed an amended notice of appeal to inform the court that Objector-Appellant Pederson also intended to appeal from the Court's Minute Order entered on July 31, 2012, ordering Pederson and attorney Bandas to post a $20,000 appeal bond. (Doc. #69) (filed Aug. 7, 2012). In addition, Mr. Palmer filed a motion requesting that the imposition of the bond be stayed pending the outcome of Objector-Appellant's appeal of the appellate bond to the Ninth Circuit. (Doc. # 68) (filed Aug. 7, 2012).

419. In addition to imposing a deadline to file the bond, Judge John C. Coughenour ordered Objector's counsel Darrell Palmer to appear before the Court on Aug. 21, 2012, to show cause as to why he should not be sanctioned for submitting a *pro hac vice* application in which he declared under penalty of perjury that he had not been disbarred or formally censured by a court of record or by a state bar association, in direct opposition to the California Bar Association web site which states that Mr. Palmer was suspended and publicly reproved as a result of a conviction. *Minute Order* (Doc. # 71) (filed Aug. 10, 2012). Prior to the Aug. 21 show cause hearing, the court issued an order denying Darrell Palmer's application to appear *pro hac vice* due to material nondisclosures in his application which he attributed to an oversight on the part of his assistant, which resulted in his failure to inform the court that he was temporarily suspended from the state bars of Colorado, California and Arizona as a result of a Colorado felony conviction. *Order Denying Application of Claimant's Counsel Darrell Palmer to Appear Pro Hac Vice* (Doc. #74) (filed Aug. 17, 2012).

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TAB 10A

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

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

September 20, 2013

The Honorable Ruth Bader Ginsburg
Associate Justice
The Supreme Court of the United States
One First Street, N.E.
Washington, DC 20543

Dear Justice Ginsburg:

I noticed your concurrence in *Chafin v. Chafin*, 133 S. Ct. 1017 (2013), where you observed that the Appellate and Civil Rules Advisory Committees might wish to consider "whether uniform rules for expediting . . . proceedings [under the Hague Convention on the Civil Aspects of International Child Abduction] are in order." As the chair of the Standing Committee on the Rules of Practice and Procedure, it warmed my heart to read your suggestion that the rules committees consider addressing some of the timing problems associated with these difficult cases.

Consistent with your suggestion, the Appellate and Civil Rules Committees discussed the issue at their April 2013 meetings. The members of the advisory committees all agreed with your observations—both about the imperative of "speed and certainty in Convention decisionmaking" and about the value of examining "the means by which the United States can best serve the Convention's aims: 'to secure the prompt return of children wrongfully removed to or retained in' this Nation; and 'to ensure that rights of custody . . . under the law of one Contracting State are effectively respected in the other Contracting States.'"

After these deliberations, the advisory committees resolved to address these concerns, at least initially, through increased judicial education rather than through rulemaking. The Judicial Conference has a long-established policy of opposing statutes or court rules that mandate docket priority and timelines for categories of cases. While exceptions exist, our collective thinking was that further education, usefully highlighted by the *Chafin* opinions, presented the best and least intrusive initial response to the issue.

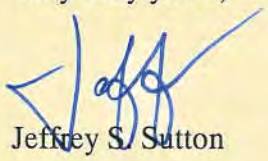
Members also noted that courts already recognize the need for resolving matters affecting child custody as promptly as possible and that the Court's opinion in *Chafin* will reinforce this understanding. On top of that, members noted that the cases highlighted in the study by the Federal Judicial Center mentioned in *Chafin*—noting that many courts already follow a practice of expediting Convention cases—were cases in which the court expedited the disposition of a particular appeal, and that none of those opinions cited a local circuit rule requiring speedy processing of this particular category of appeal. A quick search did not disclose any such local rules, suggesting that a general best-practices approach to expedition rather than a rule-based approach to expedition may work.

Finally, the Appellate Rules Committee noted that Appellate Rule 2 authorizes a court of appeals to "suspend any provision of [the Appellate Rules] in a particular case and order proceedings as it directs" in order "to expedite its decision," and that courts of appeals therefore currently possess authority to expedite Convention appeals. My own experience is that Convention cases are resolved expeditiously at the court of appeals, with preliminary injunction and stay debates briefed quickly and rulings issued promptly. Even if *Chafin* means that the cases do not become moot upon a return order, no one wants to see children physically moved in one direction after a district court decision and physically moved back after a later court of appeals decision.

The advisory committees concluded that judicial education efforts should supplement the Court's urging in *Chafin* that Convention cases be treated as expeditiously as possible and that such efforts should be prioritized as the first level of response to the concerns highlighted in *Chafin*. The Federal Judicial Center under the leadership of Judge Jeremy Fogel plans to do just that.

Thank you for referring this matter to the Rules Committees. I hope this response addresses your concern about encouraging the prompt resolution of Convention cases in federal courts. Please do not hesitate to contact me if you would like to discuss this issue further. Best of luck in the upcoming Term.

Very truly yours,



Jeffrey S. Sutton

cc: Honorable John D. Bates
Honorable David G. Campbell
Honorable Steven M. Colloton
Honorable Jeremy D. Fogel
Jonathan C. Rose, Esq.

TAB 10B

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MEMORANDUM

DATE: March 25, 2013

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 13-AP-C

This item arises from the suggestion by three members of the Supreme Court that "the Advisory Committees on Federal Rules of Civil and Appellate Procedures might consider whether uniform rules for expediting … proceedings [under the Hague Convention on the Civil Aspects of International Child Abduction] are in order." Chafin v. Chafin, 133 S. Ct. 1017, 1029 n.3 (2013) (Ginsburg, J., joined by Scalia & Breyer, JJ., concurring). I enclose a copy of the *Chafin* opinions.

The Hague Convention on the Civil Aspects of International Child Abduction ("Convention") – which the United States has ratified – "generally requires courts in the United States to order children returned to their countries of habitual residence, if the courts find that the children have been wrongfully removed to or retained in the United States." *Id.* at 1021 (unanimous opinion). Congress has implemented the Convention by enacting the International Child Abduction Remedies Act ("ICARA"). *See id.* In *Chafin*, the Court held that the return of a child to her country of habitual residence did not render moot an appeal from the order mandating that return. *See id.* at 1028 ("[R]eturn does not render this case moot; there is a live dispute between the parties over where their child will be raised, and there is a possibility of effectual relief for the prevailing parent.").

In response to "the concern that shuttling children back and forth between parents and across international borders may be detrimental to those children," the Court observed that "courts can achieve the ends of the Convention and ICARA – and protect the well-being of the affected children – through the familiar judicial tools of expediting proceedings and granting stays where appropriate." *Id.* at 1026-27. The Court emphasized the need for speedy disposition of ICARA proceedings:

> Importantly, whether at the district or appellate court level, courts can and should take steps to decide these cases as expeditiously as possible, for the sake of the children who find themselves in such an unfortunate situation. Many courts already do so. See Federal Judicial Center, J. Garbolino, The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges 116, n. 435 (2012) (listing courts that expedite appeals). Cases in American courts often take over two years

> from filing to resolution; for a six-year-old … , that is one-third of her lifetime. Expedition will help minimize the extent to which uncertainty adds to the challenges confronting both parents and child.

Id. at 1027-28.

The cases to which the Court referred – in its citation to footnote 435 in the Federal Judicial Center study – are cases in which the court expedited the disposition of a particular appeal.[1] None of those opinions cited a local circuit rule requiring speedy processing of this particular category of appeal, and a quick search did not disclose any such local provisions.[2] Appellate Rule 2 authorizes a court of appeals to "suspend any provision of [the Appellate Rules] in a particular case and order proceedings as it directs," in order, inter alia, "to expedite its decision." Accordingly, the courts of appeals clearly possess authority to expedite ICARA appeals, and the cases cited in footnote 1 illustrate the courts' use of this authority.[3]

[1] *See* Nicolson v. Pappalardo, 605 F.3d 100, 103 (1st Cir. 2010) ("The [district] court ordered S.G.N.'s return to Australia. Pappalardo appealed to this court which granted a temporary stay but expedited this appeal."); Simcox v. Simcox, 511 F.3d 594, 601 (6th Cir. 2007) ("This court granted a stay of the district court's order pending expedited appeal, citing the evidence of physical abuse, Mr. Simcox's threats to subject Mrs. Simcox to criminal prosecution, and the nearly year-long delay between the time of the alleged abduction and Mr. Simcox's filing a petition for return."); Koch v. Koch, 450 F.3d 703, 709-10 (7th Cir. 2006) ("We granted a stay pending the resolution of the appeal, and ordered expedited briefing, in keeping with the intent of the Convention to provide prompt resolution to these disputes."); Kijowska v. Haines, 463 F.3d 583, 589-90 (7th Cir. 2006) ("The Hague Convention and its implementing federal statute do not set forth a standard for the granting of stays pending appeal of orders directing (or refusing to direct) the return of children to foreign countries…. It was best to continue the stay in force until the appeal was decided, but to accelerate the appeal proceedings, as we did."); Gaudin v. Remis, 415 F.3d 1028, 1037 (9th Cir. 2005) ("[T]he older of the two children will turn sixteen next year, at which time his custody will no longer be subject to the Hague Convention's provisions…. Accordingly, the district court shall, so far as possible, expedite consideration of the case. Any subsequent appeal shall be assigned to this panel, and either party may move for an expedited briefing schedule on appeal."); Sealed Appellant v. Sealed Appellee, 394 F.3d 338, 341 (5th Cir. 2004) (deciding an "expedited appeal"); Holder v. Holder, 392 F.3d 1009, 1023 & n.13 (9th Cir. 2004) (stressing need for speedy disposition of Convention cases and noting that the court decided the appeal three days after the case was submitted); Danaipour v. McLarey, 286 F.3d 1, 11 (1st Cir. 2002) (expedited appeal decided less than a month after argument); Diorinou v. Mezitis, 237 F.3d 133, 138 (2d Cir. 2001) (expedited appeal); England v. England, 234 F.3d 268, 269 (5th Cir. 2000) (expedited appeal); Whallon v. Lynn, 230 F.3d 450, 454 (1st Cir. 2000) (expedited appeal); Lops v. Lops, 140 F.3d 927, 935 (11th Cir. 1998) (expedited appeal); Charalambous v. Charalambous, 627 F.3d 462, 464 (1st Cir. 2010) (expedited appeal). *But cf.* Whiting v. Krassner, 391 F.3d 540, 543 (3d Cir. 2004) (noting that the court of appeals had denied appellant's motions for a stay and for an expedited appeal). (*Charalambous*, the last case listed in the preceding string cite, is not cited in footnote 435 of the FJC study but is discussed in the study's text on the same page.)

[2] I searched Westlaw's USC database on March 19, 2013, using the following search: PR,CI,TI(CIRCUIT & APPEALS) & (ICARA CONVENTION CHILD).

[3] Courts also use this authority, on occasion, to expedite the issuance of the mandate.

In *Cuellar v. Joyce*, 596 F.3d 505 (9th Cir. 2010), the court of appeals reversed the district court's denial of relief under the Convention; ordered the father to return the child to the mother on the third business day after issuance of the opinion; directed the district court to "take all steps necessary to ensure that [the father] complies with this order, including, if necessary, ordering intervention of the United States Marshals Service"; and ordered that "[t]he mandate shall issue at once." Id. at 512.

In *Gitter v. Gitter*, 396 F.3d 124 (2d Cir. 2005), the court of appeals remanded for reconsideration of the denial of a petition seeking return of a child under the Convention, and stated: "This panel will

Obviously, there are compelling reasons for courts to determine ICARA proceedings as quickly as possible. The question is whether that degree of speed should be mandated by rule, or whether the courts of appeals should continue to have discretion concerning the best way to implement the speedy disposition of ICARA appeals. In a time when the courts of appeals face staffing, resource, and docket pressures, setting inflexible docket priorities might lead to unfortunate results in some instances. Thus, as the enclosed memorandum by Benjamin Robinson recounts, the Judicial Conference has developed a policy against statutory mandates concerning case-processing priorities. Rule-based mandates could raise similar concerns.

One question might be whether there are ways, short of a Rule amendment, for the Judicial Conference Committees to raise awareness concerning best practices in the disposition of ICARA appeals.

Encls.

retain jurisdiction of the appeal and await the district court's report. In view of the urgency of proceedings of this nature, we encourage the district court to deal promptly with the question. The mandate shall issue at once." *Id.* at 136.

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TAB 10C

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Supreme Court of the United States
Jeffrey Lee CHAFIN, Petitioner
v.
Lynne Hales CHAFIN.

No. 11–1347.
Argued Dec. 5, 2012.
Decided Feb. 19, 2013.

ROBERTS, C.J., delivered the opinion for a unanimous Court. GINSBURG, J., filed a concurring opinion, in which SCALIA and BREYER, JJ., joined.

Michael E. Manely, Marietta, GA, for Petitioner.

Nicole A. Saharsky, for the United States, as amicus curiae, by special leave of the Court, supporting the Petitioner.

Stephen J. Cullen, Washington, DC, for Respondent.

Michael E. Manely, Counsel of Record, John P. Smith, The Manely Firm, P.C., Marietta, GA, Stephanos Bibas, James A. Feldman, Nancy Bregstein Gordon, Philadelphia, PA, Stephen B. Kinnaird, Lisa A. Nowlin, Sean M. Smith, Michelle E. Yetter, Paul Hastings LLP, Washington, DC, for Petitioner Jeffrey Lee Chafin.

***1021** Bruce A. Boyer, Counsel of Record, Civitas ChildLaw Center, Chicago, IL, Timothy Scott, QC, David Williams, Jacqueline Renton, Counsel for The Centre for Family Law and Practice.

Chief Justice ROBERTS delivered the opinion of the Court.

The Hague Convention on the Civil Aspects of International Child Abduction generally requires courts in the United States to order children returned to their countries of habitual residence, if the courts find that the children have been wrongfully removed to or retained in the United States. The question is whether, after a child is returned pursuant to such an order, any appeal of the order is moot.

I

A

The Hague Conference on Private International Law adopted the Hague Convention on the Civil Aspects of International Child Abduction in 1980. T.I.A.S. No. 11670, S. Treaty Doc. No. 99–11. In 1988, the United States ratified the treaty and passed implementing legislation, known as the International Child Abduction Remedies Act (ICARA), 102 Stat. 437, 42 U.S.C. § 11601 *et seq.* See generally *Abbott v. Abbott*, 560 U.S. ——, —— – ——, 130 S.Ct. 1983, 1989–1990, 176 L.Ed.2d 78 (2010).

The Convention seeks "to secure the prompt return of children wrongfully removed to or retained in any Contracting State" and "to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States." Art. 1, S. Treaty Doc. No. 99–11, at 7. Article 3 of the Convention provides that the "removal or the retention of a child is to be considered wrongful" when "it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention" and "at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention." *Ibid.*

Article 12 then states:

"Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith." *Id.*, at 9.

There are several exceptions to that command. Return is not required if the parent seeking it was not exercising custody rights at the time of removal or had consented to removal, if there is a "grave risk" that return will result in harm, if the child is mature and objects to return, or if return would conflict with fundamental principles of freedom and human rights in the state from which return is requested. Arts. 13, 20, *id.*, at 10, 11. Finally, the Convention directs Contracting States to "designate a Central Authority to discharge the duties which are imposed by the Convention." Art. 6, *id.*, at 8; see also Art. 7, *ibid.*

Congress established procedures for implementing the Convention in ICARA. See 42 U.S.C. § 11601(b)(1). The Act ***1022** grants federal and state courts concurrent jurisdiction over actions arising under the Convention, § 11603(a), and directs them to "decide the case in accordance with the Convention," § 11603(d). If those courts find children to have been wrongfully removed or retained, the children "are to be promptly returned." § 11601(a)(4). ICARA also provides that courts ordering children returned generally must require defendants to pay various expenses incurred by plaintiffs, including court costs, legal fees, and transportation costs associated with the return of the children. § 11607(b)(3). ICARA instructs the President to designate the U.S. Central Authority, § 11606(a), and the President has designated the Office of Children's Issues in the State Department's Bureau of Consular Affairs, 22 CFR § 94.2 (2012).

Eighty-nine nations are party to the Convention as of this writing. Hague Conference on Private Int'l Law, Status Table, Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, http:// www. hcch. net. In the 2009 fiscal year, 324 children removed to or retained in other countries were returned to the United States under the Convention, while 154 children removed to or retained in the United States were returned to their countries of habitual residence. Dept. of State, Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction 6 (2010).

B

Petitioner Jeffrey Lee Chafin is a citizen of the United States and a sergeant first class in the U.S. Army. While stationed in Germany in 2006, he married respondent Lynne Hales Chafin, a citizen of the United Kingdom. Their daughter E.C. was born the following year.

Later in 2007, Mr. Chafin was deployed to Afghanistan, and Ms. Chafin took E.C. to Scotland. Mr. Chafin was eventually transferred to Huntsville, Alabama, and in February 2010, Ms. Chafin traveled to Alabama with E.C. Soon thereafter, however, Mr. Chafin filed for divorce and for child custody in Alabama state court. Towards the end of the year, Ms. Chafin was arrested for domestic violence, an incident that alerted U.S. Citizenship and Immigration Services to the fact that she had overstayed her visa. She was deported in February 2011, and E.C. remained in Mr. Chafin's care for several more months.

In May 2011, Ms. Chafin initiated this case in the U.S. District Court for the Northern District of Alabama. She filed a petition under the Convention and ICARA seeking an order for E.C.'s return to Scotland. On October 11 and 12, 2011, the District Court held a bench trial. Upon the close of arguments, the court ruled in favor of Ms. Chafin, concluding that E.C.'s country of habitual residence was Scotland and granting the petition for return. Mr. Chafin immediately moved for a stay pending appeal, but the court denied his request. Within hours, Ms. Chafin left the country with E.C., headed for Scotland. By December 2011, she had initiated custody proceedings there. The Scottish court soon granted her interim custody and a preliminary injunction, prohibiting Mr. Chafin from removing E.C. from Scotland. In the meantime, Mr. Chafin had appealed the District Court order to the Court of Appeals for the Eleventh

Circuit.

In February 2012, the Eleventh Circuit dismissed Mr. Chafin's appeal as moot in a one-paragraph order, citing *Bekier v. Bekier*, 248 F.3d 1051 (2001). App. to Pet. for Cert. 1–2. In *Bekier*, the Eleventh Circuit had concluded that an appeal of a Convention return order was moot when the child had been returned to the foreign country, ***1023** because the court "became powerless" to grant relief. 248 F.3d, at 1055. In accordance with *Bekier*, the Court of Appeals remanded this case to the District Court with instructions to dismiss the suit as moot and vacate its order.

On remand, the District Court did so, and also ordered Mr. Chafin to pay Ms. Chafin over $94,000 in court costs, attorney's fees, and travel expenses. Meanwhile, the Alabama state court had dismissed the child custody proceeding initiated by Mr. Chafin for lack of jurisdiction. The Alabama Court of Civil Appeals affirmed, relying in part on the U.S. District Court's finding that the child's habitual residence was not Alabama, but Scotland.

We granted certiorari to review the judgment of the Court of Appeals for the Eleventh Circuit. 567 U.S. ——, —— S.Ct. ——, —— L.Ed.2d —— (2012).

II

Article III of the Constitution restricts the power of federal courts to "Cases" and "Controversies." Accordingly, "[t]o invoke the jurisdiction of a federal court, a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990). Federal courts may not "decide questions that cannot affect the rights of litigants in the case before them" or give "opinion[s] advising what the law would be upon a hypothetical state of facts." *Ibid.* (quoting *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971) (*per curiam*); internal quotation marks omitted). The "case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate." *Lewis*, 494 U.S., at 477, 110 S.Ct. 1249. "[I]t is not enough that a dispute was very much alive when suit was filed"; the parties must "continue to have a 'personal stake' " in the ultimate disposition of the lawsuit. *Id.*, at 477–478, 110 S.Ct. 1249 (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 101, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983); some internal quotation marks omitted).

There is thus no case or controversy, and a suit becomes moot, "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Already, LLC v. Nike, Inc.*, 568 U.S. ——, ——, 133 S.Ct. 721, 726, 184 L.Ed.2d 553 (2013) (quoting *Murphy v. Hunt*, 455 U.S. 478, 481, 102 S.Ct. 1181, 71 L.Ed.2d 353 (1982) (*per curiam*); some internal quotation marks omitted). But a case "becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Service Employees*, 567 U.S. ——, ——, 132 S.Ct. 2277, 2287, 183 L.Ed.2d 281 (2012) (internal quotation marks omitted); see also *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992) ("if an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed" (quoting *Mills v. Green*, 159 U.S. 651, 653, 16 S.Ct. 132, 40 L.Ed. 293 (1895))). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Knox*, *supra*, at 1019, 132 S.Ct., at 2287 (internal quotation marks and brackets omitted).

III

This dispute is still very much alive. Mr. Chafin continues to contend that his daughter's country of habitual residence is the United States, while Ms. ***1024** Chafin maintains that E.C.'s home is in Scotland. Mr. Chafin also argues that even if E.C.'s habitual residence was Scotland, she should not have been returned because the Convention's defenses to return apply. Mr. Chafin seeks custody of E.C., and wants to pursue that relief in the United States, while Ms. Chafin is pursuing that right for herself in Scotland. And Mr. Chafin wants the orders that he pay Ms. Chafin over $94,000 vacated, while Ms. Chafin asserts the money is rightfully owed.

On many levels, the Chafins continue to vigorously contest the question of where their daughter will be raised.

This is not a case where a decision would address "a hypothetical state of facts." *Lewis, supra*, at 477, 110 S.Ct. 1249 (quoting *Rice, supra*, at 246, 92 S.Ct. 402; internal quotation marks omitted). And there is not the slightest doubt that there continues to exist between the parties "that concrete adverseness which sharpens the presentation of issues." *Camreta v. Greene*, 563 U.S. ——, ——, 131 S.Ct. 2020, 2028, 179 L.Ed.2d 1118 (2011) (quoting *Lyons, supra*, at 101, 103 S.Ct. 1660; internal quotations marks omitted).

A

At this point in the ongoing dispute, Mr. Chafin seeks reversal of the District Court determination that E.C.'s habitual residence was Scotland and, if that determination is reversed, an order that E.C. be returned to the United States (or "re-return," as the parties have put it). In short, Mr. Chafin is asking for typical appellate relief: that the Court of Appeals reverse the District Court and that the District Court undo what it has done. See *Arkadelphia Milling Co. v. St. Louis Southwestern R. Co.*, 249 U.S. 134, 145–146, 39 S.Ct. 237, 63 L.Ed. 517 (1919); *Northwestern Fuel Co. v. Brock*, 139 U.S. 216, 219, 11 S.Ct. 523, 35 L.Ed. 151 (1891) ("Jurisdiction to correct what had been wrongfully done must remain with the court so long as the parties and the case are properly before it, either in the first instance or when remanded to it by an appellate tribunal"). The question is whether such relief would be effectual in this case.

Ms. Chafin argues that this case is moot because the District Court lacks the authority to issue a re-return order either under the Convention or pursuant to its inherent equitable powers. But that argument—which goes to the meaning of the Convention and the legal availability of a certain kind of relief—confuses mootness with the merits. In *Powell v. McCormack*, 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969), this Court held that a claim for backpay saved the case from mootness, even though the defendants argued that the backpay claim had been brought in the wrong court and therefore could not result in relief. As the Court explained, "this argument ... confuses mootness with whether [the plaintiff] has established a right to recover ..., a question which it is inappropriate to treat at this stage of the litigation." *Id.*, at 500, 89 S.Ct. 1944. Mr. Chafin's claim for re-return—under the Convention itself or according to general equitable principles—cannot be dismissed as so implausible that it is insufficient to preserve jurisdiction, see *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 89, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998), and his prospects of success are therefore not pertinent to the mootness inquiry.

As to the effectiveness of any relief, Ms. Chafin asserts that even if the habitual residence ruling were reversed and the District Court were to issue a re-return order, that relief would be ineffectual because Scotland would simply ignore it.[FN1] ***1025** But even if Scotland were to ignore a U.S. re-return order, or decline to assist in enforcing it, this case would not be moot. The U.S. courts continue to have personal jurisdiction over Ms. Chafin, may command her to take action even outside the United States, and may back up any such command with sanctions. See *Steele v. Bulova Watch Co.*, 344 U.S. 280, 289, 73 S.Ct. 252, 97 L.Ed. 319 (1952); cf. *Leman v. Krentler–Arnold Hinge Last Co.*, 284 U.S. 448, 451–452, 52 S.Ct. 238, 76 L.Ed. 389 (1932). No law of physics prevents E.C.'s return from Scotland, see *Fawcett v. McRoberts*, 326 F.3d 491, 496 (C.A.4 2003), abrogated on other grounds by *Abbott v. Abbott*, 560 U.S. ——, 130 S.Ct. 1983, 176 L.Ed.2d 789 (2010), and Ms. Chafin might decide to comply with an order against her and return E.C. to the United States, see, *e.g.*, *Larbie v. Larbie*, 690 F.3d 295, 303–304 (C.A.5 2012) (mother who had taken child to United Kingdom complied with Texas court sanctions order and order to return child to United States for trial), cert. pending, No. 12–304.[FN2] After all, the consequence of compliance presumably would not be relinquishment of custody rights, but simply custody proceedings in a different forum.

> FN1. Whether Scotland would do so is unclear; Ms. Chafin cited no authority for her assertion in her brief or at oral argument. In a recently issued decision from the Family Division of the High Court of Justice of England and Wales, a judge of that court rejected the "concept of automatic re-return of a child in response to the overturn of [a] Hague order." *DL v. EL*, [2013] EWHC 49, ¶ 59 (Judgt. of Jan. 17). The judge in that case did not ignore the pertinent re-return order—issued by the District Court in *Larbie v. Larbie*, 690 F.3d 295 (C.A.5 2012), cert. pending, No. 12–304—but did not consider it binding in light of the proceedings in England.
>
> Earlier in those proceedings, the Family Division of the High Court directed the parties to provide this

Court with a joint statement on the status of those proceedings. This Court is grateful for that consideration.

FN2. Ms. Chafin suggests that the Scottish court's *ne exeat* order prohibits E.C. from leaving Scotland. The *ne exeat* order, however, only prohibits Mr. Chafin from removing E.C. from Scotland; it does not constrain Ms. Chafin in the same way.

Enforcement of the order may be uncertain if Ms. Chafin chooses to defy it, but such uncertainty does not typically render cases moot. Courts often adjudicate disputes where the practical impact of any decision is not assured. For example, courts issue default judgments against defendants who failed to appear or participate in the proceedings and therefore seem less likely to comply. See Fed. Rule Civ. Proc. 55. Similarly, the fact that a defendant is insolvent does not moot a claim for damages. See 13C C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3533.3, p. 3 (3d ed.2008) (cases not moot "even though the defendant does not seem able to pay any portion of the damages claimed"). Courts also decide cases against foreign nations, whose choices to respect final rulings are not guaranteed. See, *e.g.*, *Republic of Austria v. Altmann*, 541 U.S. 677, 124 S.Ct. 2240, 159 L.Ed.2d 1 (2004) (suit against Austria for return of paintings); *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992) (suit against Argentina for repayment of bonds). And we have heard the Government's appeal from the reversal of a conviction, even though the defendants had been deported, reducing the practical impact of any decision; we concluded that the case was not moot because the defendants might "re-enter this country on their own" and encounter the consequences of our ruling. *United States v. Villamonte–Marquez*, 462 U.S. 579, 581, n. 2, 103 S.Ct. 2573, 77 L.Ed.2d 22 (1983).

So too here. A re-return order may not result in the return of E.C. to the United ***1026** States, just as an order that an insolvent defendant pay $100 million may not make the plaintiff rich. But it cannot be said that the parties here have no "concrete interest" in whether Mr. Chafin secures a re-return order. *Knox*, 567 U.S., at ——, 132 S.Ct., at 2287 (internal quotation marks omitted). "[H]owever small" that concrete interest may be due to potential difficulties in enforcement, it is not simply a matter of academic debate, and is enough to save this case from mootness. *Ibid.* (internal quotation marks omitted).

B

Mr. Chafin also seeks, if he prevails, vacatur of the District Court's expense orders. The District Court ordered Mr. Chafin to pay Ms. Chafin over $94,000 in court costs, attorney's fees, and travel expenses. See Civ. No. 11–1461 (ND Ala., Mar. 7, 2012), pp. 15–16; Civ. No. 11–1461 (ND Ala., June 5, 2012), p. 2. That award was predicated on the District Court's earlier judgment allowing Ms. Chafin to return with her daughter to Scotland. See Civ. No. 11–1461 (ND Ala., Mar. 7, 2012), pp. 2–3, and n. 2.[FN3] Thus, in conjunction with reversal of the judgment, Mr. Chafin desires vacatur of the award. That too is common relief on appeal, see, *e.g.*, *Fawcett, supra*, at 501, n. 6 (reversing costs and fees award when reversing on the issue of wrongful removal), and the mootness inquiry comes down to its effectiveness.

FN3. The award was predicated on the earlier judgment even though that judgment was vacated. The District Court cited Eleventh Circuit cases for the proposition that if a plaintiff obtains relief before a district court and the case becomes moot on appeal, the plaintiff is still a prevailing party entitled to attorney's fees. We express no view on that question. The fact remains that the District Court ordered Mr. Chafin to pay attorney's fees and travel expenses based on its earlier ruling. A reversal, as opposed to vacatur, of the earlier ruling could change the prevailing party calculus and afford Mr. Chafin effective relief.

At oral argument, Ms. Chafin contended that such relief was "gone in this case," and that the case was therefore moot, because Mr. Chafin had failed to pursue an appeal of the expense orders, which had been entered as separate judgments. Tr. of Oral Arg. 33; see Civ. No. 11–1461 (ND Ala., Mar. 7, 2012); Civ. No. 11–1461 (ND Ala., June 5, 2012). But this is another argument on the merits. Mr. Chafin's requested relief is not so implausible that it may be disregarded on the question of jurisdiction; there is authority for the proposition that failure to appeal such judgments separately does not preclude relief. See 15B Wright, Miller, & Cooper, *supra*, § 3915.6, at 230, and n. 39.5 (2d ed.,

Supp.2012) (citing cases). It is thus for lower courts at later stages of the litigation to decide whether Mr. Chafin is in fact entitled to the relief he seeks—vacatur of the expense orders.

Such relief would of course not be " 'fully satisfactory,' " but with respect to the case as whole, "even the availability of a 'partial remedy' is 'sufficient to prevent [a] case from being moot.' " *Calderon v. Moore*, 518 U.S. 149, 150, 116 S.Ct. 2066, 135 L.Ed.2d 453 (1996) (*per curiam*) (quoting *Church of Scientology*, 506 U.S., at 13, 113 S.Ct. 447).

IV

Ms. Chafin is correct to emphasize that both the Hague Convention and ICARA stress the importance of the prompt return of children wrongfully removed or retained. We are also sympathetic to the concern that shuttling children back and forth between parents and across international borders may be detrimental to those children. But courts can achieve the ends of the Convention and ICARA—and protect the well-being of the affected children***1027** —through the familiar judicial tools of expediting proceedings and granting stays where appropriate. There is no need to manipulate constitutional doctrine and hold these cases moot. Indeed, doing so may very well undermine the goals of the treaty and harm the children it is meant to protect.

If these cases were to become moot upon return, courts would be more likely to grant stays as a matter of course, to prevent the loss of any right to appeal. See, *e.g.*, *Garrison v. Hudson*, 468 U.S. 1301, 1302, 104 S.Ct. 3496, 82 L.Ed.2d 804 (1984) (Burger, C.J., in chambers) ("When ... the normal course of appellate review might otherwise cause the case to become moot, issuance of a stay is warranted" (citation and internal quotation marks omitted)); *Nicolson v. Pappalardo*, Civ. No. 10–1125 (C.A.1, Feb. 19, 2010) ("Without necessarily finding a clear probability that appellant will prevail, we grant the stay because ... a risk exists that the case could effectively be mooted by the child's departure"). In cases in which a stay would not be granted but for the prospect of mootness, a child would lose precious months when she could have been readjusting to life in her country of habitual residence, even though the appeal had little chance of success. Such routine stays due to mootness would be likely but would conflict with the Convention's mandate of prompt return to a child's country of habitual residence.

Routine stays could also increase the number of appeals. Currently, only about 15% of Hague Convention cases are appealed. Hague Conference on Private Int'l Law, N. Lowe, A Statistical Analysis of Applications Made in 2008 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Pt. III–National Reports 207 (2011). If losing parents were effectively guaranteed a stay, it seems likely that more would appeal, a scenario that would undermine the goal of prompt return and the best interests of children who should in fact be returned. A mootness holding here might also encourage flight in future Hague Convention cases, as prevailing parents try to flee the jurisdiction to moot the case. See *Bekier*, 248 F.3d, at 1055 (mootness holding "to some degree conflicts with the purposes of the Convention: to prevent parents from fleeing jurisdictions to find a more favorable judicial forum").

Courts should apply the four traditional stay factors in considering whether to stay a return order: " '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.' " *Nken v. Holder*, 556 U.S. 418, 434, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987)). In every case under the Hague Convention, the well-being of a child is at stake; application of the traditional stay factors ensures that each case will receive the individualized treatment necessary for appropriate consideration of the child's best interests.

Importantly, whether at the district or appellate court level, courts can and should take steps to decide these cases as expeditiously as possible, for the sake of the children who find themselves in such an unfortunate situation. Many courts already do so. See Federal Judicial Center, J. Garbolino, The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges 116, n. 435 (2012) (listing courts that expedite appeals).***1028**

Cases in American courts often take over two years from filing to resolution; for a six-year-old such as E. C., that is one-third of her lifetime. Expedition will help minimize the extent to which uncertainty adds to the challenges confronting both parents and child.

* * *

The Hague Convention mandates the prompt return of children to their countries of habitual residence. But such return does not render this case moot; there is a live dispute between the parties over where their child will be raised, and there is a possibility of effectual relief for the prevailing parent. The courts below therefore continue to have jurisdiction to adjudicate the merits of the parties' respective claims.

The judgment of the United States Court of Appeals for the Eleventh Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice GINSBURG, with whom Justice SCALIA and Justice BREYER join, concurring.

The driving objective of the Hague Convention on the Civil Aspects of International Child Abduction (Convention) is to facilitate custody adjudications, promptly and exclusively, in the place where the child habitually resides. See Convention, Oct. 25, 1980, T.I.A.S. No. 11670, Arts. 1, 3, S. Treaty Doc. No. 99–11, p. 7 (Treaty Doc.). To that end, the Convention instructs Contracting States to use "the most expeditious procedures available" to secure the return of a child wrongfully removed or retained away from her place of habitual residence. Art. 2, *ibid.*; see Art. 11, *id.*, at 9 (indicating six weeks as the target time for decision of a return-order petition); Hague Conference on Private International Law, Guide to Good Practice Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part I–Central Authority Practice, § 1.5.1, p. 19 (2010) (Guide to Good Practice) ("Expeditious procedures are essential at all stages of the Convention process."). While "[the] obligation to process return applications expeditiously ... extends to appeal procedures," *id.*, Part IV–Enforcement, § 2.2, ¶ 51, at 13, the Convention does not prescribe modes of, or time frames for, appellate review of first instance decisions. It therefore rests with each Contracting State to ensure that appeals proceed with dispatch.

Although alert to the premium the Convention places on prompt return, see 42 U.S.C. § 11601(a)(4), Congress did not specifically address appeal proceedings in the legislation implementing the Convention. The case before us illustrates the protraction likely to ensue when the finality of a return order is left in limbo.

Upon determining that the daughter of Jeffrey Chafin and Lynne Chafin resided in Scotland, the District Court denied Mr. Chafin's request for a stay pending appeal, and authorized the child's immediate departure for Scotland. The Eleventh Circuit, viewing the matter as a *fait accompli*, dismissed the appeal filed by Mr. Chafin as moot.[FN1] As the Court's opinion explains, ***1029** the Eleventh Circuit erred in holding that the child's removal to Scotland rendered further adjudication in the U.S. meaningless. Reversal of the District Court's return order, I agree, could provide Mr. Chafin with meaningful relief. A determination that the child's habitual residence was Alabama, not Scotland, would open the way for an order directing Ms. Chafin to "re-return" the child to the United States and for Mr. Chafin to seek a custody adjudication in an Alabama state court.[FN2] But that prospect is unsettling. "[S]huttling children back and forth between parents and across international borders may be detrimental to those children," *ante*, at 1026, whose welfare led the Contracting States to draw up the Convention, see 1980 Conférence de La Haye de droit international privé, Enlèvement d'enfants, E. Pérez–Vera, Explanatory Report, in 3 Actes et Documents de la Quatorzième session, ¶ 23, p. 431 (1982). And the advent of rival custody proceedings in Scotland and Alabama is just what the Convention aimed to stave off.

FN1. The Court of Appeals instructed the District Court to vacate the return order, thus leaving the child's

habitual residence undetermined. The Convention envisions an adjudication of habitual residence by the return forum so that the forum abroad may proceed, immediately, to the adjudication of custody. See Convention, Arts. 1, 16, 19, Treaty Doc., at 7, 10, 11. See also *DL v. EL*, [2013] EWHC 49 (Family Div.), ¶ 36 (Judgt. of Jan. 17) ("[T]he objective of Hague is the child's prompt return to the country of the child's habitual residence so that that country's courts can determine welfare issues."); Silberman, Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence, 38 U.C.D.L.Rev. 1049, 1054 (2005) (typing the "return" remedy as "provisional," because "proceedings on the merits of the custody dispute are contemplated in the State of the child's habitual residence once the child is returned there").

FN2. As the Court observes, *ante*, at 1024 – 1025, n. 1, a judge of the Family Division of the High Court of Justice of England and Wales recently concluded that "the concept of automatic re-return of a child in response to the overturn of [a] Hague order pursuant to which [the child] came [to England] is unsupported by law or principle, and would ... be deeply inimical to [the child's] best interests." *DL v. EL*, [2013] EWHC 49, ¶ 59(e). If Mr. Chafin were able to secure a reversal of the District Court's return order, the Scottish court adjudicating the custody dispute might similarly conclude that the child should not be re-returned to Alabama, notwithstanding any U.S. court order to the contrary, and that jurisdiction over her welfare should remain with the Scottish court.

This case highlights the need for both speed and certainty in Convention decisionmaking. Most Contracting States permit challenges to first instance return orders. See Guide to Good Practice, Part IV–Enforcement, § 2.3, ¶ 57, at 14. How might appellate review proceed consistent with the Convention's emphasis on expedition? According to a Federal Judicial Center guide, "[e]xpedited procedures for briefing and handling of [return-order] appeals have become common in most circuits." J. Garbolino, The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges 116 (2012).[FN3] As an example, the guide describes *Charalambous v. Charalambous*, 627 F.3d 462 (C.A.1 2010) (*per curiam*), in which the Court of Appeals stayed a return order, expedited the appeal, and issued a final judgment affirming the return order 57 days after its entry. Once appellate review established the finality of the return order, custody could be litigated in the child's place of habitual residence with no risk of a rival proceeding elsewhere.

FN3. For the federal courts, the Advisory Committees on Federal Rules of Civil and Appellate Procedures might consider whether uniform rules for expediting Convention proceedings are in order. Cf. *ante*, at 1028 (noting that "[c]ases in American courts often take over two years from filing to resolution").

But as the Court indicates, stays, even of short duration, should not be granted "as a matter of course," for they inevitably entail loss of "precious months when [the child] could have been readjusting to life in her country of habitual residence." *Ante*, at 1027; see Tr. of Oral Arg. 39. See also *DL v. EL*, [2013] EWHC 49 (Family Div.), ***1030** ¶ 38 (Judgt. of Jan. 17) ("[Children] find themselves in a sort of Hague triangle limbo, marooned in a jurisdiction from which their return has been ordered but becalmed by extended uncertainty whether they will in the event go or stay."). Where no stay is ordered, the risk of a two-front battle over custody will remain real. See *supra*, at 1028 – 1029. See also *Larbie v. Larbie*, 690 F.3d 295 (C.A.5 2012) (vacating return order following appeal in which no stay was sought). [FN4]

FN4. The *Larbie* litigation, known by another name in the English courts, illustrates that the risk of rival custody proceedings, and conflicting judgments, is hardly theoretical. Compare *Larbie*, 690 F.3d 295, with *DL v. EL*, [2013] EWHC 49.

Amicus Centre for Family Law and Policy calls our attention to the management of Convention hearings and appeals in England and Wales and suggests that procedures there may be instructive. See Brief for Centre for Family Law and Policy 22–24 (Centre Brief). To pursue an appeal from a return order in those domains, leave must be obtained from the first instance judge or the Court of Appeal. Family Procedure Rules 2010, Rule 30.3 (U.K.). Leave will be granted only where "the appeal would have a real prospect of success; or ... there is some other compelling reason

why the appeal should be heard." *Ibid.* Although an appeal does not trigger an automatic stay, see Rule 30.8, if leave to appeal is granted, we are informed, a stay is ordinarily ordered by the court that granted leave. Centre Brief 23; Guide to Good Practice, Part IV–Enforcement, ¶ 74, at 19–20, n. 111. Appeals are then fast-tracked with a target of six weeks for disposition. Centre Brief 24. See also *DL v. EL*, [2013] EWHC 49, ¶¶ 42–43 (describing the English practice and observing that "[t]he whole process is ... very swift, and the resultant period of delay and uncertainty much curtailed by comparison with [the United States]").

By rendering a return order effectively final absent leave to appeal, the rules governing Convention proceedings in England and Wales aim for speedy implementation without turning away appellants whose pleas may have merit. And by providing for stays when an appeal is well founded, the system reduces the risk of rival custody proceedings. Congressional action would be necessary if return-order appeals are not to be available in U.S. courts as a matter of right, but legislation requiring leave to appeal would not be entirely novel. See 28 U.S.C. § 2253(c) (absent a certificate of appealability from a circuit justice or judge, an appeal may not be taken from the final decision of a district judge in a habeas corpus proceeding or a proceeding under 28 U.S.C. § 2255); cf. Guide to Good Practice, Part IV–Enforcement, § 2.5, at 16 (suggesting that, to promote expedition, Contracting States might consider a requirement of leave to appeal); *id.*, Part II–Implementing Measures, § 6.6, at 37 (measures to promote speed within the appeals process include "limiting the time for appeal from an adverse decision [and] requiring permission for appeal" (footnote omitted)).

Lynne Chafin filed her petition for a return order in May 2011. E.C. was then four years old. E.C. is now six and uncertainty still lingers about the proper forum for adjudication of her parents' custody dispute. Protraction so marked is hardly consonant with the Convention's objectives. On remand, the Court rightly instructs, the Court of Appeals should decide the case "as expeditiously as possible," *ante*, at 1027. For future cases, rulemakers and legislators might pay sustained attention to the means by which the United States can best serve the Convention's ***1031** aims: "to secure the prompt return of children wrongfully removed to or retained in" this Nation; and "to ensure that rights of custody ... under the law of one Contracting State are effectively respected in the other Contracting States." Art. 1, Treaty Doc., at 7.

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TO: EHC

FROM: BJR

DATE: September 27, 2012 (rev. Oct. 3, 2012)

RE: Background on Judicial Conference Position Opposing Fixed Civil Litigation Deadlines

The Mississippi Attorney General has suggested civil rules amendments that would, among other things, "requir[e] the automatic remand of cases in which the district court takes no action on a motion to remand within 30 days." *Civil Rules Suggestion 12-CV-C*. This memorandum briefly summarizes (1) the Judicial Conference position on statutorily imposed litigation priority, expediting, or time-limitation rules; and (2) recent, related legislative proposals that have drawn the Conference's opposition.

When faced with legislation seeking to prioritize types of civil actions and decision-making, the Judicial Conference has consistently opposed provisions imposing litigation priority, expediting, or time-limitation rules on specified cases brought in the federal courts. The Conference views 28 U.S.C. § 1657 as sufficiently recognizing the appropriateness of federal courts generally determining case management priorities and the desire to expedite consideration of limited types of actions. *Rpt. of the Comm. on Federal-State Jurisdiction* A-5 (Sept. 1998); JCUS-SEP 90, p. 80.

Since 1990, legislation setting docket and case management priorities has been studied most closely by the Conference's Committee on Federal-State Jurisdiction. But, as detailed below, the Conference's position on this issue was firmly established by 1981. The position developed from concerns that:

> (1) proliferation of statutory priorities means there will be no priorities; (2) individual cases within a class of cases inevitably have different priority treatment needs; (3) priorities are best set on a case-by-case basis as dictated by the exigent circumstances of the case and the status of the court docket; and (4) mandatory priorities, expedition, and time limits for specific types of cases are inimical to effective case management.

Letter from James C. Duff, Secretary, Judicial Conf. of the United States, to Lamar Smith (R-TX), Ranking Member, Comm. on the Judiciary, U.S. House of Representatives (Nov. 10, 2009) (expressing Judicial Conference views concerning the *Tribal Law and Order Act* of 2009).[1] The

[1] Section 103(b) of that Act authorized and encouraged each U.S. Attorney serving a district that includes Indian country "to coordinate with the applicable United States magistrate and district courts...to ensure the provision of docket time for prosecutions of Indian country crimes." Tribal Law and Order Act of 2009, H.R. 1924.

In 2010, the Judicial Conference's Executive Committee approved a recommendation from the Judicial Conference Committee on Criminal Law to "oppose the establishment of statutory litigation priorities that would call for the expediting of certain types of criminal cases." *Rpt. of the Comm. on Crim. Law* 16 (Mar. 2010). Like its approach to legislation affecting the civil docket, the Conference takes the position that the *Speedy Trial Act*, 18

Conference's formal opposition to statutory civil litigation priorities developed in part from judicial improvements and legislative reforms first called for by the American Bar Association (ABA). In February 1977, the ABA House of Delegates adopted the following resolution:

> BE IT RESOLVED, That the American Bar Association endorses the repeal by the Congress of all statutory provisions which require that any class or category of civil cases, other than habeas corpus matters, be heard by the United States Courts of Appeals and the United States District Courts on a priority basis; and
>
> BE IT FURTHER RESOLVED, That the American Bar Association endorses the principle that the Circuit Council of each United States Courts of Appeals set calendar priorities for that Circuit.

See Mandatory Appellate Jurisdiction of the Supreme Court—Abolition of Civil Priorities—Jurors Rights: Hearing Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary, 97th Cong., 1st Sess. 74 (1982) [hereinafter *Hearing*] (prepared statement of Benjamin L. Zelenko). Following this resolution, the U.S. Department of Justice's Office for Improvements in the Administration of Justice pursued several attempts to develop reform legislation that same year. *Hearing* at 82.

On August 4, 1981, Congressman Robert W. Kastenmeier (D-WI) introduced H.R. 4396 (97th Cong.), the Federal Courts Civil Priorities Act, observing that because of the large caseloads in the federal courts, the number of priority cases had increased to the extent that many non-priority civil cases could not be docketed for hearings at all, or suffered inordinate delays. *See Rpt. of the Comm. on Court Admin. and Case Mgmt.* 11 (Sept. 1981); *Hearing* 26. Consistent with the ABA resolutions, Rep. Kastenmeier's bill sought to repeal virtually all of the civil expediting provisions applicable to either the district or appellate courts. The bill's initial phrase, "[n]otwithstanding any law to the contrary," sought to ensure prospectively that any priority provision later slipped into the code would be of no effect. *Hearing* at 96.

The Judicial Conference welcomed the legislation and at its September 1981 session approved the bill based on a recommendation from the Committee on Courts Administration. JCUS-MAR 1981, p. 68. In June 1982, on behalf of the Judicial Conference, Judge Elmo B. Hunter, U.S. District Judge for the Western District of Missouri and Chairman of the Committee on Court Administration, testified in support of the bill before the House Judiciary Committee's Subcommittee on Courts, Civil Liberties, and the Administration of Justice. *See Hearings* 29-30 (recommending that all civil case priorities "be placed in a single section in the judiciary title of the United States Code . . . under proposed new section, 1657."). Judge Hunter noted that Chief Justice Warren E. Burger had previously expressed to the same subcommittee concerns about the welter of acts requiring expedited case handling. *Id*. at 43. And representatives from the U.S. Department of Justice, ABA, and the Association of the Bar of the City of New York echoed Judge Hunter's testimony supporting the bill. *See, e.g.*, *id*. at 110-12, 121-26 (testimony of Deputy Assistant Attorney General Timothy J. Finn). Ultimately, the *Federal Courts Civil*

U.S.C. § 3161, establishes the appropriate time limits for all criminal cases. *Id*. Prior to H.R. 1924, it appears the Conference had not been called upon to articulate opposition to the prioritization of certain types of criminal cases.

Priorities Act was read and referred to the House Judiciary Committee but did not become law. It was reintroduced as H.R. 5645 (98th Cong.) on May 10, 1984, and was passed only by the House.

But, in November 1984, Congress added Section 1657 to Title 28 using language substantively identical to that used in H.R. 4396. *See* 28 U.S.C § 1657 ("Notwithstanding any other provision of law . . ."). The enactment of Section 1657(a) directed "each court of the United States to determine the order in which civil actions are heard and determined," with limited exceptions for (1) habeas corpus actions; (2) actions concerning recalcitrant grand jury witnesses; (3) any action for temporary or preliminary injunctive relief; and (4) other actions if "good cause" for calendar priority is shown (for purposes of the statute, good cause is shown if a federal Constitutional right or a federal statutory right, including rights under 5 U.S.C. § 552 (FOIA), would benefit from expedited treatment). Before Section 1657 became law, more than eighty separate federal statutes authorized civil actions and, at the same time, gave the authorized civil actions calendar priority, making it difficult to obey one statute without violating another. *See Hearing* 181-90 (collecting statutes). Its addition to the United States Code abrogated most of these individual prioritizing statutes.

A temporary and apparently voluntary moratorium on legislative proposals to impose litigation priorities followed the enactment of Section 1657. But in 1990, the Committee on Federal-State Jurisdiction revisited the issue because a pending Department of Interior appropriations bill sought to give priority over all other civil actions to any federal court action that challenged a timber sale in a forest with the northern spotted owl. The legislation also required the courts to render a final decision on the merits in such cases within forty-five days. *Rpt. of the Comm. on Federal-State Jurisdiction* 3-4 (Mar. 1990). At its March 1990 session, the Conference voted to oppose reenactment of these provisions, observing that "[e]stablishing civil priorities, and imposing time limits on the judicial decision-making process, are inimical to effective civil case management and unduly hamper exercise of the necessary discretion in the performance of judicial functions." JCUS-MAR 1990, p. 19.

The Conference focused further attention on the issue of litigation priorities and expediting provisions in legislation at its next meeting, in September 1990. At the time, the Senate had incorporated into S. 1970 (101st Cong.), the major crime legislation passed by the Senate on July 11, 1990, litigation priority provisions concerning habeas corpus and Section 2255 motions in capital cases and thrift institution bailout litigation. The legislation sought to impose the following time limits for resolving habeas corpus petition litigation in capital cases: the district court would have to determine any such petition within 110 days of filing; a court of appeals would have to determine an appeal of a grant, denial, or partial denial of such a petition within ninety days after the notice of appeal is filed; and the Supreme Court would have to act on any petition for a writ of certiorari within ninety days after the petition is filed. The bill also contained priority provisions for judicial handling of Section 2255 motions in federal capital cases.

With respect to the thrift institution bailout litigation, the amendments to S. 1970 specified that (1) consistent with 28 U.S.C. § 1657, a court of the United States shall expedite the consideration of any case brought by the Federal Deposit Insurance Corporation against

directors, officers, employees, and those providing services to an insured institution, stating that "[a]s far as practicable the court shall give such a case priority on its docket;" (2) the hearing in an appeal in such a case "shall be conducted not later than 60 days after the date of filing of the notice of appeal" and "the appeal shall be decided not later than 90 days after the date of the notice of appeal;" and (3) the court may modify these schedules and limitations in a particular case "based on a specific finding that the ends of justice that would be served by making such a modification would outweigh the best interest of the public in having the case resolved expeditiously." *See Rpt. of the Comm. on Federal-State Jurisdiction* 4 (Sept. 1990) (discussing S. 1970 and past Judicial Conference positions on statutory civil priority issues). Responding to the bill, the Conference "reiterated its strong opposition to legislative provisions imposing statutory litigation priority, expediting, or time limitation rules on specified classes of civil cases [and] strongly opposed any attempt to impose statutory time limits for disposition of specified cases in the district courts, the courts of appeals or the Supreme Court." JCUS-SEP 1990, p. 80.

The "Judicial Improvement Act of 1998" (S. 2163, 105th Congress) again resurrected the docket prioritization issue. That legislation was introduced in June 1998, by Senator Orrin Hatch (R-UT), Chair of the Senate Judiciary Committee, and Senators John Ashcroft (R-MO), Spencer Abraham (R-MI), Strom Thurmond (R-SC), Jeff Sessions (R-AL), and Jon Kyl (R-AZ). Section 3(a) of the bill included an automatic termination provision modeled upon the Prison Litigation Reform Act and provided for the automatic termination of any court ordered relief or decree, if the federal district court failed to rule on a motion to terminate within sixty days. The Federal-State Jurisdiction Committee determined that the sixty-day time limit included in section 3(a) was inconsistent with previous Conference positions regarding the statutory imposition of litigation priorities and recommended that the Judicial Conference oppose the time limit because it would likely "impede the effective administration of justice." *Rpt. of the Comm. on Federal-State Jurisdiction* A-9 (Sept. 1998).

Most recently, in March 2005, Senator Lamar Alexander (R-TN) introduced the "Federal Consent Decree Fairness Act," S. 489 (109th Congress). The purpose of the bill was to create "term limits" for consent decrees and to narrow them to "encourage the courts to get the decision-making back in the hands of the elected officials as soon as possible." 151 Cong. Rec. S2064 (daily ed. Mar. 4, 2005). The legislation would have created a new section 1660 of Title 28, to allow state or local officials sued in their official capacities to file a motion to modify or vacate a consent decree (limited to those involving state or local officials and not private settlements) upon the earlier of four years after it was originally entered, or at the expiration of the term of office of the highest elected state or local official who authorized the government to consent. Section (b)(3) of the new section 1660 would have required the court to rule on such motions within 90 days. If the court did not, then pursuant to section (b)(4), the consent decree would have no force or effect beginning on the ninety-first day after the motion was filed until the date on which the court enters a ruling on the motion. Consistent with past opposition, the Committee on Federal-State Jurisdiction requested that the Director of the AO send a letter to Congress opposing the ninety-day deadline in the legislation. That letter was transmitted to selected members of the House and Senate Judiciary Committees, as well as the primary sponsors of the legislation, on June 22, 2005. *Rpt. of the Comm. on Federal-State Jurisdiction* 14-15 (Sept. 2005).

TAB 11

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N.B.: There are no materials for Item No. 13-AP-E.

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TAB 12

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TAB 12A

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MEMORANDUM

DATE: September 23, 2013

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 13-AP-H

Appellate Rule 41(b) provides that "[t]he court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later," but also provides that "[t]he court may shorten or extend the time." Under Rule 41(d)(1), a timely rehearing petition or stay motion presumptively "stays the mandate until disposition of the petition or motion." A party can seek a stay pending the filing of a certiorari petition; if the court grants such a stay and the party who sought the stay files the certiorari petition, then Rule 41(d)(2)(B) provides that "the stay continues until the Supreme Court's final disposition." Rule 41(d)(2)(D) directs that "[t]he court of appeals must issue the mandate immediately when a copy of the Supreme Court order denying the petition for writ of certiorari is filed."

The Supreme Court's decisions in *Ryan v. Schad*, 133 S. Ct. 2548 (2013) (per curiam), and *Bell v. Thompson*, 545 U.S. 794 (2005), raise at least three issues concerning the meaning of Rule 41. The Committee may wish to consider whether Rule 41 should be amended to clarify any or all of these points.

First, the Court twice declined to decide whether Rule 41 requires 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. In *Bell* and *Schad*, the petitioners argued that the mandatory language of Rule 41(d)(2)(D) admits of no exceptions, and that a court of appeals thus has no discretion to stay the issuance of the mandate. The respondent in *Bell* countered that Rule 41(d)(2)(D) "is determinative only when the court of appeals enters a stay of the mandate to allow the Supreme Court to dispose of a petition for certiorari." 545 U.S. at 803. He argued that Rule 41(b) grants a court of appeals authority to stay its mandate for other reasons following the Supreme Court's denial of certiorari and rehearing. In both *Bell* and *Schad*, the Court assumed, *arguendo*, that Rule 41 authorizes a further stay of the mandate following the denial of certiorari, but held that the court of appeals in both cases abused its discretion in doing so. The Court ruled that any authority to stay the mandate after denial of certiorari may be exercised only in "extraordinary circumstances."

The Committee may wish to consider amending Rule 41 to clarify whether a court of appeals has discretion to stay the mandate after a denial of certiorari. Two options, of course, are identified by the competing views of the current Rule described by the Court in *Bell*: Rule 41 could require that a court of appeals must issue the mandate immediately after a denial of certiorari, with no exceptions. Or Rule 41 could permit a court of appeals to stay the mandate, even after the denial of certiorari, in extraordinary circumstances. If the Committee elects to deliberate on those alternatives, three subsidiary points warrant attention:

(A) In unusual circumstances, a party may petition for a writ of certiorari before a case is finally decided in the court of appeals. In that rare situation, it would not make sense for the court of appeals to issue its mandate after a denial of certiorari while the case is still pending in the court of appeals. If the present structure of Rule 41 does not establish that Rule 41(d)(2)(D) applies only to denials of certiorari after a case is finally resolved in the court of appeals, then any amendment to make mandatory the issuance of the mandate should take into account the unusual scenarios mentioned here.

(B) Federal Rule of Appellate Procedure 2 states that "a court of appeals may—to expedite its decision or for other good cause—suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b)." According to the original Committee Note to Rule 2: "The primary purpose of this rule is to make clear the power of the courts of appeals to expedite the determination of cases of pressing concern to the public or to the litigants by prescribing a time schedule other than that provided by the rules. The rule also contains a general authorization to the courts to relieve litigants of the consequences of default where manifest injustice would otherwise result. Rule 26(b) prohibits a court of appeals from extending the time for taking appeal or seeking review." Any proposal to amend Rule 41 to make mandatory the issuance of the mandate should consider whether the availability of authority to suspend the rules under Rule 2 would frustrate the purpose of an amendment, and whether Rule 2 should be amended as well.

(C) The Supreme Court in *Calderon v. Thompson*, 523 U.S. 538 (1998), stated that "[a]lthough some Justices have expressed doubt on the point, the courts of appeals are recognized to have an inherent power to recall their mandates, subject to review for abuse of discretion." *Id*. at 549-50 (citations omitted). This power "can be exercised only in extraordinary circumstances." *Id*. at 550. If Rule 41 were amended to state that a court of appeals must *issue* the mandate immediately after denial of certiorari, then the court of appeals presumably would retain authority to *recall* the mandate in extraordinary circumstances. In considering whether to make issuance of the mandate mandatory, therefore, the Committee should consider whether there are reasons to require a court of appeals first to issue and then to recall a mandate in a case of extraordinary circumstances, rather than merely to stay the mandate after a denial of certiorari.

Second, in *Bell*, the Supreme Court said "[i]t is an open question whether a court may exercise its Rule 41(b) authority to extend the time for the mandate to issue through

mere inaction." 545 U.S. at 805. The Rule provides merely that "[t]he court may shorten or extend the time." The court of appeals in *Bell* purported to stay the issuance of the mandate after denial of certiorari without notifying the parties, and the State in that case proceeded to set an execution date in a capital case without realizing that the mandate never had issued. The Supreme Court assumed, *arguendo*, "that a court may stay the mandate without entering an order" before holding that the court of appeals abused its discretion.

The original version of the Rule stated that "[t]he mandate of the court shall issue 21 days after the entry of judgment *unless the time is shortened or enlarged by order*." The words "by order" were deleted as part of the 1998 restyling, which moved the relevant part of the rule from subdivision (a) into subdivision (b). As with all the restyling Committee Notes, the Note to Rule 41 states that most of the changes were "intended to be stylistic only." The Committee may wish to consider whether Rule 41 should be amended to clarify whether a court of appeals may extend the time of issuance of the mandate by inaction or whether it must issue an order to extend the time.

The Eleventh Circuit has adopted a local operating procedure to address this point. In *United States v. Irey*, 612 F.3d 1160 (11th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 1813 (2011), the petitioner raised the following question presented at the Supreme Court: "Whether the Eleventh Circuit exceeded its authority by delaying the issuance of the mandate without providing the parties with notice of its intention to do so and abused its discretion by failing to take any action for more than four months after the court issued its original panel decision."[1] Initially, an Eleventh Circuit panel had rejected the government's challenge to Irey's sentence.[2] The court of appeals' docket indicates that this opinion issued, and judgment was entered, on March 30, 2009. The government did not file a petition for rehearing. No further docket entries appear until August 12, 2009, when the court of appeals sua sponte granted rehearing en banc and vacated the panel opinion.[3] The en banc court of appeals subsequently vacated and remanded for resentencing.[4] The court of appeals in *Irey* had issued no order extending the time set by Rule 41(b) for the issuance of the mandate.

The Supreme Court denied certiorari in *Irey*, but the Eleventh Circuit in 2010 adopted the following IOP 6, which accompanies Appellate Rule 35:

> Any active Eleventh Circuit judge may request that the court be polled on whether rehearing en banc should be granted whether or not a

[1] Petition for Writ of Certiorari at i, Irey v. United States (No. 10-727).
[2] *See* United States v. Irey, 563 F.3d 1223 (11th Cir. 2009).
[3] *See* United States v. Irey, 579 F.3d 1207 (11th Cir. 2009).
[4] *See* United States v. Irey, 612 F.3d 1160, 1224-25 (11th Cir. 2010) (en banc) ("Because we have determined that a downward deviation from the guidelines range in this case is unreasonable, it follows that the only action on remand that will be consistent with this opinion is resentencing within the guidelines range, which necessarily means a sentence of 30 years.").

> petition for rehearing en banc has been filed by a party.... At the same time the judge may notify the clerk to withhold the mandate. If a petition for rehearing or a petition for rehearing en banc has not been filed by the date that mandate would otherwise issue, the Clerk will make an entry on the docket to advise the parties that a judge has notified the clerk to withhold the mandate. The identity of the judge will not be disclosed.[5]

The Eleventh Circuit's revised IOP seems like a useful innovation. It is true that an alert litigant ought to be attentive to whether or not the court of appeals has issued the mandate after handing down a decision. But *litigants* – particularly those not well versed in appellate procedure – may overlook the need to keep track of that question. A CM/ECF notice of a docket entry indicating that a judge has ordered the clerk to withhold the mandate will alert the litigant to the non-issuance of the mandate (at least, if the attorney has registered on CM/ECF). A quick survey of local circuit provisions reveals that most circuits do not address this topic. The Ninth Circuit Advisory Committee Notes advise litigants to check with the Clerk if the mandate has not issued timely.[6]

Third, *Schad* highlights a quirk in the wording of Rule 41(d). Rule 41(d)(2)(B) provides that if the court grants a request for a stay pending the filing of a certiorari petition, the petition is filed, and appropriate notice is given to the circuit clerk, then "the stay continues until *the Supreme Court's final disposition*." Rule 41(d)(2)(D) directs, as noted above, that "[t]he 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***.**" *Schad* illustrates that when rehearing is sought in the Supreme Court after a denial of certiorari, the "Supreme Court's final disposition" can occur later than the date when "a copy of a Supreme Court order denying the petition for writ of certiorari is filed." The court of appeals in *Schad* pegged the endpoint of its stay to what turned out to be the later of these points (the "final disposition" in the Supreme Court), and the Court did not appear to criticize this choice. Thus, perhaps the courts in practice are adopting a common-sense approach that reads Rule 41(d)(2)(D) to permit an extension until "the Court's final disposition" in cases where rehearing is timely sought in the Supreme Court. In any event, the Committee may wish to consider whether or not to adjust Rule 41(d)(2)(D)'s wording to fit more closely with that in Rule 41(d)(2)(B).

[5] The last two sentences in this IOP were added effective August 1, 2010.

[6] *See* Ninth Circuit Advisory Committee Note to Rule 25-2 (advising litigant to tell Clerk if, inter alia, "the mandate has not issued within 28 days after the time to file a petition for rehearing has expired").

TAB 12B

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Supreme Court of the United States
Charles L. RYAN, Director, Arizona Department of Corrections, Petitioner
v.
Edward Harold SCHAD.

No. 12–1084.
June 24, 2013.

***2549**

PER CURIAM.

Respondent Edward Schad was convicted of first-degree murder and sentenced to death. After an extensive series of state- and federal-court proceedings concluded with this Court's denial of respondent's petitions for certiorari and for rehearing, the Ninth Circuit declined to issue its mandate as normally required by Federal Rule of Appellate Procedure 41(d)(2)(D). The Ninth Circuit instead, *sua sponte*, construed respondent's motion to stay the mandate pending the Ninth Circuit's decision in a separate en banc case as a motion to reconsider a motion that it had denied six months earlier. Based on its review of that previously rejected motion, the court issued a stay a few days before respondent's scheduled execution. Even assuming, as we did in *Bell v. Thompson*, 545 U.S. 794, 125 S.Ct. 2825, 162 L.Ed.2d 693 (2005), that Rule 41(d)(2)(D) admits of any exceptions, the Ninth Circuit did not demonstrate that exceptional circumstances justified withholding its mandate. As a result, we conclude that the Ninth Circuit's failure to issue its mandate constituted an abuse of discretion.

I

In 1985, an Arizona jury found respondent guilty of first-degree murder for the 1978 strangling of 74–year–old Lorimer Grove.[FN1] The court sentenced respondent to death. After respondent's conviction and sentence were affirmed on direct review, see *State v. Schad*, 163 Ariz. 411, 788 P.2d 1162 (1989), and *Schad v. Arizona*, 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991), respondent again sought state habeas relief, alleging that his trial counsel rendered ineffective assistance at sentencing by failing to discover and present sufficient mitigating evidence. The state courts denied relief.

> FN1. A state habeas court vacated an earlier guilty verdict and death sentence due to an error in jury instructions. See *State v. Schad*, 142 Ariz. 619, 691 P.2d 710 (1984).

In August 1998, respondent sought federal habeas relief. He again raised a claim of ineffective assistance at sentencing for failure to present sufficient mitigating evidence. The District Court denied respondent's request for an evidentiary hearing to present new mitigating evidence, concluding that respondent was not diligent in developing the evidence during his state habeas proceedings. *Schad v. Schriro*, 454 F.Supp.2d 897 (D.Ariz.2006). The District Court alternatively held that the proffered new evidence did not demonstrate that trial counsel's performance was deficient. *Id.*, at 940–947. The Ninth Circuit affirmed in part, reversed in part, and remanded to the District Court for a hearing to determine whether respondent's state habeas counsel was diligent in developing the state evidentiary record. *Schad v. Ryan*, 606 F.3d 1022 (2010). Arizona petitioned for certiorari. This Court granted the petition, vacated

the Ninth Circuit's opinion, and remanded for further proceedings in light of *Cullen v. Pinholster*, 563 U.S. ——, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011). See *Ryan v. Schad*, 563 U.S. ——, 131 S.Ct. 2092, 179 L.Ed.2d 886 (2011). On remand, the Ninth Circuit affirmed the District Court's denial of habeas relief. *Schad v. Ryan*, 671 F.3d 708, 726 (2011). The Ninth Circuit subsequently denied a motion for rehearing and rehearing en banc on February 28, 2012.

On July 10, 2012, respondent filed in the Ninth Circuit the first motion directly at issue in this case. This motion asked the court to vacate its judgment and remand to the District Court for additional proceedings in light of this Court's decision in ***2550***Martinez v. Ryan*, 566 U.S. 1, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012).[FN2] The Ninth Circuit denied respondent's motion on July 27, 2012. Respondent then filed a petition for certiorari. This Court denied the petition on October 9, 2012, 568 U.S. ——, 133 S.Ct. 432, 184 L.Ed.2d 264, and denied a petition for rehearing on January 7, 2013. 568 U.S. ——, 133 S.Ct. 922, 184 L.Ed.2d 713.

FN2. *Martinez*, 566 U.S. 1, 132 S.Ct. 1309, 182 L.Ed.2d 272, was decided on March 20, 2012. We are unaware of any explanation for respondent's delay in bringing his *Martinez*-based argument to the Ninth Circuit's attention.

Respondent returned to the Ninth Circuit that day and filed a motion requesting a stay of the mandate in light of a pending Ninth Circuit en banc case addressing the interaction between *Pinholster* and *Martinez*. The Ninth Circuit denied the motion on February 1, 2013, "declin[ing] to issue an indefinite stay of the mandate that would unduly interfere with Arizona's execution process." Order in No. 07–99005, Doc. 102, p. 1. But instead of issuing the mandate, the court decided *sua sponte* to construe respondent's motion "as a motion to reconsider our prior denial of his Motion to Vacate Judgment and Remand in light of *Martinez*," which the court had denied on July 27, 2012. *Id.*, at 2. The court ordered briefing and, in a divided opinion, remanded the case to the District Court to determine whether respondent could establish that he received ineffective assistance of postconviction counsel under *Martinez*, whether he could demonstrate prejudice as a result, and whether his underlying claim of ineffective assistance of trial counsel had merit. No. 07–99005 (Feb. 26, 2013), App. to Pet. for Cert. A–13 to A–15, 2013 WL 791610, *6. Judge Graber dissented based on her conclusion that respondent could not show prejudice. *Id.*, at A–16 to A–17, 2013 WL 791610, *7. Arizona set an execution date of March 6, 2013, which prompted respondent to file a motion for stay of execution on February 26, 2013. The Ninth Circuit panel granted the motion on March 1, 2013, with Judge Graber again noting her dissent.

On March 4, 2013, Arizona filed a petition for rehearing and rehearing en banc with the Ninth Circuit. The court denied the petition the same day, with eight judges dissenting in two separate opinions. 709 F.3d 855 (2013).

On March 4, Arizona filed an application to vacate the stay of execution in this Court, along with a petition for certiorari. This Court denied the application, with Justices SCALIA and ALITO noting that they would grant it. 568 U.S. ——, 133 S.Ct. 2548, 186 L.Ed.2d 644, 2013 WL 3155269 (2013). We now consider the petition.

II

Federal Rule of Appellate Procedure 41(d)(2)(D) sets forth the default rule that "[t]he 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." (Emphasis added.) The reason for this Rule is straightforward: "[T]he stay of mandate is entered solely to allow this

Court time to consider a petition for certiorari." *Bell*, 545 U.S., at 806, 125 S.Ct. 2825. Hence, once this Court has denied a petition, there is generally no need for further action from the lower courts. See *ibid.* ("[A] decision by this Court denying discretionary review usually signals the end of litigation"). In *Bell*, Tennessee argued that Rule 41(d)(2)(D) "admits of no exceptions, so the mandate should have issued on the date" the Court of Appeals received notice of the Supreme Court's denial of certiorari. *Id.*, at 803, 125 S.Ct. 2825. There was no ***2551** need to resolve this issue in *Bell* because we concluded that the Sixth Circuit had abused its discretion even if Rule 41(d)(2)(D) authorized a stay of the mandate after denial of certiorari. *Id.*, at 803–804, 125 S.Ct. 2825. As in *Bell*, we need not resolve this issue to determine that the Ninth Circuit abused its discretion here.

Bell recognized that when state-court judgments are reviewed in federal habeas proceedings, "finality and comity concerns," based in principles of federalism, demand that federal courts "accord the appropriate level of respect to" state judgments by allowing them to be enforced when federal proceedings conclude. *Id.*, at 812–813, 125 S.Ct. 2825. As we noted, States have an " ' "interest in the finality of convictions that have survived direct review within the state court system." ' " *Id.*, at 813, 125 S.Ct. 2825 (quoting *Calderon v. Thompson*, 523 U.S. 538, 555, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998), in turn quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993)). Elsewhere, we explained that " 'the profound interests in repose' attaching to the mandate of a court of appeals" dictate that "the power [to withdraw the mandate] can be exercised only in extraordinary circumstances." *Calderon*, *supra*, at 550, 118 S.Ct. 1489 (quoting 16 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3938, p. 712 (2d ed.1996)). Deviation from normal mandate procedures is a power "of last resort, to be held in reserve against grave, unforeseen contingencies." *Calderon*, *supra*, at 550, 118 S.Ct. 1489. Even assuming a court of appeals has authority to do so, it abuses its discretion when it refuses to issue the mandate once the Supreme Court has acted on the petition, unless extraordinary circumstances justify that action.

Applying this standard in *Bell*, we found no extraordinary circumstances that could constitute a miscarriage of justice. There, a capital defendant unsuccessfully alleged in state postconviction proceedings that his trial counsel had been ineffective by failing to introduce sufficient mitigating evidence in the penalty phase of trial. 545 U.S., at 797, 125 S.Ct. 2825. On federal habeas review, he made the same argument. *Id.*, at 798, 125 S.Ct. 2825. After the Sixth Circuit affirmed, the defendant filed a petition for rehearing that "placed substantial emphasis" on his argument that the Sixth Circuit had overlooked new psychiatrist evidence. *Id.*, at 800, 125 S.Ct. 2825. While the Sixth Circuit denied the petition, it stayed the issuance of its mandate while the defendant sought certiorari and, later, rehearing from the denial of the writ. *Ibid.*

When this Court denied the petition for rehearing, the Sixth Circuit did not issue its mandate. Instead, the Sixth Circuit waited five months (and until two days before the scheduled execution) to issue an amended opinion that vacated the District Court's denial of habeas and remanded for an evidentiary hearing on the ineffective-assistance-of-counsel claim. *Id.*, at 800–801, 125 S.Ct. 2825. This Court reversed that decision, holding that the Sixth Circuit had abused its discretion due to its delay in issuing the mandate without notifying the parties, its reliance on a previously rejected argument, and its disregard of comity and federalism principles.

In this case, the Ninth Circuit similarly abused its discretion when it did not issue the mandate. As in *Bell*, the Ninth Circuit here declined to issue the mandate based on an argument it had considered and rejected months earlier. And, by the time of the Ninth Circuit's February 1, 2013, decision not to issue its mandate, it had been over 10 months

since we decided *Martinez* and nearly 7 months since respondent***2552** unsuccessfully asked the Ninth Circuit to reconsider its decision in light of *Martinez*.[FN3]

> FN3. Respondent did not even present the motion that the Ninth Circuit ultimately reinstated until more than 4 months after the Ninth Circuit denied respondent's request for panel rehearing and rehearing en banc and more than 3 1/2 months after *Martinez* was decided.

Further, there is no doubt that the arguments presented in the rejected July 10, 2012, motion were identical to those accepted by the Ninth Circuit the following February. Respondent styled his July 10 motion a "Motion to Vacate Judgment and Remand to the District Court for Additional Proceedings in Light of *Martinez v. Ryan*." No. 07–99005(CA9), Doc. 88, p. 1. As its title suggests, the only claim presented in that motion was that respondent's postconviction counsel should have developed more evidence to support his ineffective-assistance-of-trial-counsel claim. Here, as in *Bell*, respondent's July 10 motion "pressed the same arguments that eventually were adopted by the Court of Appeals." 545 U.S., at 806, 125 S.Ct. 2825. These arguments were pressed so strongly in the July 10 motion that "[i]t is difficult to see how ... counsel could have been clearer." *Id.*, at 808, 125 S.Ct. 2825. The Ninth Circuit had a full "opportunity to consider these arguments" but declined to do so, *id.*, at 806, 125 S.Ct. 2825, which "support[s] our determination that the decision to withhold the mandate was in error." *Id.*, at 806–807, 125 S.Ct. 2825. We presume that the Ninth Circuit carefully considers each motion a capital defendant presents on habeas review. See *id.*, at 808, 125 S.Ct. 2825 (rejecting the notion that "judges cannot be relied upon to read past the first page of a petition for rehearing"). As a result, there is no indication that there were any extraordinary circumstances here that called for the court to revisit an argument *sua sponte* that it already explicitly rejected.

Finally, this case presents an additional issue not present in *Bell*. In refusing to issue the mandate, the Ninth Circuit panel relied heavily upon *Beardslee v. Brown*, 393 F.3d 899, 901 (C.A.9 2004) (*per curiam*), *Beardslee*, which precedes our *Bell* decision by more than six months, asserts the Ninth Circuit's inherent authority to withhold a mandate. See App. to Pet. for Cert. A–3 to A–4, 2013 WL 791610, *1. But *Beardslee* was based on the Sixth Circuit's decision in *Bell*, which we reversed. See *Beardslee*, *supra*, at 901 (citing *Thompson v. Bell*, 373 F.3d 688, 691–692 (C.A.6 2004)). That opinion, thus, provides no support for the Ninth Circuit's decision.

In light of the foregoing, we hold that the Ninth Circuit abused its discretion when it neglected to issue its mandate. The petition for a writ of certiorari and respondent's motion to proceed *in forma pauperis* are granted. The Ninth Circuit's judgment is reversed, the stay of execution is vacated, and the case is remanded with instructions to issue the mandate immediately and without any further proceedings.

It is so ordered.

U.S.,2013.
Ryan v. Schad
133 S.Ct. 2548, 186 L.Ed.2d 644, 81 USLW 4568, 81 USLW 3697, 81 USLW 3701, 13 Cal. Daily Op. Serv. 6509, 2013 Daily Journal D.A.R. 8083, 24 Fla. L. Weekly Fed. S 397

TAB 12C

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Supreme Court of the United States
Ricky BELL, Warden, Petitioner,
v.
Gregory THOMPSON.

No. 04-514.
Argued April 26, 2005.

Decided June 27, 2005. Rehearing Denied Aug. 22, 2005. See 545 U.S. 1158, 126 S.Ct. 24.

373 F.3d 688, reversed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and THOMAS, JJ., joined. BREYER, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined, *post,* p. 2837.

Paul G. Summers, Attorney General, State of Tennessee, Michael E. Moore, Solicitor General, Gordon W. Smith, Associate Solicitor General, Jennifer L. Smith, Associate Deputy Attorney General, Counsel of Record, Angele M. Gregory, Assistant Attorney General, Nashville, Tennessee, for Petitioner.

Daniel T. Kobil, Capital Univ. Law School, Columbus, OH, Walter Dellinger, Counsel of Record, Matthew M. Shors, Charles E. Borden, Scott M. Hammack (admitted only in New York), O'Melveny & Myers, LLP, Washington, D.C., for Respondent.

For U.S. Supreme Court briefs, see:2005 WL 435904 (Pet.Brief)2005 WL 760329 (Resp.Brief)2005 WL 916158 (Reply.Brief)

Justice KENNEDY delivered the opinion of the Court.

***796** This case requires us to consider whether, after we had denied certiorari and a petition for rehearing, the Court of Appeals had the power to withhold its mandate for more than five months without entering a formal order. We hold that, even assuming a court may withhold its mandate after the denial of certiorari in some cases, the Court of Appeals' decision to do so here was an abuse of discretion.

I

In 1985, Gregory Thompson and Joanna McNamara abducted Brenda Blanton Lane from a store parking lot in Shelbyville, Tennessee. After forcing Lane to drive them to a remote location, Thompson stabbed her to death. Thompson offered ****2828** no evidence during the guilt phase of trial and was convicted by a jury of first-degree murder.

Thompson's defense attorneys concentrated their efforts on persuading the sentencing jury that Thompson's positive ***797** qualities and capacity to adjust to prison life provided good reasons for not imposing the death penalty.

Before trial, Thompson's counsel had explored the issue of his mental condition. The trial judge referred Thompson to a state-run mental health facility for a 30-day evaluation. The resulting report indicated that Thompson was competent at the time of the offense and at the time of the examination. The defense team retained their own expert, Dr. George Copple, a clinical psychologist. At sentencing Copple testified that Thompson was remorseful and still had the ability to work and contribute while in prison. Thompson presented the character testimony of a number of witnesses, including former high school teachers, his grandparents, and two siblings. Arlene Cajulao, Thompson's girlfriend while he was stationed with the Navy in Hawaii, also testified on his behalf. She claimed that Thompson's behavior became erratic after he suffered head injuries during an attack by three of his fellow servicemen. In rebuttal the State called Dr. Glenn Watson, a clinical psychologist who led the pretrial evaluation of Thompson's competence. Watson testified that his examination of Thompson revealed no significant mental illness.

The jury sentenced Thompson to death. His conviction and sentence were affirmed on direct review. *State v. Thompson*, 768 S.W.2d 239 (Tenn.1989), cert. denied, 497 U.S. 1031, 110 S.Ct. 3288, 111 L.Ed.2d 796 (1990).

In his state postconviction petition, Thompson claimed his trial counsel had been ineffective for failing to conduct an adequate investigation into his mental health. Thompson argued that his earlier head injuries had diminished his mental capacity and that evidence of his condition should have been presented as mitigating evidence during the penalty phase of trial. Under Tennessee law, mental illness that impairs a defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law is a mitigating factor in capital sentencing. Tenn.CodeAnn. ***798** § 39-2-203(j)(8) (1982) (repealed); § 39-13-204(j)(8) (Lexis 2003). The postconviction court denied relief following an evidentiary hearing, and the Tennessee Court of Criminal Appeals affirmed. *Thompson v. State*, 958 S.W.2d 156 (1997). The Tennessee Supreme Court denied discretionary review.

Thompson renewed his ineffective-assistance-of-counsel claim on federal habeas. Thompson's attorneys retained a psychologist, Dr. Faye Sultan, to assist with the proceedings. At this point, 13 years had passed since Thompson's conviction. Sultan examined and interviewed Thompson three times, questioned his family members, and conducted an extensive review of his legal, military, medical, and prison records, App. 12, before diagnosing him as suffering from schizoaffective disorder, bipolar type, *id.*, at 20. She contended that Thompson's symptoms indicated he was "suffering serious mental illness at the time of the 1985 offense for which he has been convicted and sentenced. This mental illness would have substantially impaired Mr. Thompson's ability to conform his conduct to the requirements of the law." *Ibid.* Sultan prepared an expert report on Thompson's behalf and was also deposed by the State.

In February 2000, the United States District Court for the Eastern District of Tennessee granted the State's motion for ****2829** summary judgment and dismissed the habeas petition. The court held that Thompson failed to show that the state court's resolution of his claim rested on an unreasonable application of Supreme Court precedent or on an unreasonable determination of the facts in light of the evidence presented in state court. See 28 U.S.C. § 2254(d). The District Court also stated that Thompson had not presented "any significant probative evidence that [he] was suffering from a significant mental disease that should have been presented to the jury during the punishment phase as mitigation." No. 4:98-cv-006 (ED Tenn., Feb. 17, 2000), App. to Pet. for ***799** Cert. 270. Sultan's deposition and report, however, had apparently not been included in the District Court record.

While Thompson's appeal to the Court of Appeals for the Sixth Circuit was pending, he filed a motion in the

District Court under Federal Rule of Civil Procedure 60(b) requesting that the court supplement the record with Sultan's expert report and deposition. Thompson's habeas counsel at the time explained that the failure to include the Sultan evidence in the summary judgment record was an oversight. Thompson also asked the Court of Appeals to hold his case in abeyance pending a ruling from the District Court and attached the Sultan evidence in support of his motion.

The District Court denied the Rule 60(b) motion as untimely, and the Court of Appeals denied Thompson's motion to hold his appeal in abeyance. On January 9, 2003, a divided panel of the Court of Appeals affirmed the District Court's denial of habeas relief. *Thompson v. Bell*, 315 F.3d 566. The lead opinion, authored by Judge Suhrheinrich, reasoned that there was no ineffective assistance of counsel because Thompson's attorneys were aware of his head injuries and made appropriate inquiries into his mental fitness. *Id.*, at 589-592. In particular, Thompson's attorneys had requested that the trial court order a competency evaluation. A team of experts at the Middle Tennessee Mental Health Institute, a state-run facility, found "no mental illness, mental defect, or insanity." *Id.*, at 589. Dr. George Copple, the clinical psychologist retained by Thompson's attorneys, also "found no evidence of mental illness." *Ibid.* Judge Suhrheinrich emphasized that none of the experts retained by Thompson since trial had offered an opinion on his mental condition at the time of the crime. *Id.*, at 589-592. The lead opinion contained a passing reference to Thompson's unsuccessful Rule 60(b) motion, but did not discuss the Sultan deposition or expert report in any detail. *Id.*, at 583, n. 13. Judge Moore concurred in the result based on Thompson's failure to present "evidence that his counsel ***800** knew or should have known either that Thompson was mentally ill or that his mental condition was deteriorating at the time of his trial or at the time of his crime." *Id.*, at 595.

Thompson filed a petition for rehearing. The petition placed substantial emphasis on the Sultan evidence, quoting from both her deposition and expert report. The Court of Appeals denied the petition for rehearing and stayed the issuance of its mandate pending the disposition of Thompson's petition for certiorari.

This Court denied certiorari on December 1, 2003. 540 U.S. 1051, 124 S.Ct. 804, 157 L.Ed.2d 701. The following day, Thompson filed a motion in the Court of Appeals seeking to extend the stay of mandate pending disposition of his petition for rehearing in this Court. The Court of Appeals granted the motion and "ordered that the mandate be stayed to allow appellant time to file a petition for rehearing from the denial of the writ of certiorari, and thereafter until the Supreme Court ****2830** disposes of the case." App. to Pet. for Cert. 348. On January 20, 2004, this Court denied Thompson's petition for rehearing. 540 U.S. 1158, 124 S.Ct. 1162, 157 L.Ed.2d 1058. A copy of the order was filed with the Court of Appeals on January 23, 2004. The Court of Appeals, however, did not issue its mandate.

The State, under the apparent assumption that the federal habeas corpus proceedings had terminated, filed a motion before the Tennessee Supreme Court requesting that an execution date be set. The court scheduled Thompson's execution for August 19, 2004.

From February to June 2004, there were proceedings in both state and federal courts related to Thompson's present competency to be executed under *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986). The state courts, after considering Sultan's testimony (which was based in part on followup observations after her initial 1998 examination) as well as that of other experts, found Thompson competent to be executed. *Thompson v. State*, 134 S.W.3d 168 (Tenn.2004). Thompson's *Ford* claim was still pending before the Federal District ***801** Court when on

June 23, 2004, some seven months after this Court denied certiorari, the Court of Appeals for the Sixth Circuit issued an amended opinion in Thompson's initial federal habeas case. 373 F.3d 688. The new decision vacated the District Court's judgment denying habeas relief and remanded the case for an evidentiary hearing on Thompson's ineffective-assistance-of-counsel claim. *Id.*, at 691-692. The Court of Appeals relied on its equitable powers to supplement the record on appeal with Sultan's 1999 deposition after finding that it was "apparently negligently omitted" and "probative of Thompson's mental state at the time of the crime." *Id.*, at 691. The court also explained its authority to issue an amended opinion five months after this Court denied a petition for rehearing: "[W]e rely on our inherent power to reconsider our opinion prior to the issuance of the mandate, which has not yet issued in this case." *Id.*, at 691-692. Judge Suhrheinrich authored a lengthy separate opinion concurring in part and dissenting in part, which explained that his chambers initiated the *sua sponte* reconsideration of the case. He agreed with the majority about the probative value of the Sultan deposition, referring to the evidence as "critical." *Id.*, at 733. Unlike the majority, however, Judge Suhrheinrich would have relied upon fraud on the court to justify the decision to expand the record and issue an amended opinion. *Id.*, at 725-726, 729-742. He found "implausible" the explanation offered by Thompson's habeas counsel for his failure to include the Sultan deposition in the District Court record, *id.*, at 742, and speculated that counsel "planned to unveil Dr. Sultan's opinion on the eve of Thompson's execution," *id.*, at 738, n. 21.

We granted certiorari. 543 U.S. 1042, 125 S.Ct. 823, 160 L.Ed.2d 609 (2005).

II

At issue in this case is the scope of the Court of Appeals' authority to withhold the mandate pursuant to Federal Rule of Appellate Procedure 41. As relevant, the Rule provides:

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

"(c) Effective Date. The mandate is effective when issued.

****2831** "(d) Staying the Mandate.

"(1) On Petition for Rehearing or Motion. The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.

"(2) Pending Petition for Certiorari.

"(A) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the certiorari petition would present a substantial question and that there is good cause for a stay.

"(B) The stay must not exceed 90 days, unless the period is extended for good cause or unless the party who

obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay. In that case, the stay continues until the Supreme Court's final disposition.

. . . . .

"(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."

Tennessee argues that the Court of Appeals was required to issue the mandate following this Court's denial of Thompson's petition for certiorari. The State's position rests on Rule 41(d)(2)(D), which states that "[t]he court of appeals ***803** must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed." This provision, the State points out, admits of no exceptions, so the mandate should have issued on the date that a copy of this Court's order denying certiorari was filed with the Court of Appeals, *i.e.*, December 8, 2003.

The State further contends that because the mandate should have issued in December 2003, the Court of Appeals' amended opinion was in essence a recall of the mandate. If this view is correct, the Court of Appeals' decision to revisit its earlier opinion must satisfy the standard established by *Calderon v. Thompson*, 523 U.S. 538, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998). *Calderon* held that "where a federal court of appeals *sua sponte* recalls its mandate to revisit the merits of an earlier decision denying habeas corpus relief to a state prisoner, the court abuses its discretion unless it acts to avoid a miscarriage of justice as defined by our habeas corpus jurisprudence." *Id.*, at 558, 118 S.Ct. 1489. See also *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995); *Sawyer v. Whitley*, 505 U.S. 333, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992).

Thompson counters by arguing that Rule 41(d)(2)(D) is determinative only when the court of appeals enters a stay of the mandate to allow the Supreme Court to dispose of a petition for certiorari. The provision, Thompson says, does not affect the court of appeals' broad discretion to enter a stay for other reasons. He relies on Rule 41(b), which provides the court of appeals may "shorten or extend the time" in which to issue the mandate. Because the authority vested by Rule 41(b) is not limited to the period before a petition for certiorari is denied, he argues that the Court of Appeals had the authority to stay its mandate following this Court's denial of certiorari and rehearing. Although the Court of Appeals failed to issue an order staying the mandate after we denied rehearing, Thompson asserts that the court exercised its Rule 41(b) powers by simply failing to issue it.

To resolve this case, we need not adopt either party's interpretation of Rule 41. Instead, we hold that-assuming, ****2832 *804** *arguendo*, that the Rule authorizes a stay of the mandate following the denial of certiorari and also that a court may stay the mandate without entering an order-here the Court of Appeals abused its discretion in doing so.

III

We find an abuse of discretion for the following reasons.

Prominent among our concerns is the length of time between this Court's denial of certiorari and the Court of Appeals' issuance of its amended opinion. We denied Thompson's petition for certiorari in December 2003 and his

petition for rehearing one month later. From this last denial, however, the Court of Appeals delayed issuing its mandate for over five months, releasing its amended opinion in June.

The consequence of delay for the State's criminal justice system was compounded by the Court of Appeals' failure to issue an order or otherwise give notice to the parties that the court was reconsidering its earlier opinion. The Court of Appeals had issued two earlier orders staying its mandate. The first order stayed the mandate pending disposition of Thompson's petition for certiorari. The second order extended the stay to allow Thompson time to file a petition for rehearing with this Court and "thereafter until the Supreme Court disposes of the case." So by the express terms of the second order the mandate was not to be stayed after this Court acted; and when we denied rehearing on January 20, 2004, the Court of Appeals' second stay dissolved by operation of law. Tennessee, acting in reliance on the Court of Appeals' earlier orders and our denial of certiorari and rehearing, could assume that the mandate would-indeed must-issue. While it might have been prudent for the State to verify that the mandate had issued, it is understandable that it proceeded to schedule an execution date. Thompson, after all, had not sought an additional stay of the mandate, and the Court of Appeals had given no indication that it might be revisiting its earlier decision.

***805** This latter point is important. It is an open question whether a court may exercise its Rule 41(b) authority to extend the time for the mandate to issue through mere inaction. Even assuming, however, that a court could effect a stay for a short period of time by withholding the mandate, a delay of five months is different in kind. "Basic to the operation of the judicial system is the principle that a court speaks through its judgments and orders." *Murdaugh Volkswagen, Inc. v. First National Bank of South Carolina*, 741 F.2d 41, 44 (C.A.4 1984). Without a formal docket entry neither the parties nor this Court had, or have, any way to know whether the court had stayed the mandate or simply made a clerical mistake. Cf. *Ballard v. Commissioner*, 544 U.S. 40, 59-60, 125 S.Ct. 1270, 1282-1283, 161 L.Ed.2d 227 (2005). The dissent claims "the failure to notify the parties was likely due to a simple clerical error" on the part of the Clerk's office. *Post*, at 2843 (opinion of BREYER, J.). The record lends no support to this speculation. The dissent also fails to explain why it is willing to apply a "presumption of regularity" to the panel's actions but not to the Clerk's. *Ibid.*

The Court of Appeals could have spared the parties and the state judicial system considerable time and resources if it had notified them that it was reviewing its original panel decision. After we denied Thompson's petition for rehearing, Tennessee scheduled his execution date. This, in turn, led to various proceedings in state and federal court to determine Thompson's present competency to be executed. See, ****2833** *e.g.*, *Thompson v. State*, 134 S.W.3d 168 (Tenn.2004). All of these steps were taken in reliance on the mistaken impression that Thompson's first federal habeas case was final. The State had begun to "invok[e] its entire legal and moral authority in support of executing its judgment." *Calderon v. Thompson*, *supra*, at 556-557, 118 S.Ct. 1489.

The parties' assumption that Thompson's habeas proceedings were complete was all the more reasonable because the Court of Appeals' delay in issuing its mandate took place ***806** after we had denied certiorari. As a practical matter, a decision by this Court denying discretionary review usually signals the end of litigation. While Rule 41(b) may authorize a court to stay the mandate after certiorari is denied, the circumstances where such a stay would be warranted are rare. See, *e.g.*, *First Gibraltar Bank, FSB v. Morales*, 42 F.3d 895 (C.A.5 1995); *Alphin v. Henson*, 552 F.2d 1033 (C.A.4 1977). In the typical case, where the stay of mandate is entered solely to allow this Court time to consider a petition for certiorari, Rule 41(d)(2)(D) provides the default: "The court of appeals must issue the mandate immedi-

ately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed."

By providing a mechanism for correcting errors in the courts of appeals before Supreme Court review is requested, the Federal Rules of Appellate Procedure ensure that litigation following the denial of certiorari will be infrequent. See Fed. Rule App. Proc. 40(a) ("Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment"). See also Fed. Rules App. Proc. 35 (rehearing en banc), 40 (panel rehearing).

Indeed, in this case Thompson's petition for rehearing and suggestion for rehearing en banc pressed the same arguments that eventually were adopted by the Court of Appeals in its amended opinion. The Sultan evidence, first presented to the Court of Appeals as an attachment to Thompson's motion to hold his appeal in abeyance, was quoted extensively in the petition for rehearing to the Court of Appeals. Pet. for Rehearing and Suggestion for Rehearing En Banc in No. 00-5516(CA6), pp. 12-20, 28-31. After the request for rehearing was denied, the State could have assumed with good reason that the Court of Appeals was not impressed by Thompson's arguments based on the Sultan evidence. The court's opportunity to consider these arguments at the rehearing stage is yet another factor supporting ***807** our determination that the decision to withhold the mandate was in error. Cf. *Calderon v. Thompson*, 523 U.S., at 551-553, 118 S.Ct. 1489 (questioning whether a "mishandled law clerk transition" and the "failure of another judge to notice the action proposed by the original panel" would justify recalling the mandate in a non habeas case).

The dissent's explanation of how the Sultan evidence was overlooked is inaccurate in several respects. For example, the statements that the "Sultan documents were not in the initial record on appeal," *post*, at 2841, and that "the panel previously had not seen these documents" before the rehearing stage, *id.*, at 2842, convey the wrong impression. Although the Sultan evidence was not part of the District Court's summary judgment record, the documents were included in the certified record on appeal as attachments to Thompson's Rule 60(b) motion. Record 133; Docket Entry 4/5/02 in No. 4:98-cv-006 (ED Tenn.); Docket Entry 4/10/02 in No. 00-5516(CA6). The dissent also argues the petition for rehearing did not adequately bring the Sultan evidence to the attention of the Court of Appeals. ****2834** *Post*, at 2841-2842, 2844. This is simply untrue. The original panel opinion, which did not discuss the Sultan evidence in any detail, emphasized that Thompson had failed to produce any evidence that he was mentally ill at the time of his offense. 315 F.3d, at 590; *id.*, at 595-596 (Moore, J., concurring in result). The petition for rehearing attacked this conclusion in no uncertain terms and placed the Sultan evidence front and center. Here, for example, is an excerpt from the petition's table of contents:

"II. THE CONCLUSION THAT THERE IS NO EVIDENCE PRESENTED IN THE RECORD OF THOMPSON'S MENTAL ILLNESS AT THE TIME OF THE CRIME IS WRONG

"A. Thompson Has Set Forth Above The Record Facts Demonstrating His Mental Illness At The Time Of The Crime

***808** "B. The Majority Overlooks The Facts And Expert Opinion Set Forth In Dr. Sultan's Report And Deposition." Pet. for Rehearing and Suggestion for Rehearing En Banc in No. 00-5516(CA6), p. ii.

See also *id.*, at 1 (mentioning the Sultan evidence in the second paragraph of the statement in support of panel

rehearing). The rehearing petition did not explain why Sultan's deposition and expert report had been omitted from the summary judgment record, but that is beside the point. The petition acknowledged that the Sultan evidence was first presented to the District Court as an attachment to the Rule 60(b) motion, *id.*, at 29, and gave the Sultan evidence a prominent and explicit mention in the table of contents. It is difficult to see how Thompson's counsel could have been clearer in telling the Court of Appeals that it was wrong. The dissent's treatment of this issue assumes that judges forget even the basic details of a capital case only one month after issuing a 38-page opinion and that judges cannot be relied upon to read past the first page of a petition forrehearing. The problem is that the dissent cannot have it both ways: If the Sultan evidence is as crucial as the dissent claims, it would not easily have been overlooked by the Court of Appeals at the rehearing stage.

Our review of the Sultan deposition reinforces our conclusion that the Court of Appeals abused its discretion by withholding the mandate. Had the Sultan deposition and report been fully considered in the federal habeas proceedings, it no doubt would have been relevant to the District Court's analysis. Based on the Sultan deposition, Thompson could have argued he suffered from mental illness at the time of his crime that would have been a mitigating factor under Tennessee law and that his trial attorneys were constitutionally ineffective for failing to conduct an adequate investigation into his mental health.

Relevant though the Sultan evidence may be, however, it is not of such a character as to warrant the Court of Appeals' ***809** extraordinary departure from standard appellate procedures. There are ample grounds to conclude the evidence was unlikely to have altered the District Court's resolution of Thompson's ineffective-assistance-of-counsel claim. Sultan examined Thompson for the first time on August 20, 1998, App. 37, some 13 years after Thompson's crime and conviction. She relied on the deterioration in Thompson's present mental health-something that obviously was not observable at the time of trial-as evidence of his condition in 1985. (Indeed, there was a marked decline in his condition during the 6-month period between Sultan's first two visits. *Id.*, at 51-58.) Sultan's findings regarding Thompson's condition in 1985 are contradicted by the testimony of two experts who examined ****2835** him at the time of trial, Dr. Watson and Dr. Copple. Watson performed a battery of tests at the Middle Tennessee Mental Health Institute, where Thompson was referred by the trial court for an examination, and concluded that Thompson " '[did] not appear to be suffering from any complicated mental disorder which would impair his capacity to appreciate the wrongfulness of the alleged offenses, or which would impair his capacity to conform his conduct to the requirements of the law.' " 19 Tr. 164. Indeed, Watson presented substantial evidence supporting his conclusion that Thompson was malingering for mental illness. *Id.*, at 151-152; 20 *id.*, at 153-160. For example, Thompson claimed he could not read despite a B average in high school and one year's college credit. 19 *id.*, at 137; 20 *id.*, at 151. Thompson's test scores also indicated that he was attempting to fake schizophrenia. 20 *id.*, at 153-154. Copple, the psychologist retained by Thompson's defense team, agreed with Watson that Thompson was not suffering from mental illness. 19 *id.*, at 58. Had the Sultan deposition been included in the District Court record, Thompson still would have faced an uphill battle to obtaining federal habeas relief. He would have had to argue that his trial attorneys should have continued to investigate his mental***810** health even after both Watson and Copple had opined that there was nothing to uncover.

Sultan's testimony does not negate Thompson's responsibility for committing the underlying offense, but it does bear upon an argument that Thompson's attorneys could have presented at sentencing. Sultan's ultimate conclusion-that Thompson's mental illness substantially impaired his ability to conform his conduct to the requirements of the law-is couched in the language of a mitigating factor under Tennessee law. Tenn.Code Ann. § 39-2-203(j)(8) (1982). See also § 39-13-204(j)(8) (Lexis 2003). Thompson's trial attorneys, however, chose not to pursue a mitigation

strategy based on mental illness, stressing instead character evidence from family and friends and expert testimony that he had the capacity to adjust to prison. *Thompson v. State*, 958 S.W.2d, at 164-165. This strategic calculation, while ultimately unsuccessful, was based on a reasonable investigation into Thompson's background. Sultan relied on three witnesses in preparing her report: Thompson's grandmother, sister, and ex-girlfriend. These witnesses not only were interviewed by the defense attorneys; they testified at sentencing. Consultation with these witnesses, when combined with the opinions of Watson and Copple, provided an adequate basis for Thompson's attorneys to conclude that focusing on Thompson's mental health was not the best strategy. As the Tennessee Court of Criminal Appeals noted, "Because two experts did not detect brain damage, counsel cannot be faulted for discarding a strategy that could not be supported by a medical opinion." *Id.*, at 165.

Without a single citation to the record, the dissent suggests that Thompson's attorneys failed to conduct adequate interviews of the defense witnesses on whom Sultan relied in her report. *Post*, at 2844-2845. Most of the information on Thompson's childhood was provided to Sultan by Nora Jean Wharton, Thompson's older sister. App. 16-18. Setting***811** aside the fact that Thompson did not argue in state court that his counsel's interview of Wharton was inadequate, *Thompson v. State*, *supra*, at 160-169, Thompson's attorneys cannot be faulted for failing to elicit from her any details on Thompson's difficult home life. After all, Wharton testified at trial that Thompson's childhood was "poor," but "very happy." 18 Tr. 3. The dissent also ****2836** implies that the experts who examined Thompson lacked information necessary to reach an accurate assessment. The record refutes this assertion. In conducting his examination, Watson had access to Thompson's social history and military records. 19 *id.*, at 149; 20 *id.*, at 186 (Exh. 102, pp. 11, 27-28). Watson was also aware of the prior head injuries as well as Thompson's claim that he heard voices. 19 *id.*, at 152; 20 *id.*, at 154-155. Nevertheless, Watson, whose evaluation was contemporaneous with the trial, found no evidence that Thompson was mentally ill at the time of the crime. Watson's report was unequivocal on this point:

> " 'Mr. Thompson's speech and communication were coherent, rational, organized, relevant, and devoid of circumstantiality, tangentiality, looseness of associations, paranoid ideation, ideas of reference, delusions, and other indicators of a thought disorder. His affect was appropriate to his thought content, and he exhibited no flight of ideas, manic, depressed, or bizarre behaviors, and his speech was not pressured nor rapid. He exhibited none of the signs of an affective illness. His judgment and insight are rather poor. Psychological testing revealed him to be functioning in the average range intellectually, to exhibit no signs of organicity or brain damage on the Bender-Gestalt Test and the Bender Interference Procedure. Personality profiles revealed no evidence of a psychosis, but indicated malingering in the mental illness direction. (For example, the schizophrenic score was at T 120, while clinical observations***812** revealed no evidence of a thought disorder.) Mr. Thompson's memory for recent and remote events appeared unimpaired.' " 20 *id.*, at 159-160.

Sultan's testimony provides some support for the argument that the strategy of emphasizing Thompson's positive attributes was a mistake in light of Thompson's deteriorated condition 13 years after the trial. This evidence, however, would not come close to satisfying the miscarriage of justice standard under *Calderon* had the Court of Appeals recalled the mandate. Neither, in our view, did this evidence justify the Court of Appeals' decision to withhold the mandate without notice to the parties, which in turn led the State to proceed for five months on the mistaken assumption that the federal habeas proceedings had terminated. The dissent suggests that failing to take account of the Sultan evidence would result in a "miscarriage of justice," *post*, at 2837-2838, 2845, but the dissent uses that phrase in a way that is inconsistent with our precedents. In *Sawyer v. Whitley*, 505 U.S., at 345-347, 112 S.Ct. 2514, this Court held that additional mitigating evidence could not meet the miscarriage of justice standard. Only evidence that affects

a defendant's eligibility for the death penalty-which the Sultan evidence is not-can support a miscarriage of justice claim in the capital sentencing context. *Id.*, at 347, 112 S.Ct. 2608; *Calderon*, 523 U.S., at 559-560, 118 S.Ct. 1489.

One last consideration informs our review of the Court of Appeals' actions. In *Calderon*, we held that federalism concerns, arising from the unique character of federal habeas review of state-court judgments, and the policies embodied in the Antiterrorism and Effective Death Penalty Act of 1996 required an additional presumption against recalling the mandate. This case also arises from federal habeas corpus review of a state conviction. While the State's reliance interest is not as strong in a case where, unlike *Calderon*, the mandate has not issued, the finality and comity concerns that animated *Calderon* are implicated here. Here a dedicated judge discovered what he believed to have been an error, ***813** and we are respectful of ****2837** the Court of Appeals' willingness to correct a decision that it perceived to have been mistaken. A court's discretion under Rule 41 must be exercised, however, in a way that is consistent with the " 'State's interest in the finality of convictions that have survived direct review within the state court system.' " *Id.*, at 555, 118 S.Ct. 1489 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993)). Tennessee expended considerable time and resources in seeking to enforce a capital sentence rendered 20 years ago, a sentence that reflects the judgment of the citizens of Tennessee that Thompson's crimes merit the ultimate punishment. By withholding the mandate for months-based on evidence that supports only an arguable constitutional claim-while the State prepared to carry out Thompson's sentence, the Court of Appeals did not accord the appropriate level of respect to that judgment. See *Calderon v. Thompson*, *supra*, at 554-557, 118 S.Ct. 1489.

The Court of Appeals may have been influenced by Sultan's unsettling account of Thompson's condition during one of her visits. She described Thompson as being in "terrible psychological condition," "physically filthy," and "highly agitated." App. 51. This testimony raised questions about Thompson's deteriorating mental health and perhaps his competence to be executed, but these concerns were properly addressed in separate proceedings. Based on the most recent state-court decision, which rejected the argument that Thompson is not competent to be executed, it appears that his condition has improved. *Thompson v. State*, 134 S.W.3d, at 184-185. Proceedings on this issue were underway in the District Court when the Court of Appeals issued its second opinion. If those proceedings resume, the District Court will have an opportunity to address these matters again and in light of the current evidence.

Taken together these considerations convince us that the Court of Appeals abused any discretion Rule 41 arguably granted it to stay its mandate, without entering a formal ***814** order, after this Court had denied certiorari. The judgment of the Court of Appeals for the Sixth Circuit is reversed.

It is so ordered.

Justice BREYER, with whom Justice STEVENS, Justice SOUTER, and Justice GINSBURG join, dissenting.

This capital case arises out of unusual circumstances-circumstances of a kind that I have not previously experienced in the 25 years I have served on the federal bench. After an appellate court writes and releases an opinion, but before it issues its mandate, the writing judge, through happenstance, comes across a document that (he reasonably believes) shows not only that the court's initial decision is wrong but that the decision will lead to a serious miscarriage of justice. What is the judge to do?

What the judge did here was to spend time-hundreds of hours (while a petition for certiorari was pending before

this Court and during the five months following our denial of the petition for rehearing)-reviewing the contents of the vast record with its many affidavits, reports, transcripts, and other documents accumulated in the course of numerous state and federal proceedings during the preceding 20 years. The judge ultimately concluded that his initial instinct about the document was correct. The document was critically important. It could affect the outcome of what is, and has always been, the major issue in the case. To consider the case without reference to it could mean a miscarriage of justice.

****2838** The judge consequently wrote a lengthy opinion (almost 30,000 words) explaining what had happened. The other members of the panel did not agree with everything in that opinion, but they did agree that their initial decision must be vacated.

The Court commendably describes what occurred as follows: A "dedicated judge discovered what he believed to have been an error, and we are respectful of the Court of Appeals' willingness to correct a decision that it perceived ***815** to have been mistaken." *Ante*, at 2836-2837. The Court, however, does not decide this case in a manner consistent with that observation. A somewhat more comprehensive account of the nature of the "error"-of the matter at stake, of the importance of the document, of the mystery of its late appearance, of the potential for a miscarriage of justice-should help make apparent the difficult circumstance the panel believed it faced. It will also explain why there was no "abuse" of discretion in the panel's effort to "correct a decision that it perceived to have been mistaken."

I

Judge Suhrheinrich, the panel member who investigated the record, is an experienced federal judge, serving since 1984 as a federal trial court judge and since 1990 as a federal appellate judge. He wrote a lengthy account of the circumstances present here. To understand this case, one must read that full account and then compare it with the Court's truncated version. I provide a rough summary of the matter based upon my own reading of his opinion. 373 F.3d 688, 692-742 (C.A.6 2004) (opinion concurring in part and dissenting in part).

A

The panel's initial decision, issued on January 9, 2003, focused upon an issue often raised when federal habeas courts review state proceedings in a capital case, namely, the effectiveness of counsel at the original trial. *Thompson v. Bell*, 315 F.3d 566, 587-594. See *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In this instance, the federal ineffective-assistance claim was that state trial counsel had not sufficiently investigated the background of the defendant, Gregory Thompson. Thompson claimed that an adequate investigation would have shown, to the satisfaction of testifying experts, that he suffered from episodes of schizophrenia at the time of the crime. The schizophrenia-though episodic ***816** would have proved a mitigating circumstance at the penalty phase. 373 F.3d, at 697-698, and n. 4.

Thompson's trial took place in a Tennessee state court, where he was found guilty of murder and sentenced to death. His state-appointed counsel put on no defense at trial. At sentencing, however, counsel sought to show that Thompson was schizophrenic. State forensic psychologists examined Thompson and concluded that Thompson, probably "malingering," did not show genuine and significant symptoms of schizophrenia at that time and was not mentally ill. A clinical psychologist hired by Thompson's counsel examined Thompson for eight hours and reached approximately the same conclusion: He said that Thompson was not *then* mentally ill. *Id.*, at 692, 694-695.

Thompson raised the issue of his mental condition in state postconviction proceedings, which he initiated in 1990. His expert witness, Dr. Gillian Blair, testified (with much supportive material) that Thompson was by that time clearly displaying serious schizophrenic symptoms-voice illusions, attempts at physical self-mutilation, and the like. Indeed, the State conceded that he was under a regime of major antipsychotic medication. But Dr. Blair said that she could not determine ****2839** whether Thompson had been similarly afflicted (*i.e.*, suffering from episodes of schizophrenia) at the time of the crime without a thorough background investigation-funds for which the state court declined to make available. The state court then ruled in the State's favor. *Id.*, at 694-695.

Thompson filed a habeas petition in Federal District Court about eight months after the state court's denial of postconviction relief became final. As I said above, see *supra*, at 2838, he claimed ineffective assistance of counsel. The Federal District Court appointed counsel, an assistant federal public defender. Counsel then obtained the services of two experts, Dr. Barry Crown and Dr. Faye Sultan. Both examined Thompson, and the latter, Dr. Sultan, ***817** conducted the more thorough background investigation that Dr. Blair had earlier sought. The State, after deposing Dr. Sultan, moved for summary judgment. 373 F.3d, at 696, 700-704, 711.

The District Court granted that motion on the ground that "Thompson has not provided this Court with anything other than factually unsupported allegations that he was incompetent at the time he committed the crime," nor "has Thompson provided this Court with any significant probative evidence that [he] was suffering from a significant mental disease that should have been presented to the jury during the punishment phase as mitigation evidence." *Id.*, at 712-713 (quoting District Court's memorandum opinion; emphasis and internal quotation marks omitted).

Thompson (now with a new public defender as counsel) appealed the District Court's grant of summary judgment in the State's favor. (A little over a year later, while the appeal was still pending, Thompson's new counsel, apparently having discovered that Dr. Sultan's deposition and report had not been included in the record before the District Court, filed a motion in that court for relief from judgment under Federal Rule of Civil Procedure 60(b), seeking to supplement the record with those documents. Counsel also filed a motion in the appellate court, with the Sultan deposition attached, requesting that the appeal be held in abeyance while the District Court considered the Rule 60(b) motion. Both motions were denied, and Thompson's counsel did not take an appeal from the District Court's denial of the Rule 60(b) motion.) 373 F.3d, at 714-715, and n. 10, 724-725.

The Court of Appeals reviewed the District Court's grant of summary judgment. In doing so, the appellate panel examined the record before that court. It noted that Thompson's federal habeas counsel had hired two experts (Crown and Sultan), and had told the court (in an offer of proof) that they would provide evidence that Thompson suffered from mental illness *at the time of the crime.* But the appellate ***818** panel found that neither expert had done so. Indeed, said the panel, Thompson had "never submitted to any court *any* proof that he suffered from severe mental illness at the time of the crime." 315 F.3d, at 590 (emphasis altered). Though Thompson's several attorneys had made the same allegation for many years in several different courts (said the panel), "at each opportunity, counsel fail[ed] to secure an answer to the critical issue of whether Thompson was mentally ill at the time of the crime." *Ibid.* That fact, concluded the panel (over a dissent), was fatal to Thompson's basic ineffective-assistance-of-counsel claim. Obviously "trial counsel cannot be deemed ineffective for failing to discover something that does not appear to exist." *Ibid.*; see also *id.*, at 595 (Moore, J., concurring in result) ("Thompson has presented no evidence that his [trial] counsel knew or

should have known either that Thompson****2840** was mentally ill or that his mental condition was deteriorating at the time of his trial or at the time of his crime"). The dissenting judge thought Thompson had made out an ineffective-assistance claim by showing that his trial counsel had relied on an inadequate expert, that is, an expert without the necessary qualifications to counter the State's experts' conclusions. *Id.*, at 599-605 (opinion of Clay, J.).

The appeals court issued its opinion on January 9, 2003. Thompson's appointed federal appeals counsel filed a rehearing petition, which the court denied on March 10, 2003. See App. to Pet. for Cert. 346 (Order in No. 00-5516(CA6)). Thompson's counsel then sought Supreme Court review. This Court denied review (and rehearing) about one year later. 540 U.S. 1051, 124 S.Ct. 804, 157 L.Ed.2d 701 (2003) (denying certiorari); 540 U.S. 1158, 124 S.Ct. 1162, 157 L.Ed.2d 1058 (2004) (denying rehearing).

B

The Court of Appeals, following ordinary appellate-court practice, withheld issuance of its mandate while the case was under review here, namely, during calendar year 2003. During***819** that time and in the months that followed, something unusual happened. Judge Suhrheinrich realized that the panel, in reaching its decision, seemed to have overlooked documents provided by Dr. Sultan that likely were relevant. In September 2003, the appellate court called for the entire certified record. Upon reviewing that record, Judge Suhrheinrich found Dr. Sultan's deposition and accompanying report. 373 F.3d, at 692-693; App. to Pet. for Cert. 347-348; see also Appendix, *infra*.

The Sultan documents filled the evidentiary gap that underlay the District Court's and the appellate panel's determinations. These documents made clear that Dr. Sultan had investigated Thompson's background in depth and that in her (well-supported) opinion, Thompson *had* suffered from serious episodic bouts of schizophrenia *at the time the crime was committed.* Clearly the documents contained evidence supporting Thompson's claim regarding his mental state at the time of the offense. Why had the District Court denied the existence of *any* such evidence? Why had Judge Suhrheinrich, and the other members of the panel (and the State, which took Dr. Sultan's deposition) done the same?

Judge Suhrheinrich then drafted an opinion that sought to answer three questions:

Question One: Do these documents actually provide strong evidence that Thompson was schizophrenic (and seriously so) at the time of the crime?

Question Two: If so, given the many previous opportunities that Thompson has had to raise the issue of his mental health, to what extent would these documents be likely to matter in respect to the legal question raised in Thompson's federal proceedings, *i.e.*, would they likely lead a federal habeas court to hold that Thompson's trial counsel was ineffective for failing to undertake a background investigation akin to that performed by Dr. Sultan?

Question Three: How did these documents previously escape our attention?

***820** 1

The panel answered the first question-regarding the importance of the documents-unanimously. Dr. Sultan's report and deposition were critically important. As Judge Suhrheinrich's opinion explains, these documents detail Thompson's horrendous childhood, his family history of mental illness, his self-destructive schizophrenic behavior

(including auditory hallucinations)****2841** as a child, his mood swings and bizarre behavior as a young adult, and a worsening of that behavior after a serious beating to his head that he suffered while in the Navy. For example, Dr. Sultan's examination of Thompson and her interviews with Thompson's family members and others revealed that as a child Thompson would repeatedly bang his head against the wall to "knock the Devil out" after his grandmother yelled at him, "You have the Devil in you." 373 F.3d, at 716 (internal quotation marks omitted). These documents explain how Thompson, as a young adult, would talk to himself and scream and cry for no apparent reason. They suggest that he had bouts of paranoia.

The documents provide strong support for the conclusion that Thompson suffered from episodes of schizophrenia at the time of the offense. And they thereby offer significant support for the conclusion that, had earlier testifying experts had this information, they could have countered the State's experts' conclusion that Thompson was malingering at the time of trial. Thus, the Sultan materials seriously undermined the foundation of the State's position in respect to Thompson's mental condition.

The Sultan materials also revealed that trial counsel failed to discover other mitigating evidence of importance. Interviews with family members revealed repeated incidents of violence in the family, including an episode in which, as a young boy, Thompson witnessed his father brutally beat and rape his mother. His grandmother, with whom Thompson ***821** and his siblings lived after their mother died, subjected them to abuse and neglect. She would forget to feed the children, leaving them to steal money from under her bed to buy food. These and other circumstances are detailed in sections of the Sultan report and deposition reproduced in the Appendix, *infra*.

2

The panel also responded unanimously and affirmatively to the second question: Would federal-court access to the Sultan documents likely have made a significant difference in respect to the federal legal question at issue in Thompson's habeas petition, namely, the failure of Thompson's trial counsel to investigate his background? Trial counsel had had important indications that something was wrong. Indeed, counsel himself had sought an evaluation of Thompson's mental condition. He also was aware of Thompson's violent behavior in the military, and knew that Thompson had said he had had auditory hallucinations all his life. He was aware, too, of the changes in Thompson's behavior. Should counsel not then have investigated further?

The Sultan documents make clear that, had he done so, he would have had a strong answer to the State's experts. Thus the documents were relevant to the outcome of the federal habeas proceedings. The Federal District Court based its grant of summary judgment on the premise that there was *no* evidence supporting Thompson's claim. The documents showed that precisely such evidence was then available.

3

The panel (while disagreeing about how to allocate blame) agreed in part about the answer to the third question: how these documents previously had escaped the panel's attention. The judges agreed that the Sultan documents were not in the initial record on appeal. The panel's original opinion,***822** while mentioning both Dr. Sultan and Dr. Crown, assumed that neither expert had addressed Thompson's mental condition at the time of the crime. ****2842**315 F.3d, at 583, n. 13 ("Sultan's affidavit does not discuss Thompson's mental state *at the time of the offense* " (emphasis added)); *ibid.* (explaining that Thompson filed a Rule 60(b) motion to supplement the record with Dr. Sultan's report, but

not mentioning that the report addressed Thompson's mental condition at the time of the offense); see also *supra*, at 2839-2840.

How had the panel overlooked the copies of the Sultan deposition attached to (1) the rehearing petition and (2) the (Rule 60(b)-related) motion to hold the appeal in abeyance? As for the rehearing petition, the reason could well lie in the petition's (incorrect) suggestion that the panel had already considered the appended document as part of the original record. See Pet. for Rehearing and Suggestion for Rehearing En Banc in No. 00-5516(CA6), p. 1 ("A majority of this panel overlooked other proof in the record, including but not limited to, the expert opinion of Dr. Faye E. Sultan"); see also *id.*, at 28-32. While the petition explains the importance of the documents, it does not explain the circumstances, namely, that the panel previously had not seen these documents. Instead, it gives the impression that counsel was simply reemphasizing a matter the panel had already considered. To that extent, the petition reduced the likelihood that the panel would make the connection it later made and fatally weakened its argument for *re*-hearing.

As for the motion to hold the appeal in abeyance, the panel's failure to recognize the significance of the appended Sultan materials is also understandable. The motion gives the impression that the appellate court would have been able to handle any problem arising from the exclusion of these materials in an appeal taken from the District Court's Rule 60(b) decision. The appellate court, however, never had any such opportunity because counsel did not appeal the District Court's denial of the Rule 60(b) motion.

***823** C

Once the panel understood the significance of the Sultan report, it had to decide what to do. An appellate court exists to correct legal errors made in the trial court. What legal error had the District Court committed? The appeal concerned its grant of summary judgment in the State's favor. The District Court made that decision on the basis of the record before it, and that record apparently lacked the relevant documents. How then could an appeals court say that the District Court was wrong to grant the summary judgment motion?

The panel answered this question by *not* holding that the District Court had erred. Finding that the Sultan documents had been "apparently negligently omitted" from the record, it exercised its equitable powers to supplement the record with the deposition. 373 F.3d, at 691. It also found that, since the State itself had helped to create that document (because the State had taken Dr. Sultan's deposition), the District Court's reconsideration of the matter would not unfairly prejudice the State. And it noted that this case is a death case. Then, relying on its "inherent power to reconsider" an opinion "prior to the issuance of the mandate," the court issued a new opinion, vacating the District Court's grant of summary judgment to the State and remanding the case to the District Court for further proceedings on the matter. *Ibid.*

II

The question before us is not whether we, as judges, would have come to the same conclusions as did the panel of the Court of Appeals. It is whether the three members of the appellate panel abused ****2843** their discretion in reconsidering the matter and, after agreeing unanimously that they would have reached a different result had they considered the overlooked evidence, vacating the District Court's judgment and remanding the case.

***824** The Court concludes that the panel's reconsideration of the matter and decision to vacate the District Court's

judgment amounted to an "abuse of discretion." *Ante,* at 2827. It therefore reverses the panel's unanimous interlocutory judgment remanding a capital case to the District Court for an evidentiary hearing. The Court lists five reasons why the Court of Appeals "abused its discretion." *Ante,* at 2832. None of these reasons, whether taken separately or considered together, stands up to examination.

Reason One. During the 5-month period after this Court denied rehearing of Thompson's certiorari petition, during which time the Court of Appeals was reconsidering the matter, it gave "no indication that it might be revisiting its earlier decision." Had it "notified" the parties, the court "could have spared the parties and the state judicial system considerable time and resources." Ante, at 2832.

If this consideration favors the Court's conclusion, it does so to a very modest degree. For one thing, the Federal Rules themselves neither set an unchangeable deadline for issuance of a mandate nor require notice when the court enlarges the time for issuance. Compare Fed. Rule App. Proc. 41(b) (2005) ("The court may shorten or extend the time") with Rule 41(a) (1968) (mandate "shall" issue "unless the time is shortened or enlarged *by order* " (emphasis added)). The Advisory Committee Notes to Rule 41 expressly contemplate that the parties will themselves check the docket to determine whether the mandate has issued. See Advisory Committee's 1998 Note on subd. (c) of Rule 41 ("[T]he parties can easily calculate the anticipated date of issuance and verify issuance of the mandate[;] the entry of the order on the docket alerts the parties to that fact"). And Sixth Circuit Rules require the Circuit Clerk to provide all parties with copies of the mandate. See Internal Operating Procedure 41(a) (CA6 2005) ("Copies of the mandate are distributed to all parties and the district court clerk's office"). Thus, the State's attorneys knew, or certainly should have known, that ***825** the mandate had not issued, and, as experienced practitioners, they also knew, or certainly should have known, that a proceeding is not technically over until the court has issued its mandate. And if concerned by the delay (and some delay in such matters is not uncommon), they could have asked the Circuit Clerk why the mandate had not issued. If necessary, they could have filed a motion seeking that information or seeking the mandate's immediate issuance.

For another thing, since notification is a clerical duty, the panel may have thought the parties *had* been notified. One of the judges on the panel could well have instructed the Circuit Clerk not to issue the mandate, and then simply have assumed that the Clerk would notify the parties of that fact (though the Clerk, perhaps inadvertently, did not do so). Why would the court want to hide what it was doing from the parties? Once we apply a presumption of regularity to the panel's actions, we must assume that the failure to notify the parties was likely due to a simple clerical error.

Further, the prejudice to the State that troubles the Court was likely small or nonexistent. The need to reset an execution date is not uncommon, and the state court's execution order explicitly foresaw that possibility. See 373 F.3d, at 692 (Tennessee Supreme Court order set ****2844** Thompson's execution date for August 19, 2004, "unless otherwise ordered by this Court or other appropriate authority" (internal quotation marks omitted)). Moreover, the State has not even argued-despite ample opportunity to do so-that the further proceedings ordered by the panel would actually have required it to set a new date.

Finally, the State did not, by way of a petition for rehearing, make any of its "failure to notify" arguments to the Court of Appeals. Although the law does not require the State to seek rehearing, such a petition would have permitted the panel to explain why the State was not notified and possibly to explore the matter of prejudice. There is no rea-

son***826** to reward the State for not filing a petition by assuming prejudice where none appears to exist.

Given the State's likely knowledge that the mandate had not issued, the existence of avenues for resolving any uncertainty, and the small likelihood of prejudice, the lack of notice does not significantly advance the Court's "abuse of discretion" finding. Indeed, if the Court believes that the Court of Appeals could have issued a revised opinion correcting its earlier judgment *if only it had given notice to the parties*, the sanction it now imposes-outright reversal-is far out of proportion to the crime.

Reason Two. The court's "opportunity to consider" the Sultan evidence "at the rehearing stage is yet another factor supporting" the abuse-of-discretion "determination." Ante, at 2833. I agree that it is unfortunate that, upon review of the rehearing petition, the panel failed to make the connection that would have allowed it, at that time, to reach the same conclusion it reached later. Still, the petition wrongly implied that the Sultan documents were part of the original appeal. Because it did not request rehearing on the ground that the documents were *not* in the record, it did not offer a genuine "opportunity to consider" the Sultan evidence.

Under these circumstances, I cannot agree that the court's opportunity to consider these documents at the rehearing stage should militate in favor of finding an abuse of discretion. To the contrary, I believe we should encourage, rather than discourage, an appellate panel, when it learns that it has made a serious mistake, to take advantage of an opportunity to correct it, rather than to ignore the problem.

Reason Three. The "Sultan evidence ... is not of such a character as to warrant [a] departure from standard appellate procedures" because "the evidence was unlikely to have altered the District Court's resolution of Thompson's ineffective-assistance-of-counsel claim." Ante, at 2834. *That is to say, given the expert testimony in the trial court, the Sultan evidence is unlikely meaningfully to have* ****827*** *strengthened Thompson's claim before the Federal District Court. Ante,* at 2834-2835.

This conclusion is wrong. The Court argues the following: (1) Dr. Sultan's conclusion rests in significant part upon interviews with three witnesses, Thompson's grandmother and sister (with whom Dr. Sultan spoke directly) and his girlfriend (whose interview with a defense investigator Dr. Sultan reviewed); (2) since all three of these witnesses testified at sentencing, Thompson's counsel must have consulted them at the time; and (3) "[c]onsultation with these witnesses, when combined with the opinions of [the State's expert] and [Thompson's expert], provided an adequate basis for Thompson's attorneys to conclude that focusing on Thompson's mental health was not the best strategy." *Ante,* at 2835. The Court then says that trial counsel's "strategy" may have ****2845** been "a mistake," *ante,* at 2836, but apparently not enough of a mistake to amount to inadequate assistance of counsel.

But how do the Court's conclusions follow from the premises? Dr. Sultan's interview of the three witnesses apparently turned up new information, indeed, crucial information. Why does that fact not tend to show that trial counsel's own "consultation" with those witnesses was inadequate? Or, if trial counsel was aware of the information, why does that not tend to show that trial counsel hired an expert who was not qualified to assess Thompson's mental condition, or that counsel failed adequately to convey the critical information to that expert? This Court in *Wiggins v. Smith*, 539 U.S. 510, 523-525, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), found trial counsel inadequate for failing to conduct a reasonable investigation, given notice that such an investigation would likely turn up important mitigating

evidence. See also *Rompilla v. Beard, ante*, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360. Why is the same not true here, where Thompson's trial counsel was fully aware of the need for a background investigation, and then either did not ask the right questions, or did not hire the right expert, or did not convey the right information ***828** to that expert? At the least, is there not a good argument to this effect-an argument that the Sultan documents significantly strengthened? All three judges on the panel thought so: They concluded that they would have reached a different result on Thompson's ineffective-assistance-of-counsel claim had they been aware of the Sultan documents. The Court does not satisfactorily explain its basis for second-guessing the panel on this point.

Reason Four. The Sultan evidence does "not come close to satisfying the miscarriage of justice standard der Calderon." Ante, at 2836 (referring to *Calderon v. Thompson*, 523 U.S. 538, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998)). As the Court apparently agrees, see *ante*, at 2831-2832, *Calderon* does not apply here. And the panel's basic conclusion-that consideration of Thompson's ineffective-assistance-of-counsel claim without the benefit of the Sultan evidence would constitute a grave miscarriage of justice-survives *any* plausible standard of review. I can find nothing in the Court's opinion that explains why the panel's conclusion is wrong.

Reason Five. The Court of Appeals "did not accord the appropriate level of respect" to the State's "judgment." Ante, at 2837. If by "judgment" the Court means to refer to the state court's original judgment of conviction, this reason simply repeats Reason Four. The panel carefully examined the entire record and determined that there is a significant likelihood the Sultan evidence would demonstrate a violation of the Federal Constitution.

If the Court means to refer to the state court's judgment not to set aside the conviction in state postconviction proceedings, the Court is clearly wrong. The state court on collateral review refused to authorize funds for a background investigation, one for which Thompson's expert then showed a strong need, and which Thompson's expert now shows could well have demonstrated a significantly mitigating mental condition. How is it disrespectful of the State for a federal habeas court to identify a constitutional error that ***829** occurred in state-court proceedings in a capital case, by taking account of a key piece of evidence, mistakenly omitted from the record?

If the Court means to refer to the State's decision to proceed with the execution, I cannot possibly agree. The Court could not mean that *any* exercise by a federal court to correct an inadvertent, ****2846** and important, evidentiary error is "disrespectful" of a State's effort to proceed to execution. But if it does not mean "any" exercise at all, then how can it say the present exercise is disrespectful? The present exercise embodies as thorough an examination of the record and as significant a piece of evidence as one is likely to find. The process-the detail and care with which the Court of Appeals combed the record-does not show "disrespect." It shows the contrary.

The upshot is that the Court's five reasons are unconvincing. The Court simply states those reasons as conclusions. It fails to show how, or why, the unanimous panel erred in reaching diametrically opposite conclusions, all supported with detailed evidence set forth in Judge Suhrheinrich's opinion. It does not satisfactorily explain the evidentiary basis for its own conclusions. And, in the process, it loses sight of the question before us: again, *not* whether we, as judges, would have reached the same conclusion that the three judges on the panel reached, but rather whether they, having unanimously agreed that their earlier decision was wrong, abused their discretion in setting it right.

III

Ultimately this case presents three kinds of questions. The first is a narrow legal question. Has the Court of Appeals abused its discretion? For the reasons I have set forth, the answer to that question, legally speaking, must be "no."

The second is an epistemological question. How, in respect to matters involving the legal impact of the Sultan ***830** report and deposition, can the Court replace the panel's judgment with its own? Judge Suhrheinrich's opinion demonstrates why any assessment of that legal impact must grow out of thorough knowledge of the record. He spent hundreds of hours with its numerous documents in order to make that assessment. Those of his conclusions that were shared by the other members of the panel are logical, rest upon record-based facts, and are nowhere refuted (in respect to those facts) by anything before us or by anything in the Court's opinion. How can the Court know that the panel is wrong?

The third question is about basic jurisprudence. A legal system is based on rules; it also seeks justice in the individual case. Sometimes these ends conflict. To take account of such conflict, the system often grants judges a degree of discretion, thereby providing oil for the rule-based gears. When we tell the Court of Appeals that it cannot exercise its discretion to correct the serious error it discovered here, we tell courts they are not to act to cure serious injustice in similar cases. The consequence is to divorce the rule-based result from the just result. The American judicial system has long sought to avoid that divorce. Today's decision takes an unfortunate step in the wrong direction.

APPENDIX TO OPINION OF BREYER, J.

Excerpts from the Gregory Thompson Psychological Report prepared by Dr. Faye E. Sultan at the Riverbend Maximum Security Institution (RMSI) (July 22, 1999), App. 11-20.

"REFERRAL QUESTIONS:

"Mr. Gregory Thompson was referred for psychological evaluation in July, 1998 by attorney Mr. Stephen M. Kissinger of the Federal Defender Services of Eastern Tennessee Incorporated. Mr. Thompson was convicted of murder in 1985. This evaluation was requested to address the following questions:

****2847 *831** "1. Mr. Thompson's current psychological status[.]

"2. Mr. Thompson's likely psychological status and mental state before and surrounding the time of the 1985 offense.

"3. Social, environmental, psychological, and economic factors in the life of Mr. Thompson which might have be[en] considered to be mitigating in nature at the time of his trial.

"PROCEDURE:

"Psychological evaluation of Mr. Thompson was initiated on August 20, 1998. This first evaluation session extended over a period of approximately four hours and consisted of clinical interview and the administration of the Minnesota Multiphasic Personality Inventory-2 (MMPI-2). Some review of prior psychological evaluation records was conducted to establish what formal psychological and neuropsychological testing had been administered to Mr.

Thompson. Levels of current intellectual and neuropsychological functioning had been recently assessed by neuropsychologist, Barry Crown, Ph.D., so no attempt was made to replicate this type of assessment.

"Following the 8-20-98 initial evaluation session, a very extensive review of legal, military, medical, prison and psychiatric/psychological records was initiated. A list of the documents examined is attached to this report.

. . . . .

" ... Two further interviews were conducted with Mr. Thompson for [the] limited purpose [of determining Thompson's competence to participate in habeas proceedings], on 2-2-99 and 4-7-99, totaling approximately six hours of additional observation. Voluminous Tennessee Department of Corrections mental health, medical, and administrative records were reviewed at this time as well.

. . . . .

***832** "[T]he extensive record review conducted, the ten hours of clinical observations made of Mr. Thompson during the preceding eleven months, the interviews conducted with collateral informants, and the recent and past psychological testing which had been administered provide enough data to make it possible to render professional opinions about Mr. Thompson's mental state at and around the time of the 1985 offense.

"CLINICAL OBSERVATIONS:

"Mr. Gregory Thompson was cooperative with the assessment procedure. He answered all questions posed to him and appeared to be alert, watchful and interested in the interview process. His speech was sometimes tangential and rambling. Although motor behavior appeared controlled there was a manic quality to his verbalizations. Mr. Thompson was oriented as to person, place and time, but he repeatedly expressed his firm belief that he had written each and every song which played on the radio.

"Mr. Thompson displayed symptoms of psychosis during the two subsequent meetings. The details of these sessions will not be reviewed here.

"FORMAL PSYCHOLOGICAL TESTING:

"The Minnesota Multiphasic Personality Inventory-2 (MMPI-2) was administered to Mr. Thompson on 8-20-98. It had been determined in other examination settings that Mr. Thompson's level of reading competence exceeded the necessary level of 8th grade ability required for proper administration of this test.

****2848** "The MMPI-2 profile produced by Mr. Thompson is considered valid and appropriate for interpretation. Individuals producing similar profiles are described as experiencing significant psychological difficulties and chronic psychological maladjustment. Such individuals are considered to be highly suspicious of others, often displaying paranoid features.***833** There is indication in this profile of the presence of a thought disorder and the inability to manage emotions. The world is perceived as a threatening and dangerous place and fears are viewed as externally generated and reality-based rather than as a product of an internally generated state. The behavior of such individuals is often described as hostile, aggressive, and rebellious against authority. Poor impulse control, lack of trust in others, and low frustration tolerance may result in such individuals displaying rage in interpersonal relationships.

"Individuals producing this testing profile are also described as experiencing depressed mood. There is the strong possibility that such individuals have contemplated suicide and report preoccupation with feeling guilty and unworthy. Testing items were endorsed which suggest memory and concentration problems, and an inability to make decisions.

"RELEVANT PSYCHOLOGICAL/PSYCHIATRIC DATA CONTAINED IN RECORDS:

"The[re] is substantial documentation throughout the Tennessee Department of Corrections records that Mr. Greg Thompson has suffered from significant mental illness since at least the time of ... his incarceration in 1985. He has been treated almost continuously with some combination of major tranquilizer and/or anti-depressant and/or anti-anxiety medications. He has received a variety of diagnostic labels including Psychosis, Psychosis Not Otherwise Specified, Paranoid Schizophrenia, Mania, Mixed Substance Abuse, Schizophrenia, BiPolar Affective Disorder, Schizoaffective Disorder, Malingering, and Adult Antisocial Behavior. This is clearly indicative of the Tennessee DOC mental health staff's view that Mr. Thompson has experienced major mental illness throughout at least most of his period of incarceration. Further, there is extensive documentation contained in these records of many episodes of bizarre aggressive and/or self-destructive behavior.

***834** "INTERVIEWS WITH COLLATERAL WITNESSES:

"Five individuals were interviewed (either by telephone or face-to-face) who provided significant supplemental information about the life circumstances and past/present psychological functioning of Mr. Gregory Thompson.

"Ms. Maybelle Lamar

"Ms. Lamar is Mr. Thompson's maternal grandmother. She was interviewed by telephone on July 21, 1999. Ms. Lamar assumed total responsibility for the care and rearing of Mr. Thompson and his two older siblings after his mother was killed when Mr. Thompson was approximately five years old. Mr. Thompson remained in her home until he entered the military as a young adult.

"Ms. Lamar recalls the period following her daughter's fatal automobile accident as one of tremendous strain and disruption for her. She was unable to describe the reaction of the three young children to their mother's death because she 'took to my bed' for approximately five or six weeks following the accident. Ms. Lamar was unable to attend to these children in any way at that time. She did not recall ****2849** how they obtained food or clothing, or whether they were in any distress. Ms. Lamar reported that she was drinking alcohol quite heavily during this period and that she left her bed to resume household activities only because the children contracted a serious medical illness.

"Ms. Lamar described Mr. Thompson as displaying significantly 'different' behavior when he returned to visit her following his discharge from the U.S. Navy. 'Greg didn't act the same'. Unlike the 'eager to please', passive, sometimes funny, gentle boy who she had reared, Mr. Thompson was 'angry', 'sometimes sad'. 'I don't think he wanted me to know what was going on with him. He mostly just stayed away from me.' Ms. Lamar reported that she noticed Mr. Thompson sometimes 'staring off into space' or 'talking to himself'. She would ask him about these behaviors. ***835** 'He'd deny it. He acted like he didn't know what I was talking about.' Ms. Lamar recalls being quite concerned about her grandson's mental state during this time. She did not recall ever being asked these questions at any time before or during Mr. Thompson's trial.

"Ms. Nora Jean Hall Wharton

"Nora Jean Wharton is Mr. Thompson's older sister. A lengthy telephone interview was conducted with her on July 21, 1999. She grew up in the same home as Mr. Thompson and had continuous contact with him throughout his childhood. Mr. Thompson lived briefly in the home of his sister following his discharge from the military.

"Ms. Wharton described Mr. Greg Thompson as a highly sensitive, passive, timid, emotionally vulnerable child. She described a childhood of great hardship. According to her report, their grandmother, Ms. Maybelle Lamar [,] was verbally abusive, neglectful of the children's basic daily needs, highly critical, and unable to care properly for the children. Ms. Wharton described many instances of such abuse and neglect. She described the period following their mother's death as particularly chaotic and neglectful, recalling that often there was no food in the home and that the children would take money from under their grandmother's mattress to go and buy food. In the period following their mother's death, Ms. Wharton reported that her grandmother was continuously drunk and unable to care for her grandchildren. According to Ms. Wharton, Greg Thompson frequently witnessed his sister Nora being beaten by their grandmother.

"Ms. Wharton further recalled that she and her younger brother had witnessed the brutal beating and rape of their mother by their biological father. She recalls Greg standing in the scene screaming and sobbing uncontrollably.

"Ms. Wharton reported that Greg would frequently cry at school during the early school years, and, as a result, was often the victim of intense mockery from his classmates. ***836** Because Ms. Wharton was in the same classroom as her brother she observed these behaviors and often intervened on her brother's behalf. She described Mr. Thompson's response to this abuse as quite passive.

"Of particular significance is Ms. Wharton's recollections about Mr. Thompson repeatedly banging his head against the wall of their home on many occasions during their early childhood. This behavior frequently followed their grandmother yelling at Greg 'You have the Devil in you.' Mr. Thompson would tell his sister that he was attempting to 'knock the Devil out' of his head in this way. Ms. Wharton recalls believing that this behavior was quite odd.

****2850** "Following his discharge from military service, Ms. Wharton described Mr. Thompson's behavior as significantly different than his prior conduct and attitude. She reported several episodes of bizarre behavior which included a sudden intense emotional reaction without obvious external provocation. Mr. Thompson would become extremely angry, would cry and scream for a len[g]thy period of time, would appear as if he might or actually become quite physically violent or aggressive, and then would suddenly retreat. Ms. Thompson reported this behavior and her concerns about it to her grandmother. Ms. Lamar suggested that Ms. Wharton take her brother to the psychiatric unit of the local hospital for treatment. Ms. Wharton did not attempt to get any treatment for Mr. Thompson and reports feeling quite guilty about this.

"Nora Jean Wharton described her own struggles with mental illness throughout the past fifteen years. She has received counseling to assist her in coping with the effects of her abusive childhood and she has been treated with a combination of a major tranquilizer (Stellazine) and anti-depressant medications. She reported that her younger half-sister Kim has also suffered from significant mental illness.

***837** "CUSTODY OFFICERS AT RMSI

"Following the second interview conducted with Mr. Thompson on 2-2-99, I informally interviewed two custody officers who escorted Mr. Thompson back to his cell. These officers have not as yet been identified by name. Both reported that they were aware that Mr. Thompson was quite mentally ill and that they were concerned about him. They further reported that they believed it would be in his best interest to be housed in a prison facility better equipped to deal with individuals experiencing severe mental illness.

"MICHAEL CHAVIS

"Federal Defender Services of Eastern Tennessee investigator, Mr. Michael Chavis, was interviewed about his July 29 through August 2, 1998 interview with Ms. Arlene Cajulao in Honolulu, Hawaii. Ms. Cajulao and Mr. Thompson had an intimate relationship and lived together for approximately four years, from 1980 to 1984.

"Mr. Chavis reported that Ms. Cajulao described Mr. Thompson as displaying increasingly bizarre behavior during the latter part of their relationship. Similar to descriptions prov[ided] by Ms. Nora Wharton, Ms. Cajulao reported several episodes of 'paranoid' and aggressive behavior which had no apparent external antecedent. She reported that Mr. Thompson sometimes thought that people were 'after' him. He would close all the curtains in the house because he did not want the person who was 'looking' for him to see him through the curtains. She remembers being quite concerned about Mr. Thompson's mental state.

"SUMMARY AND CONCLUSIONS:

"Mr. Gregory Thompson has experienced symptoms of major mental illness throughout his adult life. Indeed, there is information available which suggests that Mr. Thompson was displaying significant signs of mental illness from the time he was a small child. Self-injurious behavior is reported as ***838** early as six years old. There is extensive documentation contained within the records reviewed for this evaluation that Mr. Thompson has experienced a thought disorder and/or an affective disorder of some type for many years.

****2851** "It is my opinion that Mr. Gregory Thompson is most appropriately diagnosed, according to the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, as having Schizoaffective Disorder, Bipolar Type. As is typical of this illness, symptoms became apparent in early adulthood. Mr. Thompson was suffering serious mental illness at the time of the 1985 offense for which he has been convicted and sentenced. This mental illness would have substantially impaired Mr. Thompson's ability to conform his conduct to the requirements of the law.

"Further, Mr. Thompson was the victim of severe childhood emotional abuse and physical neglect. His family background is best described as highly neglectful and economically deprived. Mr. Thompson repeatedly witnessed episodes of violence during his childhood in which one family member assaulted or brutalized another. There are significant aspects of Mr. Thompson's social history that have been recognized as mitigating in other capital cases.

"It is important to note that all of the information related to Mr. Thompson's early mental illness and social history was available at the time of his 1985 trial.

"[signed]

"Faye E. Sultan, Ph.D."

* * *

Excerpts from the Deposition of Dr. Faye E. Sultan (July 22, 1999), *id.*, at 71-73, 76-80.

"Q. What indicates to you or what indicia are there for you that suggest Mr. Thompson was displaying significant signs of mental illness from the time he was a small child? How do you arrive at that conclusion?

***839** "A. . . . .

"By the time of the first grade, Mr. Thompson, when he was being yelled at by his grandmother, she was reportedly verbally abusive in the following fashion: She would yell at him you have the devil in you, boy. [His sister, Ms. Wharton] would then observe Mr. Thompson standing or sitting beside a wall repeatedly banging his head into the wall. She, in her role as protector of him, would ask him what was going on, and he would tell her he was trying to knock the devil out of his head. She recalls at the time, although she was quite young herself, being worried about his behavior and thinking of it as very odd.

. . . . .

"Q. Sort of a self-punishment or a self-exorcism type thing?

"A. A self-injurious behavior is what we would call it I think. Mr. Thompson, when he was Greg, in the first and second and third grade had rather frequent hysterical crying episodes in classrooms that Ms. Wharton recalls also as very unusual in the context of his schoolroom situation. She describes him as being the subject of torment on the part of the students because he behaved in an odd fashion. Sometimes he would simply begin to cry and wail and scream and apparently made a sound like a fire engine when he was sobbing and developed the nickname Fire Engine. That's reported in the trial transcript. She told me much more detail about actually the extent of those kind[s] of emotional outbursts.

"At home it was rather common for Mr. Thompson to begin to cry and scream during times when Ms. Wharton herself was being beaten by their grandmother. Ms. Wharton was the victim of physical abuse on the part of the grandmother. Mr. Thompson observed much of this since they were together virtually all of the ****2852** time, and Nora Wharton was not really permitted much interaction outside of their home.

. . . . .

***840** "Q. Your diagnosis for Mr. Thompson is schizoaffective disorder, comma, bipolar type. What leads you to that diagnosis from what you've reviewed and your testing results?

"A. What leads me to the diagnosis is that there is a long history, perhaps at this point almost a 20-year history, of

simultaneous thought disorder on the part of Mr. Thompson documented throughout all the records, and affective disorder, emotional disorder, being unable to regulate his emotions, sometimes falling into the pits of despair and becoming suicidal, sometimes becoming highly agitated and manic and having too much energy, too much exuberance, and grandiose thinking. The thought disorder is manifested in persecutory ideas, delusions of grandeur-lots of different kinds of delusions actually-auditory hallucinations that he sometimes admits to, sometimes suspected by the doctors who are doing the examination.

"The psychological testing early on in Mr. Thompson's incarceration confirm[s] the presence of a psychotic process. There was an MMPI administered to him by a prison psychologist in 1990 that is described as valid and indicative of psychotic process, and throughout the prison record he receives a variety of diagnoses that take into account both thought disorder and affective illness.

"The very best diagnosis to describe all of the complex of symptoms that I just talked to you about is schizoaffective disorder, bipolar type.

"Q. You note in your report Mr. Thompson was observed having a significant change in behavior after he was discharged from the Navy. What significance do you attach to that fact?

"A. Well ... prior to his entry into the military Mr. Thompson is described almost uniformly ... as passive, as compliant, as eager to please, as gentle, as timid, as eager to run from attacks.

"At some point ... he began to notice that people were trying to hurt him all the time, that officers and other people ***841** of his rank and slightly above his rank attempted to provoke him, that they sometimes physically assaulted him, that he thought he was being followed a lot, and that he sometimes struck out in what he thought was defense and then later found out from other people who he knew and trusted that there wasn't anything to defend against or that there might not have been anything to defend against.

"Q. This is what he related to you during your interview last August?

"A. Right. The people who saw him after the military each were struck by how very different he seemed. That was the word that kept being used, 'different.' Sometimes the people I was speaking to were not able to describe what different meant, but, for example, the grandmother said that he was different as in not right, that he wasn't himself. Ms. Wharton tells me that the grandmother was very well aware that he was in deep psychological distress, and, in fact, the grandmother suggested that he be taken to the psychiatric unit at Grady Hospital in Atlanta, I believe, for treatment. The grandmother observed him staring off into space for long periods of time. She observed him mumbling to himself. When she asked him what he was doing, he told her he had no idea what she was talking about. She said that was very different from the boy who left her to go into service.

****2853** "The sister has even a better glimpse of him than that, because he actually went to live with her for a while, and she said he was bizarre. She described him as paranoid. She said that he would explode for no reason at all, that she was afraid of him for the very first time in her life, that they had always been terribly close, the sort of close where if there was only one piece of bread to eat they would share it, that they always looked out for one another, and

that suddenly he was behaving in ways that she simply could not identify. She described three very serious episodes of aggression and emotional upset that she said are what led her ***842** to approach her grandmother about what to do for treatment for him.

. . . . .

"Q. You state that the schizoaffective disorder, bipolar type, would substantially impair Mr. Thompson's ability to conform his conduct to the requirements of the law. How so?

"A. There are points in time when Mr. Thompson is out of contact with reality. He is responding to situations that simply don't exist or that he perceives in extremely exaggerated or different form. A person is not able to conform one's conduct to the law if you are frankly delusional or hallucinating in some way. Mr. Thompson over the years has had both of those symptoms.

"Q. So it's this delusional aspect of this disorder that is the main factor that would keep him from having the ability to conform his conduct to the requirements of law, if I understand you correctly?

"A. Is it the main factor? Let me say that I think it's at least as potent a factor if not more as the other aspect of his mental illness, which is that he has emotional disregulation.

"Q. Meaning?

"A. Meaning Mr. Thompson often is not in control of his emotions. He has episodes of rage, of aggression, that he doesn't understand or relate to very well. He's told about them later. Sometimes he remembers them, sometimes he doesn't. He is often embarrassed about his behavior afterwards, but there are points at which I believe he's not in control of what he's doing.

"Q. When you say 'he's not in control of what he's doing,' are you saying that it's impulsive behavior?

"A. If I am emotionally disregulated, if I'm over-aroused and overreactive and I operate out of a faulty belief system, so that not only do I have the impulse to do things that I ordinarily wouldn't, but I also think things are going on that aren't, I have a combination in which yes, I suppose you ***843** could call it impulse, but you also have to take the notion into account that it might be an impulse to do something that doesn't make any sense.

"Q. Does this disorder prevent Mr. Thompson from planning his activities?

"A. Sometimes, yes, it does.

"Q. And so the inability to plan, would that be a factor that would prevent him from conforming his conduct to the requirements of the law?

"A. If that were in operation at some time. In the history of the Department of Corrections' mental health records, when he's properly medicated I don't think that's true about him.

"Q. Is it your professional opinion, then, that when he is medicated he has the ability to plan, but when he is not medicated****2854** he does not always have the ability to plan?

"A. Those two things are true. It's also true that if he's inadequately medicated or improperly medicated he doesn't have the ability to plan anything. I don't know whether he has impulses. I think he's all impulse, so to have impulses implies that there's a part of you that's not impulsive. For example, when Mr. Chavis and I saw him during my second interview with him, he could not have planned anything at all, not beyond the nanosecond in which he was experiencing the world. But he was receiving psychotropic medications at the time, so that's why I have to put that qualifier in there."

U.S.,2005.
Bell v. Thompson
545 U.S. 794, 125 S.Ct. 2825, 162 L.Ed.2d 693, 73 USLW 4624, 05 Cal. Daily Op. Serv. 5595, 05 Daily Journal D.A.R. 7681, 18 Fla. L. Weekly Fed. S 521

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TAB 13

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MEMORANDUM

DATE: April 4, 2014

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 14-AP-A

Appellate Rule 29(e) sets the due date for amicus merits briefs using a 7-day stagger that is triggered by the filing of the brief of the party supported:

> An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed. A court may grant leave for later filing, specifying the time within which an opposing party may answer.

Alan Morrison – the co-founder of Public Citizen Litigation Group, and now the Lerner Family Associate Dean for Public Interest and Public Service Law at George Washington University Law School – has identified a difficulty arising from Rule 29(e)'s timing provision. Mr. Morrison describes a specific instance in which the appellant (seeking to expedite the appeal) filed its brief before the court had even set a briefing schedule – with the result that Mr. Morrison was unable to comply with Rule 29(e). Although he obtained party consent to his late filing, the court nonetheless required him to move for leave to file late. Mr. Morrison suggests that this illustrates a more general problem:

> The problem with FRAP 29(e)'s timing provision is that if a party files early, even where there is a specific briefing schedule, an amicus may be precluded from filing, especially if the amicus needs every day to get the brief done on time. My case is highly unusual, but the more common case would arise when a party files a few days early - just to be safe or get it filed before going on vacation - and an unsuspecting amicus either can't file or has to move for a late filing.

Mr. Morrison proposes two ways in which Rule 29(e) could be amended to address the problem. First, "consent, if specific as to timing, should override or constitute compliance with FRAP 29(e). If the party on the other side does not object to the timing, there is no independent reason for the court to do so, so long as all the briefing is

completed on schedule." Second, the rule could instead be amended "to make a filing timely if done within the time that would be allowed if the party being supported had filed on the final day of the briefing schedule."

Rule 29's due-date provision has evolved over time. The original Rule gave amici the same deadline as the party being supported – pegged not to the party's actual filing date but rather to the party's due date – and the Rule allowed that deadline to be extended by party consent or court leave.[1] In 1998, the timing provision was relocated to Rule 29(e) and revised to read as set forth on the first page of this memo. That is to say, a 7-day stagger[2] has replaced the simultaneous due dates, but the trigger for the stagger is the party's actual filing date; and the provision permitting late filings by party consent has been eliminated.

The history of the 1998 amendment sheds some light on the choices made in drafting the current provision, but the discussion of the 7-day stagger is quite brief. On that point, the Note states in relevant part:

> The 7-day stagger was adopted because it is long enough to permit an amicus to review the completed brief of the party being supported and avoid repetitious argument. A 7-day period also is short enough that no adjustment need be made in the opposing party's briefing schedule. The opposing party will have sufficient time to review arguments made by the amicus and address them in the party's responsive pleading. The timetable for filing the parties' briefs is unaffected by this change.

In instances where the briefing deadlines are set by a scheduling order, rather than by the default rules in Appellate Rule 31(a)(1), one might argue that the Note's concern about not disturbing the briefing schedule would be adequately addressed by a 7-day stagger that was triggered by the party's due date. However, absent such a scheduling order, Rule 31(a)(1) provides that the appellee's time begins to run when the appellant's brief is served. If the appellant files and serves 15 days before the due date, then the appellee's brief is due 30 days later (15 days after the original due date). If the amicus can wait to file until seven days after the appellant's due date, even though the appellee's clock has been running, then the appellee would have only 8 days to respond to the

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[1] The original Rule provided in relevant part: "Save as all parties otherwise consent, any amicus curiae shall file its brief within the time allowed the party whose position as to affirmance or reversal the amicus brief will support unless the court for cause shown shall grant leave for later filing, in which event it shall specify within what period an opposing party may answer."

[2] The length of the "7 day" period also evolved over time. Prior to 2002, the period was 7 calendar days, because Appellate Rule 26(a) provided that intermediate weekends and holidays were to be omitted when computing periods of *less than 7* days. The 2002 amendments to Rule 26(a) changed the trigger to "less than 11 days" – which effectively extended Rule 29(e)'s 7-day periods by excluding weekends and holidays from the computation. Then, when Rule 26(a) was amended in 2009 to adopt a "days are days" approach to time-counting, Rule 29(e)'s period reverted to 7 calendar days.

amicus brief, and a court may have to adjust the opposing party's briefing schedule to allow a fair opportunity to respond.[3]

One might also ask whether it is desirable for the Appellate Rules' treatment of this timing question to diverge from the approach taken by the Supreme Court's rules. Supreme Court Rule 37.3(a) parallels Appellate Rule 29(e) (albeit without the possibility of extensions):

> An amicus curiae brief in a case before the Court for oral argument ... shall be submitted within 7 days after the brief for the party supported is filed, or if in support of neither party, within 7 days after the time allowed for filing the petitioner's or appellant's brief. Motions to extend the time for filing an amicus curiae brief will not be entertained.

Mr. Morrison reports that to his knowledge, "the Court does not treat amicus briefs as being late if filed on the last day of the 7 day grace period, even if the party files early." And some participants in the Committee's discussions over the years have questioned whether merits-stage amicus practices[4] before the Supreme Court provide a close parallel to merits-stage amicus practices before the courts of appeals. Such participants have argued that potential amici may be in a position to keep closer track of the Court's docket than of the dockets of the courts of appeals, and that there may be greater coordination between amici and parties before the Court, as well as a more complete record from the courts below concerning the parties' contentions. However, evidence of such coordination is anecdotal. Moreover, the advent of CM/ECF enables potential amici to sign up for automatic notifications of court of appeals docket activity in cases of interest to them;[5] and an amicus can access the party's brief electronically the moment it is filed.

The initial question for the Committee is whether any action is warranted on Mr. Morrison's suggestion. Even if Mr. Morrison has identified a problem that merits rulemaking attention, employing the due date as the trigger for the amicus's 7-day period would, as noted above, risk disturbing the briefing schedule set by Rule 31(a)(1). That leaves for consideration the possibility of permitting a filing later than the due date set by Rule 29(e) based on consent of all parties. Although that might make it easier for amici in Mr. Morrison's position to address the difficulties that he identifies, an amicus can, in any event, seek an extension by court order under the current Rule.

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[3] A similar difficulty could have arisen, prior to 1998, under the earlier version of Rule 29, which pegged the amicus brief's due date to the due date for the party's brief; but the problem would have been less acute, given that the pre-1998 version of Rule 29 provided no stagger.

[4] Different timing provisions govern amicus filings prior to the grant of certiorari. See Supreme Court Rule 37.2(a).

[5] *See* http://www.pacer.gov/psc/efaq.html (providing instructions for "receiving notification of docketing activities in … cases of interest … [i]n appellate courts" for those who "are not a party to a case and wish to receive notices for cases of interest").

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TAB 14

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MEMORANDUM

DATE: April 4, 2014

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 14-AP-B

In a letter submitted to both the Criminal Rules Committee and the Appellate Rules Committee, Judge Jon O. Newman has suggested that the Committees consider a rule amendment to provide "that a sentencing error to which no objection was made in the district court should be corrected on appeal without regard to the requirements of 'plain error' review, unless the error was harmless." (I enclose a copy of Judge Newman's letter.)

Judge Newman notes that while "[a] retrial to correct a trial error imposes substantial burdens on the judicial system," a resentencing proceeding "usually consumes less than an hour, requires no jury, and normally requires no witnesses." Guideline calculations can be complex, Judge Newman observes, and "[a]n uncorrected guideline miscalculation can add many months and sometimes years of unwarranted prison time to a sentence." He offers a sketch of a proposed new Criminal Rule 52(c):

> A claim of error in connection with the imposition of a sentence, not brought to the court's attention, may be reviewed on appeal whether or not the error was plain, if (a) the error caused the defendant prejudice, and (b) correction of the error will not require a new trial.

Judge Newman's proposal is included on the Criminal Rules Committee's agenda for its April 7-8, 2014, meeting; thus, by the time of the Appellate Rules Committee's meeting we will be able to report whether the Criminal Rules Committee is inclined to study the proposal in depth.

Encl.

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

Dear Judge Colloton:[1]

I write to propose a change in appellate review of claimed sentencing errors. My proposal is that a sentencing error to which no objection was made in the district court should be corrected on appeal without regard to the requirements of "plain error" review, unless the error was harmless.

Rule 52(b) of the Federal Rules of Criminal Procedure provides: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." The Supreme Court has stated the strict requirements of "plain error" review. See United States v. Olano, 507 U.S. 725, 732-38 (1993). These requirements are entirely appropriate for trial errors to which no objection was made. A retrial to correct a trial error imposes substantial burdens on the judicial system. A new jury must be empaneled, witnesses must be returned to the courtroom,

[1] I am sending this proposal to the chairs of both the Advisory Committee on Criminal Rules and the Advisory Committee on Appellate Rules (as well as the chair of the Standing Committee) because the proposal concerns appellate review of sentencing errors and might be within the jurisdiction of both committees.

with the risk of diminished recollections, and considerable time and expense are consumed. Correcting a sentencing error, however, involves no comparable burdens.[2] A resentencing usually consumes less than an hour, requires no jury, and normally requires no witnesses.

Even under advisory sentencing guidelines, a sentencing judge is required to calculate an applicable guideline range, see United States v. Crosby, 397 F.3d 103, 111-12 (2d Cir. 2005), a complicated process in which errors can easily occur, some of which may understandably escape the notice of even experienced defense counsel. An uncorrected guideline miscalculation can add many months and sometimes years of unwarranted prison time to a sentence. There is no justification for requiring a defendant to serve additional time in prison just because defense counsel failed to object to a guideline miscalculation.

The Supreme Court has recognized that the jury trial is the context in which the rigor of the "plain error" doctrine is to be applied. "[F]ederal courts have consistently interpreted the plain-error doctrine as requiring an appellate

[2] See United States v. Leung, 40 F.3d 577, 586 n.1 (2d Cir. 1994); United States v. Baez, 944 F.2d 88, 90 n.1 (2d Cir. 1991).

court to find that the claimed error not only seriously affected 'substantial rights,' but that it had an unfair prejudicial impact on the jury's deliberations." United States v. Young, 470 U.S. 1, 16 n.14 (1985) (emphasis added). When the Advisory Committee Note to Rule 52(b) stated that the rule is "a restatement of existing law," the two decisions it cited both concerned claims of jury trial error. See Wiborg v. United States, 163 U.S. 632, 559-60 (1896), and Hemphill v. United States, 112 F.2d 505 (9th Cir.), rev'd, 312 U.S. 729 (1941), conformed, 120 F.2d 115 (9th Cir. 1941).

Because Rule 52(b) makes no distinction between trial errors and sentencing errors, it is understandable that the Supreme Court has stated (or assumed) that "plain error" review applies to sentencing errors. In United States v. Cotton, 535 U.S. 625, 631-34 (2002), the Court, reviewing for plain error, declined to reject a sentencing enhancement claimed to be erroneous because drug quantity, on which the enhancement was based, was not alleged in the indictment. In United States v. Booker, 543 U.S. 220, 268 (2005), the Court stated, with respect to sentencing guideline errors, "[W]e expect reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was

raised below and whether it fails the 'plain-error' test." In Puckett v. United States, 556 U.S. 129, 143 (2009), the Court applied "plain error" review to an unobjected to breach of a plea agreement. See also Henderson v. United States, 133 S. Ct. 1121 (2013) (acting on premise that "plain error" review applies to sentencing errors, Court rules that whether error is plain is determined at time of review, not time of error).[3]

Most of the circuits apply "plain error' review to unobjected to sentencing errors, see, e.g., United States v. Eversole, 487 F.3d 1024 (6th Cir. 2007); United States v. Traxler, 477 F.3d 1243, 1250 (10th Cir. 2007); United States v. Dragon, 471 F.2d 501, 505 (3d Cir. 2006); United States v. Knows His Gun III, 438 F.3d 913, 918 (9th Cir. 2006). The First and Second Circuit's have sometimes applied a lenient form of "plain error" review to unobjected to sentencing errors, see United States v. Cortes-Claudio, 312 F.3d 17, 24 (1st Cir. 2002); United States v. Sofsky, 287 F.3d 122, 125 (2d Cir. 2002).

[3] In two cases decided before the adoption of Rule 52(b), the Supreme Court corrected a sentencing error not complained of because the error was deemed "plain." See Pierce v. United States, 255 U.S. 398, 405-06 (1921) (plain error to allow interest on a criminal fine until a judgment had been entered against shareholders of the defendant corporation); Weems v. United States, 217 U.S. 349, 380 (1910) (imposition of punishment deemed cruel and unusual set aside as plain error).

To implement my suggestion, the following addition to Rule 52 might be considered, although various other formulations could be devised:

Proposed Rule 32(c) of the Federal Rules of Criminal Procedure:

> A claim of error in connection with the imposition of a sentence, not brought to the court's attention, may be reviewed on appeal whether or not the error was plain, if (a) the error caused the defendant prejudice, and (b) correction of the error will not require a new trial.

Sincerely,

Jon O. Newman
U.S. Circuit Judge

Rule 52(b) of the Federal Rules of Criminal Procedure, applicable to the courts of appeals, see Fed. R. Crim. P. 1(a)(1), provides, "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

TAB 15

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COMMENT

TO RESTORE A RELATIONSHIP BETWEEN CLASSES AND THEIR ACTIONS: A CALL FOR MEANINGFUL REFORM OF RULE 23

to

THE CIVIL RULES ADVISORY COMMITTEE
and its
RULE 23 SUBCOMMITTEE

On Behalf of
LAWYERS FOR CIVIL JUSTICE
FEDERATION OF DEFENSE & CORPORATE COUNSEL
DRI – THE VOICE OF THE DEFENSE BAR
INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL

August 9, 2013

Lawyers for Civil Justice (LCJ), the Federation of Defense & Corporate Counsel (FDCC), DRI – The Voice of the Defense Bar (DRI) and the International Association of Defense Counsel (IADC) respectfully write to urge the Advisory Committee on Federal Rules of Civil Procedure ("Committee") and its Rule 23 Subcommittee to examine how the relationship between class members and their cases have changed since 1966, and to take much-needed action to reform Rule 23 in light of modern practices.

INTRODUCTION

Rule 23, and particularly subsection (b)(3), has become something that was not envisioned when adopted. The class action mechanism was intended to be a device for efficient litigation when the rights of the parties could be fully adjudicated in a single binding lawsuit, with representative members serving as the champions of the class members' interests. Today, however, a significant fraction of class action cases demonstrates that the Rule has fostered a type of lawsuit that differs in fundamental ways from what existed in our legal culture prior to 1966. Some common features of today's class action cases include: (1) very large classes whose members may not even know whether they have been injured; (2) class members who, despite receiving notice, have very little if any idea what is happening to their legal rights; (3) lawyers who make decisions about prosecuting and resolving cases without any meaningful input from any actual client; (4) lawyers whose focus is trained on the entrepreneurial aspects of their cases rather than on the objective of making their clients whole; (5) sparse and inconsistent judicial review (and therefore case law) concerning class certification decisions, which are often the most important legal determination in the case; (6) insufficient judicial scrutiny of settlements and fee requests to

The second alternative addresses the controversy over cy pres settlements by ensuring judicial attention to the issues that could pose the most danger. Such settlements would be available only in cases of impossibility, not merely impracticability due to cost. Recognizing that funds transferred to non-class members are not "common funds" that benefit the class, the second alternative precludes consideration of cy pres payments in the calculation of attorneys' fees under Rule 23(h).[40] Because governments acting in their formal parens patriae capacity are typically recognized as acting on behalf of the public, such as members of a putative class, an exception is provided for payments to such governmental entities. Finally, the second alternative incorporates conflict-of-interest provisions to ensure that entities chosen to receive cy pres payments are not selected due to their ties to the parties or to the court and that cy pres funds are not diverted to the facilitation of future litigation. We respectfully suggest the Committee review these proposals.

III. Rule 23(f) Should Be Amended to Provide a Right to Interlocutory Appeal of Decisions to Certify, Modify or De-Certify a Class.

The current Rule 23(f) was adopted in 1998 to provide increased opportunity for an immediate appeal to supplement the previously existing mechanisms (mainly mandamus) for obtaining appellate review of the all-important decision to certify a class action.[41] Rule 23(f) has now been in existence long enough that it would be appropriate for the Committee to consider whether it has achieved its intended goal of increasing uniformity of district court practice regarding certification decisions.

Analytical data indicates that the number of petitions filed is relatively modest and that the number of actual written opinions is very small.[42] For instance, one study indicates that only 476 petitions required decision over the almost seven years of data (thus an average of 5.2 petitions per Circuit per year).[43] Only a fraction of those petitions accepted for review ultimately result in opinions (a total of 47 opinions over almost 7 years – or, on average, less than a single opinion per Circuit). Notably these numbers indicate that only 28 percent of those petitions actually accepted result in an opinion (47 opinions out of 169 petitions granted over all Circuits over the nearly 7 year time period). These data demonstrate not only how little judicial review is occurring, but also indicate why there is a paucity of meaningful case law being developed to provide clear and uniform standards.

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[40] *See Baby Prods.,* 708 F.3d at 178 ("awarding attorneys' fees based on the entire settlement amount rather than individual distributions creates a potential conflict of interest between absent class members and their counsel").

[41] Certification decisions, although vitally important, are not subject to immediate appellate review. The courts have deemed "final" only a slim set of "collateral orders" that share these characteristics: They "are conclusive, [they] resolve important questions separate from the merits, and [they] are effectively unreviewable on appeal from the final judgment in the underlying action." *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 601 (2009) (quoting *Swint v. Chambers Cnty Comm'n*, 514 U.S. 35, 42 (1995)). "[O]rders relating to class certification" in federal court, it is settled, do not fit that bill. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 470 (1978).

[42] Barry Sullivan & Amy Kobelski Trueblood, *Rule 23(1): A Note on Law and Discretion in the Courts of Appeal*, 246 F.R.D. 277, 290 (2008).

[43] *Id.*

A. The Committee's Purpose in Drafting Rule 23(f) Was to Provide Greater Uniformity in Certification Decisions.

During the early 1990s, the Advisory Committee proposed reform to permit interlocutory appeals because it recognized that the certification ruling is often the crucial ruling in a case filed as a class action.[44] According to the Committee Note submitted with the proposed rule change to the Standing Committee in May of 1993, the severe consequences to be expected from a certification decision "justify a special procedure allowing early review of this critical ruling."[45] The Committee's proposal was limited because of concern over "the disruption that can be caused by piecemeal reviews."[46] But the initial proposal required certification by the trial court, as well as agreement to hear the case by the appellate court.

In 1995, after further discussion and study, the Advisory Committee revised the initial proposal to eliminate the requirement that the district court certify the request for an immediate appeal. The Partial Draft Advisory Committee Note of December 12, 1995, noted that the expansion of "appeal opportunities affected by subdivision (f) is indeed modest."[47] The note further mentioned the drafters' view that the most suitable questions for immediate appeal would be those turning on "novel or unsettled" questions of law.[48] And in the drafters' view, "[s]uch questions are most likely to arise during the early years of experience with new class-action provisions as they may be adopted within Rule 23 or enacted by legislation."[49] The drafters also thought that permission would likely be denied when "certification decisions turn on case-specific matters of fact and district court discretion."[50]

In a 1997 report of the Advisory Committee, Chair Niemayer noted that the proposed Rule 23(f) "has persisted virtually unchanged through the many alternative Rule 23 drafts that have been prepared by the Advisory Committee over the last six years."[51] Chair Niemayer explained that the rule was intended to address the "widespread observations that it is difficult to secure

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[44] Scholars and courts have regularly characterized the decision whether to certify a class as a key turning point in litigation. Such rulings "have enormous practical impact; a grant may impel the defendant to settle and a denial leaves only the named plaintiff's claim which often saps the plaintiff's lawyer of incentive to proceed." Richard D. Freer, *Interlocutory Review of Class Action Certification Decisions: A Preliminary Empirical Study of Federal and State Experience*, 35 W. ST. U. L. REV. 13, 13 (2007-2008). Few decisions are more significant to the litigants than a district court decision granting or denying class certification.

[45] Letter (and attachments) from Sam C. Pointer, Jr., Chairman, Advisory Committee on Civil Rules, to Honorable Robert E. Keeton, Chairman, Standing Committee on Rules of Practice and Procedure (May 17, 1993) (citing (attached) Proposed Amendments to the Federal Rules of Civil Procedure, at 11 (May 1993)), *available at* http://www.uscourts.gov/RulesAndPolicies/rules/archives/advisory-committee-reports/advisory-committee-rules-civil-procedure.aspx.

[46] *Id.*

[47] Letter (and attachments) from Patrick E. Higginbotham to Members of the Standing Committee on Rules of Practice and Procedure (Dec. 13, 1995) (citing Partial Draft Advisory Committee Note Draft Rule 23 at 10), *available at* http://www.uscourts.gov/RulesAndPolicies/rules/archives/advisory-committee-reports/advisory-committee-rules-civil-procedure.aspx.

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] Memorandum from Paul V. Niemayer, Chair, Advisory Committee on Civil Rules, to Honorable Alicemarie H. Stotler, Chair, Standing Committee on Rules of Practice and Procedure (May 21, 1997).

effective appellate review of class certification decisions and that increased appellate review would increase the uniformity of district-court practice."[52]

B. Rule 23(f) Has Not Delivered Uniformity in Certification Decisions Because It Is Highly Discretionary.

Interlocutory review is available under Rule 23(f) in the "sole discretion of the court of appeals."[53] The Committee Note characterizes the discretion vested in the courts of appeals about whether to hear the appeal as "unfettered."[54] The Note suggests that the appellate courts would likely "develop standards for granting review that reflect the changing areas of uncertainty in class litigation."[55] But no standards were included in the rule – the appellate courts could grant or deny petitions for leave to appeal on "any consideration that the court of appeals finds persuasive."[56]

The federal appellate courts have, as the drafters of Rule 23(f) anticipated, sought to cabin their completely free discretion by adopting lists of criteria for determining whether or not to grant certification appeals. But the criteria adopted continue to be so "flexible" as to allow for virtually "unfettered" decision-making as is evident from review of the following cases:

Blair v. Equifax Check Services, Inc., 181 F.3d 832, 834-35 (7th Cir. 1999) (Declining to adopt a bright-line approach, but instead focuses on whether an appeal is important because class certification is likely to be outcome-determinative or "may facilitate the development of the law. . . .")

Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 293-94 (1st Cir. 2000) (Recognizing three categories of cases that warrant the exercise of discretionary appellate jurisdiction: (1) when a denial of class status effectively ends the case; (2) when the grant of class status raises the stakes of the litigation so substantially that the defendant likely will feel irresistible pressure to settle; (3) when granting class status will permit the resolution of an unsettled legal issue that is important to the particular litigation as well as important in itself and likely to escape effective review if left hanging until the end of the case.)

Prado-Steiman ex rel. Prado v. Bush, 221 F.3d 1266, 1274-76 (11th Cir. 2000) (In determining whether to grant interlocutory appellate review of class certification, a court should consider, (1) whether the district court's ruling is likely dispositive of the litigation by creating a "death knell" for either plaintiff or defendant; (2) whether the petitioner has shown a substantial weakness in the class certification decision, such that the decision likely constitutes an abuse of discretion; (3) whether the appeal will permit the resolution of an unsettled legal issue that is important to the particular litigation as well as important in itself; (4) the nature and status of

[52] *Id.*
[53] FED. R. CIV. P. 23(f) advisory committee's note (1998).
[54] *Id.*
[55] *Id.*
[56] *Id.*

litigation before the district court; and (5) the likelihood that future events may make appellate review more or less appropriate.)

Sumitomo Copper Litig. V. Credit Lyonnais Rouse, Ltd., 262 F.3d 134 (2d Cir.2001) (petitioners seeking leave to appeal pursuant to Rule 23(f) must demonstrate either (1) that the certification order will effectively terminate the litigation and there has been a substantial showing that the district court's decision is questionable, or (2) that the certification order implicates a legal question about which there is a compelling need for immediate resolution.)

Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 164 (3d Cir. 2001) (although not entirely restricting grant of class status to these three categories, the Court cited "(1) when denial of certification effectively terminates the litigation because the value of each plaintiff's claim is outweighed by the costs of stand-alone litigation; (2) when class certification places inordinate or hydraulic pressure on defendants to settle, avoiding the risk, however small, of potentially ruinous liability; and (3) when an appeal implicates novel or unsettled questions of law; in this situation, early resolution through interlocutory appeal may facilitate the orderly development of the law.")

Lienhart v. Dryvit Sys., Inc., 255 F.3d 138, 145-46 (4th Cir. 2001) (The court adopted the five-factor of *Prado-Steima,* adding that "the 'substantial weakness' prong operates on a sliding scale to determine the strength of the necessary showing regarding the other factors.")

In re Lorazepam & Clorazepate Antitrust Litig., 289 F.3d 98, 105 (D.C. Cir. 2002) (Interlocutory review of class certification decisions is appropriate when (1) when there is a death-knell situation for either the plaintiff or defendant that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable, taking into account the district court's discretion over class certification; (2) when the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review; and (3) when the district court's class certification decision is manifestly erroneous."); *In re Delta Air Lines*, 310 F.3d 953, 959 (6th Cir. 2002) (The Sixth Circuit "eschew[s] any hard-and-fast test in favor of a broad discretion," but is guided by the relevant factors articulated in other circuits.)

Chamberlan v. Ford Motor Co., 402 F.3d 952, 959 (9th Cir. 2005) ("Review of class certification decisions will be most appropriate when: (1) there is a death-knell situation for either the plaintiff or defendant that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable; (2) the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review; or (3) the district court's class certification decision is manifestly erroneous.")

Vallario v. Vandehey, 554 F.3d 1259 (10th Cir. 2009) (Interlocutory review of district court's class certification order is generally appropriate: (1) in "death knell" cases, when questionable class certification order is likely to force either party to resolve case based on considerations independent of the merits; (2) certification decision involves unresolved issue of

law relating to class actions that is likely to evade end-of-case review, significant to instant case as well as class action cases generally; or (3) decision is manifestly erroneous.)[57]

These cases demonstrate that the criteria applied in numerous appellate decisions continue to be so "flexible" as to allow for virtually "unfettered" decision-making.

C. Unfettered Decision-Making Has Resulted in Seemingly Arbitrary and Highly Inconsistent Results.

The empirical data on immediate appeals under Rule 23(f) raises grave concerns about how it is working. One scholar commented that "between the courts' 'unfettered discretion' and their opaque decision-making processes, what happens behind the courts' closed doors has been something of a mystery…."[58] After examining available data, Sullivan and Trueblood concluded that "[a]t best, the circuits may be described as inconsistent – in terms of petition volume, as to whether the court of appeals adheres to an articulated standard of review, the frequency with which the circuits publish their opinions explaining why they accept or deny Rule 23(f) petitions, and of course, the frequency with which Rule 23(f) petitions are granted."[59] In fact, as of the date of their data (December, 1998 - October 2006), one Circuit had failed to grant even a single Rule 23(f) petition and another Circuit had granted only five. The grant percentages for the Circuits varied wildly from 0% to 86% even though the data covered almost seven total years. Further, there was not much middle ground – six Circuits were 28% or below and four Circuits were 54% or higher.[60]

Even more troubling, available data suggested inconsistent success rates between plaintiffs' petitions and those brought by defendants.[61] These inconsistencies raise concern about whether litigants are being provided a process that conforms to traditional notions of due process and judicial decision-making. Those concerns are necessarily heightened by the staggering consequences that flow from the decision to certify or deny certification. The importance of this decision point was acknowledged when Rule 23(f) was enacted. But the reform made interlocutory appellate review so discretionary as to invite arbitrary decision-making. Unlike the Supreme Court's certiorari discretion to which it has been analogized, Rule 23(f) does not empower a single national body to accept cases to establish national law; it empowers twelve circuits to decide complex, and often fact-based decisions about whether a case will proceed as a class or not. And further, unlike the Supreme Court's certiorari discretion, Rule 23(f) considerations are not examining whether there is a circuit split to ensure a consistent national rule of law but are "at least as much concerned with deciding actual disputes as with clarifying the law…."[62] These distinctions are important, and they underscore the necessity for appeals of certification decisions as a matter of right.

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[57] Neither the Fifth Circuit, *see, e.g. Anderson v. U.S. Dept. of Hous. & Urban Dev.*, 554 F.3d 525, 527 (5th Cir. 2008), nor the Eighth Circuit, *Liles v. Del Campo*, 350 F.3d 742, 746 n, 5 (8th Cir. 2003), has adopted specific standards regarding when the court will hear an interlocutory appeal of a class certification order.
[58] Barry Sullivan & Amy Kobelski Trueblood, *supra* note 32, at 280-81.
[59] Barry Sullivan & Amy Kobelski Trueblood, *supra* note 32, at 284.
[60] Barry Sullivan & Amy Kobelski Trueblood, *supra* note 32, at 290.
[61] Barry Sullivan & Amy Kobelski Trueblood, *supra* note 32, at 286.
[62] Barry Sullivan & Amy Kobelski Trueblood, *supra* note 32, at 288.

D. Uncertainty About Class Certification Decision Standards Creates Difficulty for Bench and Bar, and It Undermines the Litigants' Faith in the Judicial System.

The inconsistency in certification decisions creates uncertainty for the parties, renders it difficult for lawyers representing the parties to properly advise their clients, and undermines respect for the judiciary as an institution adhering to the rule of the law. For many years, great jurists and scholars of the past criticized the equitable courts for equitable power resulting in rulings as uncertain as the length of the Chancellor's foot, which might be long, or short, or somewhere in between.[63] The lack of predictability that made equity a "roguish thing" exists today in class certification decisions.[64] When judges employ different standards for the right of appellate review – let alone the standards for such review – the process inevitably departs from what has traditionally been considered the rule of law. Like cases are not treated alike. Litigants find it impossible to navigate such unpredictability, and frustration feeds the pressure to settle a case, not because it is weak on the merits, but to avoid the costs and vagaries of judicial system.

E. Amending Rule 23(f) to Provide Immediate Appeal Would Remove Uncertainty.

Adoption of a rule allowing for an immediate appeal of decisions to certify, de-certify or modify a class would end the arbitrary "unfettered" decision-making about when an interlocutory appeal can be taken and would foster the development of more case law on certification standards. Many states have adopted legislation providing for an immediate right of appeal from the certification decision of the trial court.[65] Ample precedent exists for the Committee's power to provide exceptions to the "final-decision" rule.[66] For the parties, the certification decision can

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[63] John Seldon's oft-quoted comment about the problems created by unfettered discretion in the courts of equity applies here with even more force. He said:

> Equity is a roguish thing. For Law we have a measure, know what to trust to; Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. 'T is all one as if they should make the standard for the measure we call a "foot" a Chancellor's foot; what an uncertain measure would this be! One Chancellor has a long foot, another a short foot, a third an indifferent foot. 'T is the same thing in the Chancellor's conscience.

John Bartlett, *Familiar Quotations,* (10th ed, rev. and enl. by Nathan Haskell Dole. Boston: Little, Brown, 1919; Bartleby.com, 2000) (quoting John Selden) *available at* http://www.bartleby.com/100/155.html .

[64] *See generally*, Freer, *supra* at 20-22 (showing that different circuits accept review at different rates and on appeal affirm or reverse certification decisions at different rates).

[65] *See, e.g.,* ALA. CODE § 6-5-642 (1975) ("court's order certifying a class or refusing to certify a class action shall be appealable in the same manner as a final order to the appellate court which would otherwise have jurisdiction over the appeal from the final order in the action"); GA. CODE ANN. § 9-11-23 (g) (West 2012) ("court's order certifying a class or refusing to certify a call shall be appealable in the same manner as a final order to the appellate court which would otherwise have jurisdiction over the appeal from a final order in the action"). Some states have embodied this right of immediate appeal in court rules. *See, e.g.,* N. D. R. CIV. P. 23; OHIO REV. CODE ANN. § 2505.02(B)(5) (West 2012); Pa. R. Civ. P. 1710; TEXAS INS. CODE ANN. Art. 541.259. Florida's appellate rules likewise permit an appeal as a matter of right by an aggrieved party of orders either granting or denying class certification. Fla. R. App. P. 9.130. *See also* I.C.A. Rule 1.264/1.264(3)(making an order certifying or refusing to certify an action as a class action as appealable); LSA-C.C.P. Art. 592 (Louisiana's provision allowing for an appeal to be taken as a matter of right from an order that an action should be maintained as a class action). Many other states provide for discretionary appeals of certification decisions.

[66] *See* FED. R. CIV. P. 23(f) (pursuant to § 1292(e), accords Courts of Appeals discretion to permit appeals from district court orders granting or denying class-action certification); FED. R. CIV. P. 54(b) (providing for "entry of a

mean the death knell of the litigation – either because a denial makes the lawsuit too expensive to pursue or because a grant threatens litigation costs or risks that will be ruinous to the defendant thus forcing settlement. In either case, under our current system, the party who has been unsuccessful at the certification stage of the lawsuit is relegated to an extraordinary discretionary process that does not offer sufficient safeguards to assure that the decision is correct. It is time to re-write the rule.

IV. The Committee Should Adopt an "Opt-In" Rule for Rule 23(b)(3) Class Actions to Ensure a Meaningful Connection Between Class Members and the Case.

Rule 23(b)(3) permits representative plaintiffs to seek damages on behalf of all plaintiffs who have been certified as class action members. Because Rule 23(b)(3) actions are governed by Rule 23(c)(2)(B)(v)'s "opt-out" mechanism, the legal rights and interests of millions of people are determined in Rule 23(b)(3) cases each year where they are represented, often without their knowledge or consent, by attorneys they do not choose. The dramatic expansion of classes and the resulting changing nature of class action cases has led to a widespread view that many class members are so unconnected to the action that they have no idea whether class attorneys are conducting the action and handling the terms and conditions of settlement in the best interests of the class members. To address these problems, the Committee should consider amending Rule 23 by replacing the "opt-out" provision found in Rule 23(c)(2)(B)(v) and (vi) and 23(c)(3)(B) with an "opt-in" provision to ensure that every individual that becomes a certified class member has a meaningful right to decide whether to join a class action and choose his or her own lawyer.

The 1966 amendments authorized courts to certify as a class all persons who received actual or constructive notice of a certain type of class action (a Rule 23(b)(3) class action) and failed to take affirmative steps to withdraw from the class upon receipt of class notice. Under this system, unless a person within that class takes affirmative action to "opt-out" of the class, they are deemed class members and are bound by the outcome of the case. This is true regardless of whether they received or understood the class notice, and regardless of whether they wanted to be a member of the class.

To recipients, a class notice can be a complex legal document whose implications are unclear. As a result of this uncertainty, the common response of doing nothing has the incongruous effect of converting the recipient of the notice into a class member, often unwittingly. The effect is the creation of massive classes comprised of many members who do not understand the implications of class membership. These class members often do not understand that they have consented to be represented by class counsel who will effectively make all key decisions in the case, including the terms and conditions of any settlement that, if approved by the court, will be binding on all class members.

Equally important, a class member who passively fails to "opt-out" often does not understand the relationship between his or her inclusion in the class and class counsel's compensation. As a

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final judgment as to one or more, but fewer than all, of the claims or parties"). Congress has authorized the promulgation of rules defining finality and allowing for immediate appeal. Prescriptions in point include 28 USC § 1292 (immediately appealable "[i]nterlocutory decisions"); 28 USC § 2072(c) (authorizing promulgation of rules defining when a district court ruling is final for purposes of appeal under § 1291).

TAB 16

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TAB 16A

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MEMORANDUM

DATE: April 4, 2014

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Information item concerning *Ray Haluch Gravel Co.*

I enclose the Supreme Court's decision in *Ray Haluch Gravel Co. v. Central Pension Fund of Intern. Union of Operating Engineers and Participating Employers*, 134 S. Ct. 773 (2014).

In *Ray Haluch Gravel*, the Court noted its prior holding "that a decision on the merits is a 'final decision' under [28 U.S.C.] § 1291 even if the award or amount of attorney's fees for the litigation remains to be determined." *Ray Haluch Gravel*, 134 S. Ct. at 777 (citing *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988)). The *Ray Haluch Gravel* Court addressed "whether a different result obtains if the unresolved claim for attorney's fees is based on a contract rather than, or in addition to, a statute." It answered this question in the negative: "Whether the claim for attorney's fees is based on a statute, a contract, or both, the pendency of a ruling on an award for fees and costs does not prevent, as a general rule, the merits judgment from becoming final for purposes of appeal." 134 S. Ct. at 777.

Responding to the argument that this ruling would result in piecemeal appeals in instances where it would be more desirable for the fee appeal and the merits appeal to be adjudicated together, the Court noted the Rules provisions that permit a motion for attorney fees to be treated the same as a timely Rule 59 motion for purposes of tolling the time to appeal. The Court acknowledged, however, that the respondents had raised questions concerning whether that mechanism would have been available in their case:

> [Civil] Rule 54(d)(2) provides for motions claiming attorney's fees and related nontaxable expenses. [Civil] Rule 58(e), in turn, provides that the entry of judgment ordinarily may not be delayed, nor may the time for appeal be extended, in order to tax costs or award fees.... Rule 58(e) further provides that if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect as a timely motion under Rule 59 for purposes of Federal Rule of Appellate Procedure 4(a)(4). This delays the running of the time to file an appeal

> until the entry of the order disposing of the fee motion. Rule 4(a)(4)(A)(iii).
>
> In their brief in opposition to the petition for certiorari, the Funds argued that in their case this procedure would not have been applicable.... Rule 54(d)(2) provides that "[a] claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages." The [1993] Advisory Committee Notes to Rule 54(d)(2) state that the procedure outlined in that Rule "does not ... apply to fees recoverable as an element of damages, as when sought under the terms of a contract; such damages typically are to be claimed in a pleading and may involve issues to be resolved by a jury."

The Court observed that the respondents had abandoned their reliance on this argument, and it also noted that the parties in *Ray Haluch Gravel* had not sought to employ the Civil Rule 58(e) mechanism. It concluded its discussion of this point as follows:

> Regardless of how the Funds' fee claims could or should have been litigated, however, the Rules eliminate concerns over undue piecemeal appeals in the vast range of cases where a claim for attorney's fees is made by motion under Rule 54(d)(2). That includes some cases in which the fees are authorized by contract. See 2 M. Derfner & A. Wolf, Court Awarded Attorney Fees ¶18.01[1][c], pp. 18–7 to 18–8(2013) (remarking that Rule 54(d)(2) applies "regardless of the statutory, contractual, or equitable basis of the request for fees," though noting inapplicability whereattorney's fees are an element of damages under the substantive law governing the action).

Ray Haluch Gravel, 134 S. Ct. at 782.

The *Ray Haluch Gravel* Court, thus, did not seem concerned about the possibility that the Civil Rule 58(e) mechanism might be unavailable in some cases involving claims for contractual attorney fees. Nor has the Committee received reports of problems arising from such a gap in Rule 58(e)'s coverage. Accordingly, I do not suggest that the Committee investigate this issue further, though it may be useful to monitor the caselaw for any further developments.

Encl.

TAB 16B

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

RAY HALUCH GRAVEL CO. ET AL. *v.* CENTRAL PENSION FUND OF INTERNATIONAL UNION OF OPERATING ENGINEERS AND PARTICIPATING EMPLOYERS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 12–992. Argued December 9, 2013—Decided January 15, 2014

Respondents, various union-affiliated benefit funds (Funds), sued petitioner Ray Haluch Gravel Co. (Haluch) in Federal District Court to collect benefits contributions required to be paid under federal law. The Funds also sought attorney's fees and costs, which were obligations under both a federal statute and the parties' collective bargaining agreement (CBA). The District Court issued an order on June 17, 2011, on the merits of the contribution claim and a separate ruling on July 25 on the Funds' motion for fees and costs. The Funds appealed both decisions on August 15. Haluch argued that the June 17 order was a final decision pursuant to 28 U. S. C. §1291, and thus, the Funds' notice of appeal was untimely since it was not filed within the Federal Rules of Appellate Procedure's 30-day deadline. The Funds disagreed, arguing that there was no final decision until July 25. The First Circuit acknowledged that an unresolved attorney's fees issue generally does not prevent judgment on the merits from being final, but held that no final decision was rendered until July 25 since the entitlement to fees and costs provided for in the CBA was an element of damages and thus part of the merits. Accordingly, the First Circuit addressed the appeal with respect to both the unpaid contributions and the fees and costs.

Held: The appeal of the June 17 decision was untimely. Pp. 5–13.

(a) This case has instructive similarities to *Budinich* v. *Becton Dickinson & Co.*, 486 U. S. 196. There, this Court held a district court judgment to be a "final decision" for §1291 purposes despite an

unresolved motion for statutory-based attorney's fees, noting that fee awards do not remedy the injury giving rise to the action, are often available to the defending party, and were, at common law, an element of "costs" awarded to a prevailing party, not a part of the merits judgment. *Id.*, at 200. Even if laws authorizing fees might sometimes treat them as part of the merits, considerations of "operational consistency and predictability in the overall application of §1291" favored a "uniform rule." *Id.*, at 202. Pp. 5–7.

(b) The Funds' attempts to distinguish *Budinich* fail. Pp. 7–13.

(1) Their claim that contractual attorney's fees provisions are always a measure of damages is unpersuasive, for such provisions often provide attorney's fees to prevailing defendants. More basic, *Budinich*'s uniform rule did not depend on whether the law authorizing a particular fee claim treated the fees as part of the merits, 486 U. S., at 201, and there is no reason to depart from that sound reasoning here. The operational consistency stressed in *Budinich* is not promoted by providing for different jurisdictional effect based solely on whether an asserted right to fees is based on contract or statute. Nor is predictability promoted since it is not always clear whether and to what extent a fee claim is contractual rather than statutory. The Funds urge the importance of avoiding piecemeal litigation, but the *Budinich* Court was aware of such concerns when it adopted a uniform rule, and it suffices to say that those concerns are counterbalanced by the interest in determining with promptness and clarity whether the ruling on the merits will be appealed, especially given the complexity and amount of time it may take to resolve attorney's fees claims. Furthermore, the Federal Rules of Civil Procedure provide a means to avoid a piecemeal approach in many cases. See, *e.g.*, Rules 54(d)(2), 58(e). Complex variations in statutory and contractual fee-shifting provisions also counsel against treating attorney's fees claims authorized by contract and statute differently for finality purposes. The *Budinich* rule looks solely to the character of the issue that remains open after the court has otherwise ruled on the merits. The Funds suggest that it is unclear whether *Budinich* applies where, as here, nonattorney professional fees are included in a motion for attorney's fees and costs. They are mistaken to the extent that they suggest that such fees will be claimed only where a contractual fee claim is involved. Many fee-shifting statutes authorize courts to award related litigation expenses like expert fees, see *West Virginia Univ. Hospitals, Inc.* v. *Casey*, 499 U. S. 83, 89, n. 4, and there is no apparent reason why parties or courts would find it difficult to tell that *Budinich* remains applicable where such fees are claimed and awarded incidental to attorney's fees. Pp. 7–11.

(2) The Funds' claim that fees accrued prior to the commence-

Syllabus

ment of litigation fall outside the scope of *Budinich* is also unpersuasive. *Budinich* referred to fees "for the litigation in question," 486 U. S., at 202, or "attributable to the case," *id.*, at 203, but this Court has observed that "some of the services performed before a lawsuit is formally commenced by the filing of a complaint are performed 'on the litigation,' " *Webb* v. *Dyer County Bd. of Ed.*, 471 U. S. 234, 243. Here, the fees for investigation, preliminary legal research, drafting of demand letters, and working on the initial complaint fit the description of standard preliminary steps toward litigation. Pp. 11–13.

695 F. 3d 1, reversed and remanded.

KENNEDY, J., delivered the opinion for a unanimous Court.

SUPREME COURT OF THE UNITED STATES

No. 12–992

RAY HALUCH GRAVEL COMPANY, ET AL., PETITIONERS *v.* CENTRAL PENSION FUND OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS AND PARTICIPATING EMPLOYERS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[January 15, 2014]

JUSTICE KENNEDY delivered the opinion of the Court.

Federal courts of appeals have jurisdiction of appeals from "final decisions" of United States district courts. 28 U. S. C. §1291. In *Budinich* v. *Becton Dickinson & Co.*, 486 U. S. 196 (1988), this Court held that a decision on the merits is a "final decision" under §1291 even if the award or amount of attorney's fees for the litigation remains to be determined. The issue in this case is whether a different result obtains if the unresolved claim for attorney's fees is based on a contract rather than, or in addition to, a statute. The answer here, for purposes of §1291 and the Federal Rules of Civil Procedure, is that the result is not different. Whether the claim for attorney's fees is based on a statute, a contract, or both, the pendency of a ruling on an award for fees and costs does not prevent, as a general rule, the merits judgment from becoming final for purposes of appeal.

I

Petitioner Ray Haluch Gravel Co. (Haluch) is a landscape supply company. Under a collective-bargaining agreement (CBA) with the International Union of Operating Engineers, Local 98, Haluch was required to pay contributions to union-affiliated benefit funds. Various of those funds are respondents here.

In 2007, respondents (Funds) commissioned an audit to determine whether Haluch was meeting its obligations under the CBA. Based on the audit, the Funds demanded additional contributions. Haluch refused to pay, and the Funds filed a lawsuit in the United States District Court for the District of Massachusetts.

The Funds alleged that Haluch's failure to make the required contributions was a violation of the Employee Retirement Income Security Act of 1974 (ERISA) and the Labor Management Relations Act, 1947. The Funds also sought attorney's and auditor's fees and costs, under §502(g)(2)(D) of ERISA, 94 Stat. 1295, 29 U. S. C. §1132(g)(2)(D) (providing for "reasonable attorney's fees and costs of the action, to be paid by the defendant"), and the CBA itself, App. to Pet. for Cert. 52a (providing that "[a]ny costs, including legal fees, of collecting payments due these Funds shall be borne by the defaulting Employer").

At the conclusion of a bench trial, the District Court asked the parties to submit proposed findings of fact and conclusions of law to allow the court "to consider both the possibility of enforcing [a] settlement and a decision on the merits at the same time." Tr. 50 (Feb. 28, 2011). These submissions were due on March 14, 2011. The District Court went on to observe that "[u]nder our rules . . . if there is a judgment for the plaintiffs, typically a motion for attorney's fees can be filed" shortly thereafter. *Id.*, at 51. It also noted that, "[o]n the other hand, attorney's fees is part of the damages potentially here." *Ibid.* It gave the

plaintiffs the option to offer a submission with regard to fees along with their proposed findings of fact and conclusions of law, or to "wait to see if I find in your favor and submit the fee petition later on." *Ibid.*

The Funds initially chose to submit their fee petition at the same time as their proposed findings of fact and conclusions of law, but they later changed course. They requested an extension of time to file their "request for reimbursement of attorneys' fees and costs in the above matter." Motion to Extend Time to Submit Request for Attorneys' Fees in No. 09–cv–11607–MAP (D Mass.), p. 1. The District Court agreed; and on April 4, the Funds moved "for an [o]rder awarding the total attorneys' fees and costs incurred . . . in attempting to collect this delinquency, in obtaining the audit, in protecting Plaintiffs' interests, and in protecting the interests of the participants and beneficiaries." App. 72. The motion alleged that "[t]hose fees and costs . . . amount to $143,600.44," and stated that "[d]efendants are liable for these monies pursuant to" ERISA, "and for the reasons detailed in the accompanying" affidavit. *Ibid.* The accompanying "affidavit in support of [the] application for attorneys' fees and costs," in turn, cited the parties' agreements (including the CBA, as well as related trust agreements) and §502(g)(2)(D) of ERISA. *Id.*, at 74.

As to the merits of the claim that Haluch had underpaid, on June 17, 2011, the District Court issued a memorandum and order ruling that the Funds were entitled to certain unpaid contributions, though less than had been requested. *International Union of Operating Engineers, Local 98 Health and Welfare, Pension and Annuity Funds* v. *Ray Haluch Gravel Co.,* 792 F. Supp. 2d 129 (Mass.). A judgment in favor of the Funds in the amount of $26,897.41 was issued the same day. App. to Pet. for Cert. 39a–40a. The District Court did not rule on the Funds' motion for attorney's fees and costs until July 25, 2011.

On that date it awarded $18,000 in attorney's fees, plus costs of $16,688.15, for a total award of $34,688.15. 792 F. Supp. 2d 139, 143. On August 15, 2011, the Funds appealed from both decisions. Haluch filed a cross-appeal a week later.

In the Court of Appeals Haluch argued that there had been no timely appeal from the June 17 decision on the merits. In its view, the June 17 decision was a final decision under §1291, so that notice of appeal had to be filed within 30 days thereafter, see Fed. Rule App. Proc. 4(a)(1)(A). The Funds disagreed. They argued that there was no final decision until July 25, when the District Court rendered a decision on their request for attorney's fees and costs. In their view the appeal was timely as to all issues in the case. See *Digital Equipment Corp.* v. *Desktop Direct, Inc.*, 511 U. S. 863, 868 (1994).

The Court of Appeals agreed with the Funds. 695 F. 3d 1, 7 (CA1 2012). It acknowledged this Court's holding that an unresolved issue of attorney's fees generally does not prevent judgment on the merits from being final. But it held that this rule does not "mechanically . . . apply to all claims for attorneys' fees, whatever their genesis," and that, instead, "[w]here, as here, an entitlement to attorneys' fees derives from a contract . . . the critical question is whether the claim for attorneys' fees is part of the merits." *Id.*, at 6. Interpreting the CBA in this case as "provid[ing] for the payment of attorneys' fees as an element of damages in the event of a breach," the Court of Appeals held that the June 17 decision was not final. *Ibid.* Concluding that the appeal was timely as to all issues, the Court of Appeals addressed the merits of the dispute with respect to the amount of unpaid remittances as well as the issue of fees and costs, remanding both aspects of the case to the District Court. *Id.*, at 11.

Haluch sought review here, and certiorari was granted to resolve a conflict in the Courts of Appeals over whether

and when an unresolved issue of attorney's fees based on a contract prevents a judgment on the merits from being final. 570 U. S. ___ (2013). Compare *O & G Industries, Inc.* v. *National Railroad Passenger Corporation*, 537 F. 3d 153, 167, 168, and n. 11 (CA2 2008); *United States ex rel. Familian Northwest, Inc.* v. *RG & B Contractors, Inc.*, 21 F. 3d 952, 954–955 (CA9 1994); *Continental Bank, N. A.* v. *Everett*, 964 F. 2d 701, 702–703 (CA7 1992); and *First Nationwide Bank* v. *Summer House Joint Venture*, 902 F. 2d 1197, 1199–1200 (CA5 1990), with *Carolina Power & Light Co.* v. *Dynegy Marketing & Trade*, 415 F. 3d 354, 356 (CA4 2005); *Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P. A.* v. *MedPartners, Inc.*, 312 F. 3d 1349, 1355 (CA11 2002) (*per curiam*); *Gleason* v. *Norwest Mortgage, Inc.*, 243 F. 3d 130, 137–138 (CA3 2001); and *Justine Realty Co.* v. *American Nat. Can Co.*, 945 F. 2d 1044, 1047–1049 (CA8 1991). For the reasons set forth, the decision of the Court of Appeals must be reversed.

II

Title 28 U. S. C. §1291 provides that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ." "[T]he timely filing of a notice of appeal in a civil case is a jurisdictional requirement." *Bowles* v. *Russell*, 551 U. S. 205, 214 (2007). Rule 4 of the Federal Rules of Appellate Procedure provides, as a general matter and subject to specific qualifications set out in later parts of the Rule, that in a civil case "the notice of appeal . . . must be filed . . . within 30 days after entry of the judgment or order appealed from." Rule 4(a)(1)(A). The parties in this case agree that notice of appeal was not given within 30 days of the June 17 decision but that it was given within 30 days of the July 25 decision. The question is whether the June 17 order was a final decision for purposes of §1291.

In the ordinary course a "final decision" is one that ends

the litigation on the merits and leaves nothing for the court to do but execute the judgment. *Catlin* v. *United States*, 324 U. S. 229, 233 (1945). In *Budinich,* this Court addressed the question whether an unresolved issue of attorney's fees for the litigation prevents a judgment from being final. 486 U. S., at 202. There, a District Court in a diversity case had entered a judgment that left unresolved a motion for attorney's fees based on a Colorado statute providing attorney's fees to prevailing parties in certain cases. *Id.*, at 197. The Court held that the judgment was final for purposes of §1291 despite the unresolved issue of attorney's fees. *Id.*, at 202.

The Court in *Budinich* began by observing that "[a]s a general matter, at least, . . . a claim for attorney's fees is not part of the merits of the action to which the fees pertain." *Id.*, at 200. The Court noted that awards of attorney's fees do not remedy the injury giving rise to the action, are often available to the party defending the action, and were regarded at common law as an element of "costs" awarded to a prevailing party, which are generally not treated as part of the merits judgment. *Ibid.* Though the Court acknowledged that the statutory or decisional law authorizing the fees might sometimes treat the fees as part of the merits, it held that considerations of "operational consistency and predictability in the overall application of §1291" favored a "uniform rule that an unresolved issue of attorney's fees for the litigation in question does not prevent judgment on the merits from being final." *Id.*, at 202.

The facts of this case have instructive similarities to *Budinich*. In both cases, a plaintiff sought to recover employment-related payments. In both cases, the District Court entered a judgment resolving the claim for unpaid amounts but left outstanding a request for attorney's fees incurred in the course of litigating the case. Despite these similarities, the Funds offer two arguments to distinguish

Budinich. First, they contend that unresolved claims for attorney's fees authorized by contract, unlike those authorized by statute, are not collateral for finality purposes. Second, they argue that the claim left unresolved as of June 17 included fees incurred prior to the commencement of formal litigation and that those fees, at least, fall beyond the scope of the rule announced in *Budinich*. For the reasons given below, the Court rejects these arguments.

III

A

The Funds' principal argument for the nonfinality of the June 17 decision is that a district court decision that does not resolve a fee claim authorized by contract is not final for purposes of §1291, because it leaves open a claim for contract damages. They argue that contractual provisions for attorney's fees or costs of collection, in contrast to statutory attorney's fees provisions, are liquidated-damages provisions intended to remedy the injury giving rise to the action.

The premise that contractual attorney's fees provisions are always a measure of damages is unpersuasive, for contractual fee provisions often provide attorney's fees to prevailing defendants. See 1 R. Rossi, Attorneys' Fees §9:25, p. 9–64 (3d ed. 2012); cf. *Gleason*, *supra*, at 137, n. 3. The Funds' argument fails, however, for a more basic reason, which is that the Court in *Budinich* rejected the very distinction the Funds now attempt to draw.

The decision in *Budinich* made it clear that the uniform rule there announced did not depend on whether the statutory or decisional law authorizing a particular fee claim treated the fees as part of the merits. 486 U. S., at 201. The Court acknowledged that not all statutory or decisional law authorizing attorney's fees treats those fees as part of "costs" or otherwise not part of the merits; and the Court even accepted for purposes of argument that the

Colorado statute in that case "ma[de] plain" that the fees it authorized "are to be part of the merits judgment." *Ibid.* But this did not matter. As the Court explained, the issue of attorney's fees was still collateral for finality purposes under §1291. The Court was not then, nor is it now, "inclined to adopt a disposition that requires the merits or nonmerits status of each attorney's fee provision to be clearly established before the time to appeal can be clearly known." *Id.*, at 202. There is no reason to depart here from this sound reasoning. By arguing that a different rule should apply to fee claims authorized by contract because they are more often a matter of damages and thus part of the merits, the Funds seek in substance to relitigate an issue already decided in *Budinich*.

Were the jurisdictional effect of an unresolved issue of attorney's fees to depend on whether the entitlement to fees is asserted under a statute, as distinct from a contract, the operational consistency and predictability stressed in *Budinich* would be compromised in many instances. Operational consistency is not promoted by providing for different jurisdictional effect to district court decisions that leave unresolved otherwise identical fee claims based solely on whether the asserted right to fees is based on a contract or a statute.

The Funds' proposed distinction also does not promote predictability. Although sometimes it may be clear whether and to what extent a fee claim is contractual rather than statutory in nature, that is not always so. This case provides an apt illustration. The Funds' notice of motion itself cited just ERISA; only by consulting the accompanying affidavit, which included an oblique reference to the CBA, could it be discerned that a contractual fee claim was being asserted in that filing. This may explain why the District Court's July 25 decision cited just ERISA, without mention or analysis of the CBA provision or any other contractual provision. 792 F. Supp. 2d,

at 140.

The Funds urge the importance of avoiding piecemeal litigation. The basic point is well taken, yet, in the context of distinguishing between different sources for awards of attorney's fees, quite inapplicable. The Court was aware of piecemeal litigation concerns in *Budinich*, but it still adopted a uniform rule that an unresolved issue of attorney's fees for the litigation does not prevent judgment on the merits from being final. Here it suffices to say that the Funds' concern over piecemeal litigation, though starting from a legitimate principle, is counterbalanced by the interest in determining with promptness and clarity whether the ruling on the merits will be appealed. This is especially so because claims for attorney's fees may be complex and require a considerable amount of time to resolve. Indeed, in this rather simple case, the fee-related submissions take up well over 100 pages in the joint appendix. App. 64–198.

The Federal Rules of Civil Procedure, furthermore, provide a means to avoid a piecemeal approach in the ordinary run of cases where circumstances warrant delaying the time to appeal. Rule 54(d)(2) provides for motions claiming attorney's fees and related nontaxable expenses. Rule 58(e), in turn, provides that the entry of judgment ordinarily may not be delayed, nor may the time for appeal be extended, in order to tax costs or award fees. This accords with *Budinich* and confirms the general practice of treating fees and costs as collateral for finality purposes. Having recognized this premise, Rule 58(e) further provides that if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect as a timely motion under Rule 59 for purposes of Federal Rule of Appellate Procedure 4(a)(4). This delays the running of the time to file an appeal until the entry of the order disposing of the fee

motion. Rule 4(a)(4)(A)(iii).

In their brief in opposition to the petition for certiorari, the Funds argued that in their case this procedure would not have been applicable. Brief in Opposition 34. Rule 54(d)(2) provides that "[a] claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages." The Advisory Committee Notes to Rule 54(d)(2) state that the procedure outlined in that Rule "does not . . . apply to fees recoverable as an element of damages, as when sought under the terms of a contract; such damages typically are to be claimed in a pleading and may involve issues to be resolved by a jury." Advisory Committee's 1993 Note on subd. (d), par. (2) of Fed. Rule Civ. Proc. 54, 28 U. S. C. App., pp. 240–241.

The Funds no longer rely on their reading of Rule 54 and the Advisory Committee Notes as a basis for their argument that the June 17 decision was not final under §1291. And this is not a case in which the parties attempted to invoke Rule 58(e) to delay the time to appeal. Regardless of how the Funds' fee claims could or should have been litigated, however, the Rules eliminate concerns over undue piecemeal appeals in the vast range of cases where a claim for attorney's fees is made by motion under Rule 54(d)(2). That includes some cases in which the fees are authorized by contract. See 2 M. Derfner & A. Wolf, Court Awarded Attorney Fees ¶18.01[1][c], pp. 18–7 to 18–8 (2013) (remarking that Rule 54(d)(2) applies "regardless of the statutory, contractual, or equitable basis of the request for fees," though noting inapplicability where attorney's fees are an element of damages under the substantive law governing the action).

The complex variations in statutory and contractual fee-shifting provisions also counsel against making the distinction the Funds suggest for purposes of finality. Some

fee-shifting provisions treat the fees as part of the merits; some do not. Some are bilateral, authorizing fees either to plaintiffs or defendants; some are unilateral. Some depend on prevailing party status; some do not. Some may be unclear on these points. The rule adopted in *Budinich* ignores these distinctions in favor of an approach that looks solely to the character of the issue that remains open after the court has otherwise ruled on the merits of the case.

In support of their argument against treating contractual and statutory fee claims alike the Funds suggest, nevertheless, that it is unclear whether *Budinich* still applies where, as here, auditor's fees (or other nonattorney professional fees) are included as an incidental part of a motion for attorney's fees and costs. (In this case, auditor's fees accounted for $6,537 of the $143,600.44 requested in total.) To the extent the Funds suggest that similar fees will be claimed alongside attorney's fees only where a contractual fee claim is involved, they are incorrect. Statutory fee claims are not always limited to attorney's fees *per se*. Many fee-shifting statutes authorize courts to award additional litigation expenses, such as expert fees. See *West Virginia Univ. Hospitals, Inc.* v. *Casey*, 499 U. S. 83, 89, n. 4 (1991) (listing statutes); cf. Fed. Rule Civ. Proc. 54(d)(2)(A) (providing mechanism for claims by motion for "attorney's fees and related nontaxable expenses"). Where, as here, those types of fees are claimed and awarded incidental to attorney's fees, there is no apparent reason why parties or courts would find it difficult to tell that *Budinich* remains applicable.

B

The Funds separately contend that the June 17 decision was not final because their motion claimed some $8,561.75 in auditor's and attorney's fees (plus some modest additional expenses) incurred prior to the commencement of

litigation. These included fees for the initial audit to determine whether Haluch was complying with the CBA, as well as attorney's fees incurred in attempting to obtain records from Haluch, researching fund auditing rights, drafting a letter demanding payment, and working on the initial complaint. Brief for Respondents 4–5; App. 64–67, 81–88. The Funds argue that these fees do not fall within the scope of *Budinich*, because the Court in *Budinich* referred only to fees "for the litigation in question," 486 U. S., at 202, or, equivalently, "attributable to the case," *id.*, at 203.

The fact that some of the claimed fees accrued before the complaint was filed is inconsequential. As this Court has observed, "some of the services performed before a lawsuit is formally commenced by the filing of a complaint are performed 'on the litigation.'" *Webb* v. *Dyer County Bd. of Ed.*, 471 U. S. 234, 243 (1985). "Most obvious examples" include "the drafting of the initial pleadings and the work associated with the development of the theory of the case." *Ibid.* More generally, pre-filing tasks may be for the litigation if they are "both useful and of a type ordinarily necessary to advance the . . . litigation" in question. *Ibid.*

The fees in this case fit that description. Investigation, preliminary legal research, drafting of demand letters, and working on the initial complaint are standard preliminary steps toward litigation. See *id.*, at 250 (Brennan, J., concurring in part and dissenting in part) ("[I]t is settled that a prevailing party may recover fees for the time spent before the formal commencement of the litigation on such matters as . . . investigation of the facts of the case, research on the viability of potential legal claims, [and] drafting of the complaint and accompanying documents . . . ."); 2 Derfner, *supra*, ¶16.02[2][b], at 16–15 ("[H]ours . . . spent investigating facts specific to the client's case should be included in the lodestar, whether [or not] that time is spent prior to the filing of a complaint"). To be

sure, the situation would differ if a party brought a free-standing contract action asserting an entitlement to fees incurred in an effort to collect payments that were not themselves the subject of the litigation. But that is not this case. Here the unresolved issue left open by the June 17 order was a claim for fees for the case being resolved on the merits.

* * *

There was no timely appeal of the District Court's June 17 order. The judgment of the Court of Appeals is reversed. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.