ADVISORY COMMITTEE
ON APPELLATE RULES

Washington, DC
April 12-13, 2012

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TABLE OF CONTENTS

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Agenda for Spring 2012 Meeting of
Advisory Committee on Appellate Rules
April 12 and 13, 2012
Washington, DC

I. Introductions

II. Approval of Minutes of October 2011 Meeting

III. Report on January 2012 Meeting of Standing Committee

IV. Other Information Items

- A. *Gonzalez v. Thaler*, 132 S. Ct. 641 (2012)
- B. D.C. Circuit Rule 35(a)

V. Action Items

- A. For final approval
  1. Item No. 08-AP-G (FRAP Form 4 / i.f.p. applications)
  2. Item No. 08-AP-M (FRAP 13, 14, and 24 / tax appeals)
  3. Item No. 10-AP-B (FRAP 28 & 28.1 / statement of the case)
- B. For publication
  1. Item No. 09-AP-C (FRAP 6 / direct bankruptcy appeals)
  2. Item No. 08-AP-L (FRAP 6(b)(2)(A) / *Sorensen* issue)

VI. Discussion Items

- A. Item No. 09-AP-B (definition of "state" and Indian tribes)
- B. Item No. 10-AP-I (redactions in briefs)
- C. Item No. 11-AP-B (FRAP 28 / introductions in briefs)

VII. Additional Old Business and New Business

- A. Item No. 11-AP-E (FRAP 4(b) / criminal appeal deadlines)

VIII. Adjournment

ADVISORY COMMITTEE ON APPELLATE RULES

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Jeffrey S. Sutton Chair	C	Sixth Circuit	Member: Chair:	2005 2009	---- 2012
Amy Coney Barrett	ACAD	Indiana		2010	2013
Michael A. Chagares	C	Third Circuit		2011	2014
Robert Michael Dow, Jr.	D	Ilinois (Northern)		2010	2013
Allison Eid	JUST	Colorado		2010	2013
Peter T. Fay	C	Eleventh Circuit		2009	2012
Neal K. Katyal	ESQ	Washington, DC		2011	2014
Kevin C. Newsom	ESQ	Alabama		2011	2014
Richard G. Taranto	ESQ	Washington, DC		2009	2012
Donald B. Verrilli, Jr.*	DOJ	Washington, DC		----	Open
Catherine T. Struve Reporter	ACAD	Pennsylvania		2006	Open
Principal Staff: Jonathan C. Rose 202-502-1820					

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* Ex-officio

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Liaison for the Advisory Committee on Bankruptcy Rules	**Judge James A. Teilborg**	***(Standing)***
Liaison for the Advisory Committee on Civil Rules	**Judge Arthur I. Harris**	***(Bankruptcy)***
Liaison for the Advisory Committee on Civil Rules	**Judge Diane P. Wood**	***(Standing)***
Liaison for the Advisory Committee on Criminal Rules	**Judge Marilyn L. Huff**	***(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)***

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TAB 1A

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Advisory Committee on Appellate Rules
Table of Agenda Items — March 2012

FRAP Item	Proposal	Source	Current Status
05-01	Amend FRAP 21 & 27(c) to conform to Justice for All Act of 2004.	Advisory Committee	Discussed and retained on agenda 04/05; awaiting proposal from Department of Justice Discussed and retained on agenda 04/06; Department of Justice will monitor practice under the Act
07-AP-E	Consider possible FRAP amendments in response to Bowles v. Russell (2007).	Mark Levy, Esq.	Discussed and retained on agenda 11/07 Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 04/11
07-AP-H	Consider issues raised by Warren v. American Bankers Insurance of Florida, 2007 WL 3151884 (10th Cir. 2007), concerning the operation of the separate document rule.	Appellate Rules Committee	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08
07-AP-I	Consider amending FRAP 4(c)(1) to clarify the effect of failure to prepay first-class postage.	Hon. Diane Wood	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal.	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08
08-AP-C	Abolish FRAP 26(c)'s three-day rule.	Hon. Frank H. Easterbrook	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09
08-AP-G	Consider substantive and style changes to FRAP Form 4	Appellate Rules Committee	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 10/10 Draft approved 04/11 for submission to Standing Committee Approved for publication by Standing Committee 06/11 Published for comment 08/11

FRAP Item	Proposal	Source	Current Status
08-AP-H	Consider issues of "manufactured finality" and appealability	Mark Levy, Esq.	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 10/10 Discussed and retained on agenda 04/11
08-AP-J	Consider FRAP implications of conflict screening	Committee on Codes of Conduct	Discussed and retained on agenda 11/08
08-AP-L	Amend FRAP 6(b)(2)(A)(ii) to remove ambiguity	Reporter	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09 Discussed and retained on agenda 10/10 Discussed jointly with Bankruptcy Rules Committee and retained on agenda 04/11 Discussed and retained on agenda 10/11
08-AP-M	Consider FRAP implications of interlocutory appeals in tax cases	Reporter	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Draft approved 10/10 for submission to Standing Committee Approved for publication by Standing Committee 01/11 Published for comment 08/11
08-AP-N	Amend FRAP 5 to allow parties to submit an appendix of key documents from the record along with petitions and answers	Peder K. Batalden, Esq.	Discussed and retained on agenda 04/09
08-AP-P	Amend FRAP 32 to change from double line-spacing to 1.5 line-spacing for briefs	Peder K. Batalden, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09
08-AP-Q	Consider amending FRAP 10(b) to permit the use of digital audio recordings in place of written transcripts	Hon. Michael M. Baylson	Discussed and retained on agenda 04/09 Discussed and retained on agenda 10/10
08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 04/09
09-AP-A	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	ABA Council of Appellate Lawyers	Discussed and retained on agenda 04/09

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

FRAP Item	Proposal	Source	Current Status
11-AP-F	Consider amendment authorizing discretionary interlocutory appeals from attorney-client privilege rulings	Amy M. Smith, Esq.	Awaiting initial discussion

TAB 1B

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

I. Introductions

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

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

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

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

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

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

good job with the Civil Rules amendments relating to electronic discovery but he argued that they had not done as well in responding to concerns about pleading.

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

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

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

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

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

Rules.

II. Approval of Minutes of April 2011 Meeting

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

III. Report on June 2011 Meeting of Standing Committee

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

Judge Sutton reported that the proposed amendments to Appellate Rules 4 and 40 (which will clarify the treatment of the time to appeal or to seek rehearing in civil cases to which a United States officer or employee is a party) are currently on track to take effect on December 1, 2011 (absent contrary action by Congress). Because the time to appeal in a civil case is set not only by Appellate Rule 4 but also by 28 U.S.C. § 2107, legislation has been introduced that will make the same clarifying change to Section 2107. Such a change is very important in order to avoid creating a trap for unsophisticated litigants. The goal is for the amendment to Section 2107 to take effect simultaneously with the amendments to Rules 4 and 40.

IV. Action Items

A. For publication

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

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

Professor Barrett provided an overview of the proposals to amend Appellate Rule 6. Rule 6(a) addresses appeals from a district court exercising original jurisdiction in a bankruptcy

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

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

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

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

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

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

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

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

V. Discussion Items

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

Judge Sutton invited Mr. Taranto to introduce Item No. 08-AP-D, which concerns Peder Batalden's suggestion that the Committee amend Appellate Rule 4(a)(4) to address potential problems arising from the possibility of a time lag between entry of the order disposing of a

tolling motion and entry of any resulting amended judgment. Mr. Taranto began by suggesting that this is an issue that started small; then it got bigger; and now it seems that perhaps the balloon has burst. He noted that sometimes it is not clear whether an order has "disposed of" a postjudgment motion. Moreover, he noted, in some instances the time lag between entry of such an order and entry of a resulting amended judgment might be longer than the 30-day time limit for taking an appeal. The Committee considered various ways to address this issue, but found that each possibility carried a risk of creating other problems. Mr. Taranto recalled that he had suggested that the Committee consider proposing to the Civil Rules Committee that it broaden Civil Rule 58(a)'s separate document requirement. Mr. Taranto observed that a number of participants had expressed concern about such a proposal – notably the participants in the Appellate Rules Committee's joint discussion with the Bankruptcy Rules Committee, and also Professor Cooper. A central concern, Mr. Taranto noted, is that district courts already neglect to comply with the existing separate document requirement. Mr. Taranto closed his introductory remarks by wondering whether this item presented an example of the occasions that Professor Freer had posited, when rulemaking changes are not warranted.

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

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

A member moved that the Committee remove this item from its agenda until a case raising this problem is brought to the Committee's attention. The motion was seconded and passed by voice vote without dissent. Judge Sutton undertook to write to Mr. Batalden and thank him for his helpful suggestion.

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

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

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

Judge Sutton suggested that one possible course of action would be to write to the Chief Judges of all the circuits to share with them the Committee's discussions and research, and to state that although the Committee is not moving ahead with a national rule change at this point, it is open to each circuit to adopt a local rule authorizing Native American tribes to file amicus

briefs without party consent or court leave. The letter could report that a number of Committee members favor such a rule but that the Committee is not prepared at this point to adopt it as an amendment to Rule 29. The responses to such a letter, he suggested, could help the Committee discern whether it makes sense to amend Rule 29. On the other hand, though a circuit could adopt a local rule permitting amicus filings as of right by Native American tribes, it does not appear that a circuit would have authority to adopt a local rule exempting Native American tribes from Rule 29(c)(5)'s authorship-and-funding disclosure requirement. Professor Coquillette cautioned against sending a letter that would encourage the proliferation of local rules.

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

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

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

An appellate judge member offered a differing view, arguing that the Committee has the information it needs and that it should decide whether to amend Rule 29. This member argued in support of treating tribes the same as states for purposes of amicus filings; the member stated that such an approach would have no downside and that the rule amendment could also encompass municipalities and could be justified on the grounds that all large, important,

sovereign entities should be treated similarly under Rule 29. The Reporter stated that although the extent of tribal government authority is much debated and has been altered in Supreme Court decisions since 1978, the doctrine is still clear that Native American tribes retain their sovereignty except to the extent that it has been removed by a federal treaty, by a federal statute, or by implication of the tribes' status as "domestic dependent nations." An attorney member observed that the term "state" is now defined by Appellate Rule 1(b) to include United States territories, which are not sovereign entities; under Rules 1(b) and 29(a), those non-sovereign entities are permitted to file amicus briefs without party consent or court leave. This member asked whether amending Rule 29(a) to treat tribes the same as states would be perceived as having broader implications for legal doctrines concerning tribal authority. A participant responded that the answer to that question is unclear. In any event, this participant observed, those who oppose treating tribes the same as states for purposes of Rule 29(a) may do so for reasons unrelated to their views of tribal sovereignty; such opponents may have a general aversion to amicus filings and may view the requirement of a motion for leave to file an amicus brief as a useful hurdle.

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

An attorney member – turning to the question of the disclosure requirement – observed that as one moves along the spectrum from the federal government to other government entities the likelihood of ghostwritten briefs increases (though it is still low). States with well-developed appellate operations write their own amicus briefs, but that might not always be true of states with less-developed appellate litigation functions. When a brief is circulated among the members of the National Association of Attorneys General, those reviewing the brief want to know who wrote it. An appellate judge member agreed that states' practices vary. Another attorney member asked whether one could amend Rule 29(c)(5) to apply the authorship-and-funding disclosure requirement to all amici, including government amici. Such an approach would differ from that taken in Supreme Court Rule 37.6, but, he argued, the practicalities of amicus briefs differ as between filings in the courts of appeals and filings in the Supreme Court. Mr. Letter noted that if the disclosure requirement extended to the United States' amicus filings, the United States' answers to all the questions would always be "No." A participant asked whether extending the disclosure requirement to the United States would raise separation of

powers issues. An attorney participant asked whether such an amendment to Rule 29(c)(5) would run counter to the presumption that one should not amend a rule that is functioning well.

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

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

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

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

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

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

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

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

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

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

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

Judge Dow observed that there are a number of different possible approaches to sealing on appeal. One approach is that taken by the D.C. Circuit and Federal Circuit; these circuits require the litigants – at the outset of the appeal – to review the record, mutually agree on whether some or all sealed portions can be unsealed, and present that agreement to the court or agency below. Some other circuits appear to operate on the assumption that materials that were sealed in the district court presumptively remain sealed on appeal. A third approach is that taken

by the Seventh Circuit (and in some instances by the Third Circuit); this approach provides a grace period during which matters sealed below remain sealed on appeal, but mandates that those matters are unsealed (to the extent they appear in the record on appeal) if no motion is made within the grace period to maintain the seal on appeal.

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

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

The Reporter posited that the question of sealing on appeal is distinct from the question of protective orders concerning discovery materials under Civil Rule 26(c). In the latter context, many or all of the sealed materials may never be filed with the court; by contrast, sealing on appeal by definition concerns materials filed by a party in support of or in opposition to a request for action by the court. Judge Sutton, noting the variation among the circuits' approaches to sealing on appeal, suggested that the Committee discuss the significance of that variation. Professor Coquillette responded that one approach would be to wait for the Supreme Court to resolve these questions; another approach would be to pursue uniformity through the promulgation of a national rule. Mr. McCabe pointed out the salience of the Judicial Conference Committee on Court Administration and Case Management ("CACM"). CACM's jurisdiction, he noted, encompasses questions of privacy and sealing. He observed that those planning the Next Generation of CM/ECF have approved two requirements for the next iteration of the CM/ECF system: First, the system must accommodate a sealed as well as a non-sealed level of filing; and second, there should be a system for "lodging" submissions with the court without actually filing them. An attorney participant asked how frequently non-parties make motions to unseal a sealed filing.

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

VI. Additional Old Business and New Business

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

Judge Sutton invited the Reporter to introduce Item No. 11-AP-B, which concerns the possibility of amending Rule 28 to discuss the inclusion of introductions in briefs. The Reporter stated that this topic grows out of Committee discussions concerning the proposal – currently out for comment – that would amend Rule 28 to combine the statement of the case and of the facts. Some participants in those discussions had suggested that it would be useful for Rule 28 to alert lawyers to the possibility of including an introduction in their brief. Participants had also discussed a related idea of moving the statement of issues (currently provided for in Rule 28(a)(5)) so that it would follow rather than precede the statement of the case. Rather than attempt to address these issues in the context of the proposal concerning the statement of the case, the Committee had added these questions to its agenda as a separate item.

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

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

placement in the brief (a necessary topic given that Rule 28(a) directs that the listed items appear in the order stated in the rule); and the respective roles of the introduction and the summary of argument.

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

Judge Sutton observed that if the currently published proposals are adopted, Rule 28(a)(6) would require "a concise statement of the case setting out the facts relevant to the issues submitted for review and identifying the rulings presented for review, with appropriate references to the record (see Rule 28(e))." The attorney participant suggested that it would be possible to amend this provision to mention "an optional introduction." But even without such a modification, she argued, the published language would permit the inclusion of an introduction as part of the statement of the case.

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

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

A member suggested that it did not make sense to amend Rule 28 to discuss

introductions. Two attorney members agreed with this view, as did two other participants. A district judge member suggested that it could be useful to provide guidance concerning introductions in the Committee Note. Two appellate judge members agreed with this idea, as did two other participants (one of those participants reiterated her alternative suggestion that the rule text could be revised to refer to an "optional introduction"). Mr. Letter advocated adding a discussion of introductions either to the rule text or to the Committee Note in order to raise awareness concerning the possibility of including introductions; he argued that it would be better to address this topic in the rule text than in the Note. Professor Coquillette advised against including in the Committee Note something that should be addressed in the rule text. An appellate judge member stated that junior lawyers need guidance, and advocated addressing introductions either in the rule text or in the Note.

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

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

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

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

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

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

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

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

Judge Sutton suggested that changes relating to electronic filing and service might be

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

VII. Other Information Items

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

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

As the Committee has previously discussed, current Rule 39 already provides the courts of appeals with discretion to deny costs in a case such as *Snyder*. On the other hand, the circuits have varied in their application of Rule 39's cost provisions. Pursuant to a request from the Committee, Ms. Leary and the FJC completed a very informative study of circuit practices concerning appellate costs. Ms. Leary found that the circuit practices vary due to differences with respect to factors such as the ceilings on the reimbursable cost per page of copying and the number of copies. In *Snyder*, the great bulk of the cost award was due to the cost of copying the briefs and extensive appendices.

At the Committee's request, Judge Sutton sent Ms. Leary's report to the Chief Judges of each circuit; and the circuits are responding to the study. Thus, for example, the Fourth Circuit has amended Fourth Circuit Rule 39(a) to lower the ceiling on reimbursable costs from $ 4.00 per page to 15 cents per page. Chief Judge Easterbrook has commented that there seems to be no need to amend the Seventh Circuit's local rules, but that the Appellate Rules should be amended to set the maximum reimbursement per page, to provide that only actual costs are reimbursable,

and to clarify that reimbursement can be claimed only for the number of copies that are required by local rule. Chief Judge Lynch has disseminated the FJC study to the judges in the First Circuit for their review. In July 2011, the Rules Committees submitted a memo to argue that the proposed bill to amend Civil Rule 68 and Appellate Rule 39
would be unnecessary in light of, inter alia, the circuits' responses to the FJC study and the growing prevalence of electronic filing (which will decrease copying costs). The bill has not been reintroduced in the 112th Congress.

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

B. FRAP-related circuit splits and certiorari petitions

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

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

Judge Sutton asked whether Committee members wished to discuss any of the other cases addressed in the memos. An appellate judge member noted that he had been struck by the procedure employed by the court of appeals in *Karls v. Goldman Sachs Group, Inc.*, 131 S. Ct. 180 (2010). The practice followed in the Ninth Circuit appears to be that if an appeal meets the test for summary affirmance (in the Ninth Circuit, "appeals obviously controlled by precedent and cases in which the insubstantiality is manifest from the face of appellant's brief"), then the panel that summarily affirmed can, if it chooses, reject any petition for rehearing en banc without circulating it to the other active judges. The member noted that when an appeal is controlled by circuit precedent, rehearing en banc would be a particularly important avenue for the litigant seeking to overturn that precedent. A member suggested that the Ninth Circuit's use of this procedure may stem from the docket pressures in that circuit. Another member observed that this procedure ceded authority (over whether to vote to rehear a case en banc) to the judges on the panel.

VIII. Date and Location of Spring 2012 Meeting

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

IX. Adjournment

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

Respectfully submitted,

Catherine T. Struve
Reporter

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Feb. 28, 2012

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 5-6, 2012
Phoenix, Arizona
Draft Minutes

TABLE OF CONTENTS

ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Phoenix, Arizona, on Thursday and Friday, January 5 and 6, 2012. The following members were present:

Judge Mark R. Kravitz, Chair
Dean C. Colson, Esquire
Roy T. Englert, Jr., Esquire
Gregory G. Garre, Esquire
Judge Neil M. Gorsuch
Judge Marilyn L. Huff
Chief Justice Wallace B. Jefferson
Dean David F. Levi
Judge Patrick J. Schiltz
Judge James A. Teilborg
Judge Richard C. Wesley
Judge Diane P. Wood

Deputy Attorney General James M. Cole and Larry D. Thompson, Esquire were unable to attend, but Mr. Thompson participated by telephone. The Department of Justice was represented at the meeting by Elizabeth J. Shapiro, Esquire.

Also participating were the committee's former chair, Judge Lee H. Rosenthal, former lawyer members Douglas R. Cox and William J. Maledon, and the committee's style consultant, Professor R. Joseph Kimble.

Judge Rosenthal chaired a discussion on class action issues with the following panelists: Dean Robert H. Klonoff, a member of the Advisory Committee on Civil Rules; Daniel C. Girard, Esquire, a former member of the advisory committee; and John H. Beisner, Esquire.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Peter G. McCabe	The committee's secretary
Jonathan C. Rose	Rules Committee Officer
Andrea L. Kuperman	Rules law clerk to Judge Kravitz
Joe Cecil	Research Division, Federal Judicial Center
Bernida Evans	Rules Office Management Analyst

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Jeffrey S. Sutton, Chair
Professor Catherine T. Struve, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Eugene R. Wedoff, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Troy A. McKenzie, Associate Reporter
Advisory Committee on Civil Rules —
Judge 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
Professor Nancy J. King, Associate Reporter
Advisory Committee on Evidence Rules —
Judge Sidney A. Fitzwater, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Committee Membership Changes

Judge Kravitz announced with regret that the terms of Messrs. Cox and Maledon had expired on October 1, 2011, and both were attending their last Standing Committee meeting. He thanked them for their distinguished service on the committee, described their many contributions to the committee's work and the rules program, and presented each with a plaque signed by Chief Justice John Roberts, Jr. and Judge Thomas F. Hogan, Director of the Administrative Office.

Judge Kravitz introduced the new committee members, Judge Wesley and Mr. Garre, and he summarized their impressive legal backgrounds. He reported that Mr. Thompson was also a newly appointed member of the committee, but was unable to attend the meeting.

Meeting with Supreme Court Justices

Judge Rosenthal reported on a recent meeting held at the Supreme Court that she had attended with Judge Kravitz, Dean Levi, Professor Coquillette, and former committee chair Judge Anthony J. Scirica. They had an extensive and candid exchange with the Chief Justice and other justices on the rules program. The discussion, she said, touched upon such matters as the openness of the rules process, the procedures followed by the rules committees, the effective use of empirical research to support proposed rule amendments, and the rules committees' ongoing relationships with Congress, the bar, and the academy. The meeting, she said, had been very beneficial and met all the committee's objectives. She added that it would make sense to pursue similar dialogues with the Court every five years or so.

Judicial Conference Report

Judge Kravitz reported that the Judicial Conference at its September 2011 session had approved all the proposed amendments to the rules and forms presented by the committee.

Rules Taking Effect on December 1, 2011

Judge Kravitz referred to the amendments to the appellate, criminal, and evidence rules and the bankruptcy rules and forms that took effect by operation of law on December 1, 2011.

Pending Rule Amendments

Judge Kravitz reported that proposed amendments to the appellate, bankruptcy, civil, criminal, and evidence rules had been published for comment in August 2011. Although public hearings had been scheduled, few requests had been submitted by bench and bar to date to testify on the proposals.

Lawsuit Abuse Reduction Act

Ms. Kuperman reported that the proposed Lawsuit Abuse Reduction Act of 2011 (H.R. 966) would restore the mandatory-sanctions provision of FED. R. CIV. P. 11 (sanctions). Adopted in 1983, she said, the provision simply did not work and was later repealed in 1993. In addition, she said, the proposed legislation would eliminate the beneficial safe-harbor provision of Rule 11(c)(2), added in 1993. It gives a party 21 days to withdraw challenged assertions on a voluntary basis.

She pointed out that Judges Rosenthal and Kravitz had written to the chair of the House Judiciary Committee to oppose the bill. Their letter emphasized that the Federal Judicial Center's empirical research had demonstrated that the 1983 version of Rule 11 had produced wasteful satellite litigation and increased the time and costs of civil litigation. She added that the American Bar Association and other organizations had also sent letters to Congress opposing the legislation.

She noted that the House Judiciary Committee had held a hearing on H.R. 966 in March 2011 and then reported out the bill. But there was no further action in the House, although a companion bill (S. 533) was introduced in the Senate.

Sunshine in Litigation Act

Ms. Kuperman reported that Judges Rosenthal and Kravitz had written to the chair of the Senate Judiciary Committee to oppose the proposed Sunshine in Litigation Act of 2011 (S. 623). The bill would prevent a court from issuing a discovery protective order unless it first makes particularized findings of fact that the order would not restrict the disclosure of information relevant to protecting public health or safety. She noted that the bill, similar to others introduced in past Congresses, had been favorably reported out of committee in May 2011, but there had been no further action on it.

Pleading Standards

Ms. Kuperman reported that no legislation was currently pending in Congress to address civil pleading standards in light of the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

Consent Decrees

Ms. Kuperman noted that legislation (H.R. 3041) had been introduced to limit the duration of consent decrees issued by federal courts that impose injunctive or other prospective relief against state or local programs or officials. The bill, she said, was being monitored closely by the Judicial Conference's Federal-State Jurisdiction Committee. It would not amend the federal rules directly, but could impact the rules in procedural ways. The legislation, she said, had been referred to Congressional committee, but no further action had taken place on it.

Costs and Burdens of Civil Discovery

Ms. Kuperman reported that the House Judiciary Committee Subcommittee on the Constitution had held a hearing in December 2011 on "the costs and burdens of civil discovery." She noted that Judges Kravitz and Campbell had sent a letter to the subcommittee chair providing an update on the advisory committee's various efforts to reduce discovery costs, burdens, and delays. The letter, she said, urged Congress to allow the Advisory Committee on Civil Rules to continue pursuing these issues under the thorough and deliberate process that Congress created in the Rules Enabling Act. She added that Congressional staff had been invited to, and had attended, the advisory committee's recent meeting in Washington. The committee, she added, will continue to keep members and staff of Congress informed of pertinent developments.

Time to File a Notice of Appeal When a Federal Officer or Employee is a Party

Ms. Kuperman reported that the Congress had enacted legislation amending 28 U.S.C. § 2107 to conform it to the December 2011 change in FED. R. APP. P. 4(a)(1) (time to file a notice of appeal in a civil case). The statute mirrors the amended rule and clarifies the time for parties to appeal in a civil case when a federal officer or employee is sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States.

Bankruptcy Legislation

Ms. Kuperman reported that legislation (Pub. L. No. 112-64) had been enacted in December 2011 to extend for another four years the exemption given to qualified reservists and members of the National Guard from application of the means-test presumption of abuse in Chapter 7 bankruptcy cases. She noted that a footnote in an interim bankruptcy rule would have to be updated to incorporate the number of the new public law. In addition, she said, legislation was pending to add some bankruptcy judgeships and increase the filing fee for chapter 11 cases. If enacted, it would require conforming changes to the bankruptcy forms to reflect the higher fee.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rose reported that Judge Thomas F. Hogan had assumed his duties as the new Director of the Administrative Office.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil reported that Judge Jeremy D. Fogel, the new Director of the Federal Judicial Center, had decided to undertake a comprehensive study of case-dispositive motions in civil cases. To that end, he said, the Center was seeking assistance from several law professors to participate in the study and provide law students to help in the research. The Center, he added, was conducting pilot efforts for the project and would present proposals for consideration by the Advisory Committee on Civil Rules at its March 2012 meeting. He suggested that the project would likely be ready to proceed at the start of the next academic year.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of the last meeting, held on June 2-3, 2011.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Sutton and Professor Struve presented the report of the advisory committee, as set forth in Judge Sutton's memorandum and attachments of December 7, 2011 (Agenda Item 10). Judge Sutton reported that the advisory committee had no action items to present.

Informational Items

Judge Sutton thanked the members, reporters, and committee staff for working with congressional staff on the amendment of 28 U.S.C. § 2107 to make it consistent with FED. R. APP. P. 4(a)(1) (time to file a notice of appeal in a civil case). Even though it involved a relatively minor, technical change, he said, it had taken enormous effort and skill to accomplish the legislative action.

He reported that only one comment had been received to date on the advisory committee's proposed amendment to FED. R. APP. P. 28 (briefs) that would remove the requirement that a brief set forth separate statements of the case and of the facts. The comment, from a prominent appellate judge, opposed combining the two statements.

But, he said, the advisory committee believed that the current requirement of separate statements had generated confusion and redundancy. Combining them would provide lawyers with greater flexibility in making their presentations.

Judge Sutton reported that the advisory committee had not reached a consensus on whether to treat federally recognized Indian tribes the same as states for the purpose of filing amicus briefs under FED. R. APP. P. 29(a) (amicus briefs). The committee, though, did reach a consensus that municipalities should be included with Indian tribes if a Rule 29 amendment were pursued. Judge Sutton added that he had sent a letter to the chief judges of all the courts of appeals soliciting their views on the matter.

Judge Sutton reported that Professor Richard D. Freer of Emory Law School, a guest speaker at the advisory committee's recent meeting had complained about the frequency of federal rule changes. Professor Freer argued that frequent changes increase costs, add confusion for lawyers, complicate electronic searches, and may lead to unintended consequences. He suggested that if rule changes were made less often – such as once every several years – the bar would pay more attention to the rules and submit more and better comments. Judge Sutton noted that the advisory committee was taking the criticism to heart and generally supports deferring and bundling amendments where feasible.

A member endorsed the suggestion generally and added that lawyers often complain about the committees "tinkering" with the rules. Other participants pointed out that the advisory committees do in fact bundle rule amendments where possible. Nevertheless, many rule changes are required by legislation, case law developments, and other factors beyond the committees' control.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Wedoff and Professor Gibson presented the report of the advisory committee, as set forth in Judge Wedoff's memorandum and attachments of December 12, 2011 (Agenda Item 8).

Amendments for Publication

FED. R. BANKR. P. 7054(b) and 7008(b)

Judge Wedoff reported that the proposed amendments to FED. R. BANKR. P. 7054 (judgments and costs) and FED. R. BANKR. P. 7008(b) (attorney's fees) would clarify the procedure for seeking the award of attorney's fees in adversary proceedings. Bankruptcy procedures, he explained, are different from those in civil actions in the district courts.

Civil practice is governed by FED. R. CIV. P. 54(d)(2) (attorney's fees), which specifies that a claim for attorney fees be made by motion unless the substantive law requires proving the fees at trial as an element of damages. The bankruptcy rules, though, have no analog to FED. R. CIV. P. 54(d)(2). Instead, attorney's fees are governed by FED. R. BANKR. P. 7008(b), which specifies that a request for the award of attorney's fees be pleaded as a claim in a complaint or other pleading.

The difference between the civil and bankruptcy rules, he said, creates a trap for the unwary, especially for lawyers who practice regularly in the district courts. Moreover, the difference between bankruptcy practice and civil practice has led bankruptcy courts to adopt different, non-uniform approaches to handling fee applications. The largest bankruptcy court in the country, for example, has adopted the civil practice by local rule.

In a recent decision, the Ninth Circuit bankruptcy appellate panel pointed to a gap in the current bankruptcy rules. It noted that when a party follows FED. R. BANKR. P. 7008(b) and pleads its demand for attorney's fees in the complaint, the bankruptcy rules specify no procedure for awarding them. The panel's opinion expressly invited the advisory committee to close the gap by amending FED. R. BANKR. P. 7054. That rule currently incorporates FED. R. CIV. P. 54(a)-(c) and has its own provision governing recovery of costs by a prevailing party. But it has no provision like FED. R. CIV. P. 54(d)(2) governing recovery of attorney's fees.

Judge Wedoff explained that the advisory committee agreed with the bankruptcy appellate panel and decided to conform the bankruptcy rules to the civil rules – thus requiring that a claim for the award of attorney's fees in an adversary proceeding be made by motion. To do so, the proposed amendments incorporate much of FED. R. CIV. P. 54(d)(2) into a new FED. R. BANKR. P. 7054(b)(2) prescribing the procedure for seeking attorney fees. Current FED. R. BANKR. P. 7008(b), requiring that the demand be pleaded in a complaint or other pleading, would be deleted. Judge Wedoff added that FED. R. CIV. P. 54(d)(2)(D), dealing with referral of matters to a master or magistrate judge, would not be incorporated because it is not relevant to the bankruptcy courts.

Judge Wedoff reported that the advisory committee would also correct a long-standing grammatical error in the first sentence of FED. R. BANKR. P. 7054(b) by changing the verb "provides" to "provide."

The committee without objection by voice vote approved publication of the proposed amendments to FED. R. BANKR. P. 7054(b) and the proposed deletion of FED. R. BANKR. P. 7008(b).

Information Items

PART VIII – THE BANKRUPTCY APPELLATE RULES

Judge Wedoff reported that the advisory committee had been engaged for several years in a major project to revise the Part VIII rules. The principal objectives of the project, he said, are: (1) to align Part VIII more closely with the Federal Rules of Appellate Procedure; and (2) to adjust the rules to the reality that bankruptcy court records today are filed, stored, and transmitted electronically, rather than in paper form.

He explained that the advisory committee had made substantial progress and would return to the Standing Committee in June 2012 seeking permission to publish the revised Part VIII rules for public comment. At this point, the advisory committee just wanted to give the Standing Committee a preliminary look at the first half of the rules, explain the principal changes from the current rules, and address any concerns that members might have. He invited the members to bring any suggestions to the advisory committee's attention.

Professor Gibson noted that Part VIII deals primarily with appeals from a bankruptcy court to a district court or bankruptcy appellate panel. If a case proceeds from there to the court of appeals, the Federal Rules of Appellate Procedure take over. In addition, in 2005 Congress authorized direct appeals from a bankruptcy court to a court of appeals in limited circumstances. Accordingly, the new Part VIII rules also contain provisions dealing with permissive direct appeals.

She noted that Part VIII had largely been neglected since 1983, even though the Federal Rules of Appellate Procedure have since been amended on several occasions and completely restyled in 1998. She pointed out that Part VIII was difficult to follow and needs to be reorganized and rewritten for greater ease of use. In addition, it needs to be updated and made more consistent with the current Federal Rules of Appellate Procedure. She emphasized that the proposed revisions were comprehensive in nature. Some rules would be combined, some deleted, and some moved to new locations.

Professor Gibson explained that the advisory committee had conducted two mini-conferences on the proposed rules with members of the bench and bar. The participants, she said, expressed substantial support for the proposed revisions, but several recommended that additional changes be made to take account of the widespread use of technology in the federal courts. They urged the committee to revise the rules to recognize explicitly that court records in bankruptcy cases now are filed and maintained in electronic form.

Judge Wedoff and Professor Gibson noted that the proposed new Part VIII rules largely adopt the style conventions of the other, restyled federal rules. For example, they

consistently use the word "must" to denote an affirmative obligation to act, even though the other parts of the bankruptcy rules still use the word "shall." He pointed out that the Part VIII rules are largely distinct from the rest of the bankruptcy rules. As a result, there should be no problem with using the modern terminology only in Part VIII and not in other bankruptcy rules.

Professor Gibson noted that the advisory committee had revised and reorganized Part VIII so thoroughly that it would not be meaningful to produce a redlined or side-by-side version comparing the old and new rules. Rather, she said, the committee was using the committee notes to specify where particular provisions in the new rules are located in the current rules.

A participant suggested that it would be helpful to produce a chart showing readers where each provision in the current rules has been relocated. Professor Gibson agreed, but explained that some provisions had been broken up and relocated in several different places. Judge Wedoff agreed to work on producing a chart, but added that it might be of limited value because readers will need to examine the new rules as a whole.

FED. R. BANKR. P. 8001

Professor Gibson noted that proposed FED. R. BANKR. P. 8001 (scope and definitions) was new and had no counterpart in the existing rules. Similar to FED. R. APP. P. 1, it sets forth the scope of the Part VIII rules and contains three definitions: (1) "BAP" to mean a bankruptcy appellate panel; (2) "appellate court" to mean either the district court or the BAP to which an appeal is taken; and (3) "transmit" to mean sending documents electronically (unless a document is sent by or to a pro se litigant, or a local court rule requires a different means of delivering the document).

She explained that the advisory committee had deliberately selected the term "transmit" to highlight a specific process with a strong presumption in favor of electronic transfer of a document or record. A member suggested, though, that the proposed definition of "transmit" was not sufficiently forceful and suggested including a stronger affirmative statement that electronic transmission is to be the norm. Judge Wedoff agreed and added that electronic transmission was already universal in the bankruptcy courts except for pro se litigants. Another member cautioned that it is problematic to use a word like "transmit," which has a much broader common meaning, and ascribe to it an intentionally narrower meaning. Perhaps a unique new term could be devised, such as "e-transmit."

Some members questioned the proposed definition of "appellate court" because it contradicted the ordinary meaning of the term, which normally refers to the courts of appeals. Judge Wedoff and Professor Gibson agreed to have the advisory committee reconsider the definition.

FED. R. BANKR. P. 8002

Professor Gibson reported that proposed FED. R. BANKR. P. 8002 (time to file a notice of appeal) must remain in its current place because 28 U.S.C. § 158(c)(2) refers to it by number. She said that the committee had essentially restyled the existing rule and added a provision to cover inmates confined in institutions.

FED. R. BANKR. P. 8003 and 8004

Professor Gibson explained that proposed Rules 8003 (appeal as of right) and 8004 (appeal by leave) would set forth in two separate rules the provisions governing appeals as of right and appeals by leave. The two are combined in the current FED. R. BANKR. P. 8001 (manner of taking an appeal). The proposed revisions, she said, will conform Part VIII to the Federal Rules of Appellate Procedure.

She noted that under the current bankruptcy appellate rules, an appeal is not docketed in the appellate court until the record is complete and received from the bankruptcy clerk. Proposed FED. R. BANKR. P. 8003(d)(2), however, conforms to the Federal Rules of Appellate Procedure and requires the clerk of the appellate court to docket the appeal earlier, as soon as a notice of appeal is received. Proposed FED. R. BANKR. P. 8004 would continue the current bankruptcy practice of requiring an appellant to file both a notice of appeal and a motion for leave to appeal.

FED. R. BANKR. P. 8005

Professor Gibson explained that proposed FED. R. BANKR. P. 8005 (election to have an appeal heard by the district court) governs appeals in those circuits that have a BAP. Under 28 U.S.C. § 158(c)(1), an appeal in those circuits is heard by the BAP unless a party to the appeal elects to have it heard by the district court. The proposed rule provides the procedure for exercising that election, and it eliminates the current requirement that the election be made on a separate document. Instead, a new Official Form will be devised for the election. Proposed Rule 8005(c) specifies that a party seeking a determination of the validity of an election must file a motion in the court in which the appeal is then pending.

FED. R. BANKR. P. 8006

Professor Gibson noted that proposed FED. R. BANKR. P. 8006 (certification of a direct appeal to the court of appeals) overlaps substantially with the Federal Rules of Appellate Procedure. Under 28 U.S.C. § 158(d)(2), a case may be certified for direct appeal from a bankruptcy court in three ways. First, the bankruptcy court, the district court, or the BAP may make the certification itself based on one of the direct appeal criteria specified in 28 U.S.C. § 158(d)(2)(A). Second, the certification may be made by all the parties to the appeal. Third, the bankruptcy court, district court, or BAP must make the certification if a majority of the parties on both sides of the appeal ask the court to make it.

Judge Wedoff explained that the proposed rule provides the procedures for implementing each of the three options. Since the bankruptcy court is likely to have the most knowledge about a case, proposed Rule 8006(b) specifies that a case will remain pending in the bankruptcy court, for purposes of certification only, for 30 days after the effective date of the first notice of appeal. The 30-day hold gives the bankruptcy court time to make a certification. Once the certification has been made, the case is in the court of appeals, and the request for permission to take a direct appeal must be filed with the circuit clerk within 30 days. The court of appeals has discretion to take the direct appeal, and the procedure is similar to that under 28 U.S.C. § 1292(b).

Judge Sutton reported that the Advisory Committee on Appellate Rules was working closely with the bankruptcy advisory committee on revising the Part VIII rules, with Professor Struve and Professor Amy Barrett serving as liaisons to the project. He noted that the appellate advisory committee had drafted corresponding changes in FED. R. APP. P. 6 (appeal in a bankruptcy case) by adding a new subdivision 6(c) to address permissive direct appeals from a bankruptcy court.

He reported that appellate advisory committee members had questioned the choice of the verb "transmit" in FED. R. APP. P. 6 and debated several other potential terms. In addition, he said, concern had been voiced over the wisdom of introducing a new term, such as "transmit,""provide," or "furnish," but only in FED. R. APP. P. 6. It would be inconsistent with the terminology used in the other appellate rules. The appellate courts, moreover, are not as far advanced with electronic filing as the bankruptcy courts and may not be ready to receive other types of appeals in the same manner as bankruptcy appeals. But, he added, it may well be acceptable as a practical matter to live with two different verbs in the rules for a while. A member suggested using the term "send," but Judge Sutton pointed out that in the electronic environment, the clerk of the bankruptcy court may merely provide the appellate court with links to the bankruptcy court record, rather than actually send or transmit the record to the appellate court.

Judge Sutton suggested convening an ad hoc subcommittee, comprised of at least one person from each advisory committee, to consider a uniform way of describing the transmission of records throughout the federal rules. Several participants endorsed the concept and emphasized the desirability of using the same language across all the rules. Others warned, though, that the project could be very complicated because many other provisions in the rules also need to be amended to take account of technology, and they cited several examples. A member cautioned that whatever terminology is selected must accommodate the continuing need for paper records and paper copies.

Professor Gibson said that the new bankruptcy appellate rules, scheduled to be published in August 2012, will be the test case for the new terminology. Judge Sutton added that eventually all the federal rules will have to be accommodated to the electronic world. But that project, he said, will take considerable time to accomplish. He emphasized that the immediate problem facing the advisory committees was to decide before publication on the right terminology for the proposed new Part VIII bankruptcy rules and the amendments to FED. R. APP. P. 6.

Judge Kravitz appointed Judge Gorsuch to chair an ad hoc subcommittee to consider devising a standard way of describing electronic filing and transmission throughout the rules. He asked the chairs of the appellate, bankruptcy, civil, and criminal advisory committees to provide at least one representative each.

FED. R. BANKR. P. 8007

Professor Gibson noted that proposed FED. R. BANKR. P. 8007 (stay pending appeal) would continue the practice of current FED. R. BANKR. P. 8005 that requires a party ordinarily to seek relief pending an appeal in the bankruptcy court first.

A member pointed out that proposed Rule 8007(b)(2) did not provide for the situation in which a bankruptcy court fails to issue a timely ruling. He said that the Federal Rules of Appellate Procedure in that circumstance authorize a party to ask the court of appeals for relief. Professor Gibson replied that the advisory committee will consider the matter.

FED. R. BANKR. P. 8008

Professor Gibson explained that proposed FED. R. BANKR. P. 8008 (indicative rulings) had been adapted from the new indicative ruling provisions in the civil and appellate rules. Proposed FED. R. BANKR. P. 8008(a) is parallel to FED. R. CIV. P. 62.1. It specifies what action a bankruptcy court may take on a motion for relief that it lacks authority to grant because an appeal has been docketed and is pending. The moving party must notify the appellate court if the bankruptcy court states either that it would grant the motion or the motion raises a substantial issue.

She pointed out that the rule is complicated because an appeal may be pending in the district court, the BAP, or the court of appeals. Proposed FED. R. BANKR. P. 8008(c) governs the indicative ruling procedure in the district court and the BAP, while FED. R. APP. P. 12.1 takes over if the appeal is pending in the court of appeals.

FED. R. BANKR. P. 8009 and 8010

Professor Gibson reported that proposed FED. R. BANKR. P. 8009 (record and issues on appeal) and FED. R. BANKR. P. 8010 (completing and transmitting the record) would govern the record on appeal. They apply to direct appeals to the court of appeals, as well as to appeals to the district court or BAP.

Rule 8009 differs from the Federal Rule of Appellate Procedure because it continues the current bankruptcy practice of requiring the parties to designate the record on appeal. That procedure is necessary because a bankruptcy case is a large umbrella that may cover thousands of documents, of which only a few may be at issue on appeal.

Proposed FED. R. BANKR. P. 8009(f) would govern sealed documents. If a party designates a sealed document as part of the record, it must identify the document without revealing secret information and file a motion with the appellate court to accept it under seal. If the motion is granted, the bankruptcy clerk transmits the sealed document to the appellate court.

Professor Gibson noted that the advisory committee was still refining proposed FED. R. BANKR. P. 8010 to specify a court reporter's duty to provide a transcript and file it with the appellate court. The majority of bankruptcy courts, she said, record proceedings by machine. A transcript is prepared by a transcription service when ordered through the clerk. She suggested that the court reporters may not always know in which court an appeal is pending and where they must file the transcript.

FED. R. BANKR. P. 8011

Professor Gibson reported that proposed FED. R. BANKR. P. 8011 (filing, service, and signature) had been derived from current FED. R. BANKR. P. 8008 (filing and service) and FED. R. APP. P. 25 (filing and service). She noted that it followed the format, style, and some of the detail of FED. R. APP. P. 25, but placed more emphasis on electronic filing and service.

FED. R. BANKR. P. 8012

Professor Gibson reported that proposed FED. R. BANKR. P. 8012 (corporate disclosure statement) was a new provision derived from FED. R. APP. P. 26.1.

RULES AND FORMS PUBLISHED FOR COMMENT IN AUGUST 2011

Judge Wedoff reported that the advisory committee had received 11 comments and one request to testify on the proposed rules and forms published in August 2011. The only significant area of concern reflected in the comments, he said, related to the proposed amendment to Official Form 6C, dealing with exemptions. Prompted by the Supreme Court's decision in *Schwab v. Reilly*, 130 S. Ct. 2652 (2010), the revised form would give debtors the option of stating the value of their claimed exemptions as "the full fair market value of the exempted property." Some trustees, he said, are concerned that the change will encourage people to claim the entire value of the property even though they are not entitled to it.

STERN V. MARSHALL

Judge Wedoff reported that the advisory committee was continuing to monitor case law developments in the wake of the Supreme Court's decision in *Stern v. Marshall,* 131 S. Ct. 2594 (2011). He pointed out that Professor McKenzie was leading the committee's efforts and had identified three concerns.

First, he said, the scope of the decision was unclear. The holding itself was narrow. It stated that even though that the Bankruptcy Code designates a counterclaim by a bankruptcy estate against a creditor as a "core" bankruptcy proceeding that a bankruptcy judge may decide with finality, that statutory grant of authority is inconsistent with Article III of the Constitution. A non-Article III bankruptcy judge cannot exercise the authority constitutionally because the counterclaim is really a non-bankruptcy matter.

It is not clear, he said, whether the constitutional prohibition will be held to apply to other matters designated by the statute as "core," especially fraudulent conveyance claims. The Supreme Court, he explained, has previously described fraudulent conveyance actions as essentially common law claims like those usually reserved to the Article III courts.

Second, there is uncertainty over the extent to which litigant consent may cure the defect and authorize a bankruptcy judge to hear and finally determine a proceeding that would otherwise fall beyond the judge's authority. The governing statute, 28 U.S.C. § 157(b) and (c), specifies that a bankruptcy judge may decide "core" bankruptcy proceedings with finality. If a matter is not a "core" proceeding, the bankruptcy judge

may only file proposed findings and conclusions for disposition by the district court, unless the parties consent to entry of a final order or judgment by the bankruptcy judge.

The bankruptcy rules, he explained, currently contain a mechanism for obtaining litigant consent, but only in "non-core" proceedings. FED. R. BANKR. P. 7008(a) (general pleading rules) provides that parties must specify in their pleadings whether an adversary proceeding is "core" or "non-core" and, if "non-core," whether the pleader consents to entry of final orders or judgment by the bankruptcy judge. The problem, he said, is that the term "core" now is ambiguous. As a result of *Stern v. Marshall*, he suggested, there are now statutory "core" proceedings, enumerated in 28 U.S.C. § 157(b), and constitutional "core" proceedings. The advisory committee, he said, was considering proposed rule amendments to resolve the ambiguity.

Third, there is a potential for reading *Stern v. Marshall* as having created a complete jurisdictional hole in which a bankruptcy court may not be able to do anything at all in some cases – either to enter a final order or to submit proposed findings and conclusions. He explained that 28 U.S.C. § 157(c) specifies that if a matter is not a "core" proceeding under 28 U.S.C. § 157(b), a bankruptcy judge may enter proposed findings of fact and conclusions of law for disposition by the district court. After *Stern v. Marshall*, some statutory "core" proceedings are now unconstitutional for the bankruptcy court to decide with finality. Therefore, there is a question as to whether 28 U.S.C. § 157(c), which specifically authorizes a bankruptcy judge to issue proposed findings and conclusions in "a matter that is not a core proceeding," refers only to matters that are not core under 28 U.S.C. § 157(b) or also includes matters that are not "core" under the Constitution.

If § 157(c) refers only to matters that are not "core" under the statute, bankruptcy judges would have no authority to issue proposed findings and conclusions of law in matters that the statute explicitly defines as "core" matters. And for some of these statutory "core" matters, the Constitution prevents bankruptcy judges from entering a final judgment. The potential void, he said, could arise relatively frequently. It would apply to all counterclaims by a bankruptcy estate against creditors filing claims against the estate, and it might also be held to include fraudulent conveyance cases.

QUARTERLY REPORTING BY ASBESTOS TRUSTS

Judge Wedoff reported that the advisory committee had decided to take no action on a proposal for a new rule that would require asbestos trusts created in accordance with § 524(g) of the Bankruptcy Code to file quarterly reports with the bankruptcy courts. The committee, he said, had concerns over its authority to issue a rule to that effect under the Rules Enabling Act because the trusts are created at the conclusion of a chapter 11 case. He noted that the committee had obtained input on the proposal from various interested organizations, and the great majority stated that a rule was not appropriate.

FORMS MODERNIZATION PROJECT

Judge Wedoff reported that the advisory committee's forms modernization project was making substantial progress and was linked ultimately to the Administrative Office's development of the Next Generation electronic system to supersede CM/ECF. He said that the new forms produced by the committee had been designed in large measure to take advantage of electronic filing and reporting. They are clearer, easier to read, and have instructions integrated into the questions. As a result, though, some attorneys have complained that the new forms are appreciably longer than the current versions and will require more time to complete.

The advisory committee, he said, was very sensitive to these concerns and was trying to shorten the forms where possible, while still eliciting more accurate information. Moreover, he said, the length of the forms will be substantially reduced by not having separate instructions filed.

He added that the advisory committee would like to expedite implementation of the new forms, especially consumer forms that deal with debtor income and expenses. The committee, he said, was planning to bring some of the forms to the Standing Committee at its next meeting and seek authority to publish them for public comment.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Campbell and Professor Cooper presented the report of the advisory committee, as set forth in Judge Campbell's memorandum and attachments of December 2, 2011 (Agenda Item 6). Judge Campbell reported that the advisory committee had no action items to present.

Information Items

POTENTIAL RULE ON PRESERVATION FOR FUTURE LITIGATION

Judge Campbell reported that a panel at the May 2010 Duke Law School conference on civil litigation had urged the advisory committee to adopt a new national rule governing preservation of evidence in civil cases. The panel, he said, presented the outline of a proposed preservation rule, including eight specific elements that it said needed to be addressed in order to provide appropriate guidance to bench and bar. The proposal, he said, had been referred to the committee's discovery subcommittee, and Ms. Kuperman was asked to prepare a memorandum on the state of the law regarding preservation obligations and sanctions.

Judge Campbell pointed out that the committee's research revealed that federal case law is unanimous in holding that the duty to preserve discoverable information is triggered when a party reasonably anticipates being a party to litigation. But, he said, no consensus exists in the case law regarding: (1) when a party should reasonably anticipate being brought into litigation; and (2) the extent of the preservation duty. Rather, the law is fact-driven and left to resolution on a case-by-case basis.

As for the law on sanctions for failure to preserve, the courts of appeals are in disagreement. Some circuits hold that mere negligence is sufficient for a court to invoke sanctions, while others require some form of willfulness or bad faith before sanctions may be imposed. Some courts, moreover, have tried to specify what kinds of conduct may result in what kinds of sanctions.

Judge Campbell reported that the advisory committee wanted to ascertain the extent of preservation problems, and it asked the Federal Judicial Center to study the frequency of spoliation motions in the federal courts. That study, conducted by Emery Lee, reviewed over 131,000 cases filed in 19 district courts in 2007 and 2008. It found that spoliation motions had been filed in only 209 cases, or 0.15% of the total. About half those motions related to electronically stored information. The study revealed, moreover, that sanctions had been imposed against both plaintiffs and defendants.

In addition, the committee examined the existing laws that impose preservation obligations. It found that there is a substantial body of statutes that deal with preservation, covering many different subjects. But no coherent pattern emerges from them.

Judge Campbell reported that the discovery subcommittee had focused on what elements should be included in a proposed rule, and Professor Marcus produced initial discussion drafts to show three different possible approaches to a rule. The first was a very detailed rule, as proposed by the Duke panel. It included specific provisions giving examples of the types of events that constitute reasonable anticipation of litigation and trigger a duty to preserve. It addressed the scope of the duty to preserve, including the subject matter, the sources of information, the types of information, and the form of preservation. It also laid out time limits on the scope of the duty, such as how far back a custodian must retain information and how long the obligation to preserve continues. It contained a presumptive number of record custodians who must be identified and instructed to preserve information. The rule was also detailed on sanctions, specifying what kinds of conduct will lead to what kinds of sanctions.

The second proposed rule, he said, was substantially more general, addressing the trigger, scope, and duration of the duty to preserve and the selection of sanctions, but in less detail. Essentially, it directed parties to behave reasonably in all dimensions.

The third proposed rule addressed only sanctions and did not specify the trigger, scope, or duration of preservation obligations. Instead, it focused exclusively on the area of greatest concern to lawyers and their clients – the area, moreover, where there is the greatest disagreement and uncertainty in the law. The expectation was that by addressing the key problem of sanctions, the rule would give guidance to the people who make preservation decisions and relieve much of the uncertainty about the trigger and scope of the duty to preserve.

The third rule also distinguished between sanctions and curative measures. The latter consist of targeted actions designed to cure the consequences flowing from a failure to preserve information, such as allowing extra time for discovery or requiring the party who failed to preserve to pay the costs of seeking substitutes for the missing information. Under the proposed rule, remedial measures could be imposed if a preservation duty were not followed.

Imposition of more serious sanctions – such as an adverse inference instruction, claim preclusion, dismissal, or entry of judgment – would require something more than a mere failure to preserve. A showing would have to be made of some kind of knowing conduct, such as willfulness or bad faith. The rule also laid out the factors that a judge should consider in imposing sanctions, including the level of notice given the custodians, the reasonableness and proportionality of the efforts, whether there was good faith consultation, the sophistication of the parties, the actual demands made for preservation, and whether a party sought quick guidance from a judge.

Judge Campbell reported that the three rules had been discussed at a one-day mini-conference in Dallas in September with invited attorneys, judges, law professors, and technical experts. The committee, he said, heard very thoughtful, competing views from the participants. The discussions were very helpful, and several participants submitted papers elaborating on their positions.

In essence, he said, corporate representatives argued that the sheer cost of preserving information in anticipation of litigation is an urgent problem that calls for a strong, detailed rule providing clear guidance to record custodians. In particular, they complained about the uncertainty that corporations face in not knowing where and when a suit will be filed against them, what the claims will be, and what information may be relevant in each case. They are concerned about the heavy costs of over-preserving information. But, more importantly, they fear the harm to their reputation that may result from accusations of spoliation.

On the other hand, plaintiffs' lawyers argued that a detailed national rule would lead to greater destruction of information because of its negative implications. It would encourage custodians to destroy information not explicitly spelled out in the rule. They emphasized that there will always be information that simply does not fit within the details of a rule, but must nevertheless be preserved.

Department of Justice representatives argued that case law should be allowed to continue running its course, and no preservation rule should be adopted at this time. They argued, in particular, that the first of the three proposed rules would lead to over-preservation by government agencies, as they would be forced to preserve records whenever there is a dispute over a claim with the government.

Judge Campbell noted that the discovery subcommittee met at the close of the mini-conference and later by telephone. It then reported in detail on the mini-conference at the full advisory committee's November 2011 meeting. After lengthy discussion, the committee decided that the subcommittee needed to continue to receive input and explore the three potential options. Under its new chair, Judge Paul W. Grimm, the subcommittee will continue to consider all the issues as open and report back at the advisory committee's March 2012 meeting.

Several members suggested that the first of the three proposed rules, the detailed option, would not be workable because of the endless variety of possible situations that may arise. A detailed new national rule, moreover, could lead to satellite litigation, as with the 1983 amendments to FED. R. CIV. P. 11 (sanctions). A sanctions-only rule, on the other hand, such as the third proposal, would resolve the serious split among the circuits on the law of sanctions, and it might well be effective in sending strong signals regarding pre-litigation conduct.

Judge Campbell suggested that even if the committee were to adopt a new federal rule on spoliation, a myriad of different rules will still exist in the state courts. Accordingly, there will not be national uniformity in any event. The problems of uncertainty will continue because state law often governs preservation obligations. A participant added that the rules on preservation are largely rules of attorney conduct, which lie within the traditional province of the states. Because of the relevance of state law, the federal courts would be on stronger jurisdictional grounds if the rule were limited to sanctions.

A member added that in most cases no federal proceeding is pending when the duty to preserve first attaches. It was suggested that the advisory committee take a limited focus because it may lack authority under the Rules Enabling Act to adopt pre-litigation preservation standards.

A participant pointed out that the scope of the obligation to preserve before trial is related to the scope of discovery under FED. R. CIV. P. 26(b)(1). Therefore, it may not be possible to have a rule that narrows the scope of what information must be preserved before a case is filed if that provision is at odds with what information must be produced in discovery after a case is filed. Moreover, apart from the duty to preserve certain records and information, substantial additional cost is incurred in searching the

information. Thus, even if it were inexpensive just to preserve information, it would still be expensive for the parties to search through it. Therefore, it might be necessary to reconsider the scope of discovery under Rule 26(b)(1).

FED. R. CIV. P. 45

Judge Campbell reported that the proposed amendments to Rule 45 (subpoena) had been published in August 2011. They make four basic changes: (1) simplifying the rule by having a subpoena issued in the name of the presiding court, authorizing nationwide service, and having local enforcement in the district where the witness is; (2) allowing the court where discovery is taken in appropriate instances to send disputes back to the court presiding over the case; (3) overruling the *Vioxx* line of cases that authorize subpoenas for out-of-state parties and a party's corporate officers to testify at trial from a distance of over 100 miles; and (4) clarifying the obligation of a serving party to provide notice.

He said that a public hearing had been scheduled for January 27, 2012, but the committee had received only two requests to testify. As a result, the hearing may be canceled and the requesting parties asked to put their views in writing or participate in a teleconference.

DUKE CONFERENCE SUBCOMMITTEE

Judge Campbell reported that a subcommittee chaired by Judge John G. Koeltl was studying the many recommendations for improvements in civil litigation made by participants at the May 2010 Duke Law School conference. He noted that the subcommittee was focusing on five categories of proposals to implement suggestions made at the conference.

First, one of the common themes voiced by lawyers at the conference was that judges need to be more active in case management. But merely promulgating additional rules will not produce better managers. Therefore, the subcommittee was coordinating with the Federal Judicial Center to improve judicial education programs and enhance informational resources. Among other things, a new civil case-management section of the *Benchbook for U.S. District Court Judges* had been drafted.

Second, Judge Campbell noted that efforts were being made to tap into local efforts around the country to test new procedures for managing litigation. A number of case-management pilot programs were underway, and the committee was working with the Federal Judicial Center to identify and monitor them. In addition, the committee would ask chief judges around the country to keep it informed about pertinent local developments.

Judge Campbell reported that one of the initiatives that the committee was encouraging was a project to develop a standard protocol for initial discovery in employment discrimination cases. Drafted jointly by lawyers representing both plaintiffs and defendants, the protocol identifies the information that each side must exchange at the outset of an employment case, without the need for depositions or interrogatories. No objections are allowed except for attorney-client privilege. The protocol, he said, will be made available to all federal courts, and all the judges on the advisory committee will adopt it and encourage their colleagues to do the same.

Third, the advisory committee had encouraged additional empirical work, especially by the Federal Judicial Center, on how federal courts are actually handling their cases on a daily basis. One study by the Center was focusing on the early stages of a civil case, including initial scheduling orders, Rule 26(f) planning conferences, and Rule 16(b) initial pretrial conferences. The study revealed that court dockets show that the initial scheduling orders required by FED. R. CIV. P. 16(b)(1) are issued in only about half the civil cases in the district courts. But, he cautioned, docket information may not be sufficiently reliable because there are no uniform ways of recording the pertinent data, and the absence of public records may be the result of inadequate docketing practices. In addition to reviewing the docket sheets, the Center will conduct a survey of lawyers to ascertain what events occurred early in their cases.

Fourth, Judge Campbell noted that the committee had invited judges and lawyers from the Alexandria Division of the Eastern District of Virginia to discuss their experiences with that court's "rocket docket." He added that all the judges on the court share a common philosophy that cases must be handled promptly, and the bar works very well within that court culture.

Fifth, Judge Campbell said that several specific rule amendments were being considered in light of the Duke Conference, including: reducing the time to hold an initial case management conference from 120 to 60 days; eliminating the moratorium on discovery until after the Rule 26(f) conference is held; requiring parties to talk to the court about discovery problems before filing motions; amending Rule 26 to emphasize the importance of proportionality; reducing obstructive objections; limiting the presumed number of depositions in a case to five and the presumptive maximum time of a deposition from seven hours to four; reducing the presumptive number of interrogatories below the current 25; postponing contention interrogatories until later in a case; reducing service time; mandating that judges hold a scheduling conference; and emphasizing in Rule 1 that lawyers must cooperate with each other. He added that rules language was being drafted to help in considering these various ideas.

Professor Cooper added that another area for potential rulemaking was the relationship between pleading motions and discovery. Two competing proposals had been offered. One would suspend discovery until the court rules on a motion to dismiss

for failure to state a claim. The other would create a presumption in favor of ruling on a motion to dismiss only after some discovery has occurred.

Judge Campbell said that the central theme at the Duke conference had been that parties generally believe that civil litigation takes too long and costs too much. The advisory committee, he said, was contemplating conducting a "Duke II" conference, but had not yet made a decision on the matter.

PLEADING STANDARDS

Professor Cooper reported that the advisory committee had no immediate plans to propose rule amendments dealing with pleading standards. The committee was actively reviewing the developing case law, and the Federal Judicial Center was continuing to conduct empirical research on the frequency of motions to dismiss and their disposition.

The Center's research had found a statistically significant increase in the number of motions filed, but not in the rate of granting motions. It was not possible to tell whether more cases were being dismissed out of the system because courts often grant motions to dismiss with leave to amend. A follow-up study by the Center had shown no statistically significant increase in plaintiffs excluded from the system by motions to dismiss or cases terminated by motions to dismiss, other than in financial instrument cases. On the other hand, some law professors have conducted their own research and claim that there has in fact been an increase in dismissals from the system.

Professor Cooper noted that the advisory committee had been presented with a large number of suggested changes in pleading standards and various suggestions for integrating pleading practice with discovery practice. He noted that there were many opportunities and possibilities for rule changes, but the committee was not contemplating proposing any rule for publication in the coming year.

PLEADING FORMS

Professor Cooper pointed out that FED. R. CIV. P. 84 (forms) specifies that the illustrative civil forms in the appendix "suffice" under the rules. He noted specifically that the form for pleading negligence had been approved by the Supreme Court in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 565 n.10 (2007). But lower federal courts have found a tension between Supreme Court cases and the current pleading forms, especially Form 18 (complaint for patent infringement).

The larger question, he said, was why the committee was still in the forms business. There was a clear need for illustrative forms in 1938 to show the bar how the new federal rules would work in practice. That objective, however, may no longer be important. Moreover, the committee has generally not paid a great deal of attention to

the forms over the years. Although some, such as Form 5 (notice of a lawsuit) and Form 6 (waiver of service of a summons) had been very carefully coordinated with FED. R. CIV. P. 4(d) (waiver of service), most forms do not receive much attention.

He noted that the advisory committees have adopted different approaches towards drafting forms, and the forms are used in different ways for different purposes. The civil and appellate forms, for example, are promulgated through the full Rules Enabling Act process. The official bankruptcy forms, on the other hand, follow the first several steps of that process, but are prescribed by the Judicial Conference. The criminal forms do not go through the Rules Enabling Act process at all. They are drafted by the Administrative Office with some consultation with the criminal advisory committee..

The Standing Committee, he said, had appointed an ad hoc subcommittee on forms, composed of members of the advisory committees, to consider the appropriate role of the committees in preparing forms. Among other things, the subcommittee will consider whether the current variety of approaches is appropriate or whether there is a need for more uniformity. There appears to be little support for adopting a uniform approach, as sufficient coordination may be achieved through the Standing Committee's review of the advisory committees' recommendations. The subcommittee will also consider whether it is advisable for any of the forms to continue to follow all the steps of the full Rules Enabling Act process. He added that there was no urgency in making those decisions.

CLASS ACTIONS

Judge Campbell reported that the advisory committee had recently formed a subcommittee on class actions, chaired by Judge Michael W. Mosman, and it had begun to identify issues that might possibly warrant future rulemaking.

Professor Marcus provided background on the development of Rule 23. He explained that after the important 1966 amendments to FED. R. CIV. P. 23 (class actions), the advisory committee took no action on class actions for 25 years. In 1991, the Judicial Conference, on the recommendation of its ad hoc committee on asbestos litigation, directed the committee to study whether Rule 23 should be amended to improve the disposition of mass tort cases.

In response, the committee considered a wide range of different possible changes in the rule and sought extensive input from the bench and bar. In 1996, it published a limited number of significant amendments. They would have required a court to consider whether a class claim is sufficiently mature and whether the probable relief to individual class members justifies the costs and burdens of class litigation (commonly referred to as the "just ain't worth it" test). They would also have explicitly permitted certification of settlement classes and a discretionary interlocutory appeal from certification decisions.

During the publication period, the proposed amendments to revise the certification process proved to be very controversial. Moreover, the Supreme Court issued its decision in *Amchem Products, Inc. v. Windsor,* 521 U.S. 591 (1997), dealing with settlement certification. As a result, the committee decided to proceed only with the proposed addition of Rule 23(f) authorizing a discretionary interlocutory appeal. That provision took effect in 1998 and has proved successful.

In 2000, the committee continued working on the rule. Its additional efforts resulted in several amendments that took effect in 2003, including improving the timing of the court's certification decision, strengthening the process for reviewing proposed class-action settlements, and authorizing a second opt-out opportunity for certain class members to seek exclusion from the settlement. It also added Rule 23(g) governing the appointment of class counsel, including interim class counsel, and Rule 23(h) governing the award of attorney's fees.

Judge Campbell pointed out that the amendments pursued by the advisory committee did not address the problems of overlapping classes, recurrent efforts to certify a class through judge-shopping, or recurrent efforts to approve a settlement. Professor Cooper, he noted, had devised creative ideas on addressing those issues by rule, but they attracted too much controversy.

Judge Campbell reported that the advisory committee was considering whether Rule 23 needs to be amended to take account of several recent developments, including enactment of the Class Action Fairness Act and recent class-action case law. The committee, he said, had compiled a list of potential issues that might be addressed and was considering whether the time was ripe to give further consideration to Rule 23. On the other hand, he said, any significant change in the rule would likely be controversial, and the committee has several other, more important projects on its agenda.

INTERLOCUTORY APPEAL FROM ATTORNEY-CLIENT PRIVILEGE DECISION

Professor Cooper reported that a suggestion had been referred to the advisory committee for a rule amendment that would allow appeal by permission from an order granting or denying discovery of materials claimed to be protected by attorney-client privilege. Although referred to the civil committee, he said, the matter should also be considered by the other advisory committees.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raggi and Professor Beale presented the report of the advisory committee, as set forth in Judge Raggi's memorandum and attachments of December 12, 2011 (Agenda Item 9).

Amendments for Final Approval

FED. R. CRIM. P. 16(a)(2)

Judge Raggi reported that the advisory committee was proposing an amendment to FED. R. CRIM. P. 16(a)(2) (discovery and inspection) that would clarify an ambiguity introduced during the 2002 restyling of the criminal rules. The change would make it clear that the restyling of the rule had made no change in the protection given to government work product.

She explained that Rule 16(a) allows a defendant to inspect papers and materials held by the government. Before restyling, Rule 16(a)(1)(C) had contained enumerated exceptions to that access, including one for the government's work product. The restyled rule, however, eliminated the exceptions.

The district courts, she said, have rejected claims that the 2002 amendments had changed the substance of the rule, using the doctrine of a "scrivener's error" to deny access by the defendant to the government's work product. As a result, there appear to be no serious practical problems and no urgency to make a correction. Nevertheless, she said, the advisory committee agreed unanimously that it was inappropriate to have an ambiguous restyled rule and decided to pursue an amendment.

The committee, she pointed out, believed that the proposed change was technical and could be made without publication. Nevertheless, it recognized that the Standing Committee needed to make that policy decision.

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

Information Items

FED. R. CRIM. P. 6(e)

Judge Raggi reported that the advisory committee was considering the Attorney General's recommendation to amend FED. R. CRIM. P. 6(e) (recording and disclosing grand jury proceedings). The amendment would provide procedures for authorizing disclosure of historically significant grand jury materials after a suitable period of years.

The proposal, she said, was in response to a district court decision that ordered the release of grand jury materials dealing with President Nixon's testimony before the Watergate grand jury. The district court issued the release order relying on its inherent

authority, even though FED. R. CRIM. P. 6(e) contains no provision expressly authorizing release of the materials.

She noted that the Department of Justice did not agree that the court had inherent authority to order disclosure, but it did not appeal the decision. Instead, it asked the advisory committee to amend Rule 6 to allow disclosure after a specified period of years. The proposal, she said, was being studied by a subcommittee chaired by Judge John F. Keenan.

FED. R. CRIM. P. 16

Judge Raggi reported that the advisory committee – after extensive study and debate – had decided not to pursue amendments to FED. R. CRIM. P. 16 (discovery and inspection) to codify the duty of prosecutors to turn over exculpatory information to the defendant. The committee, however, agreed to address the matter in a "best practices" section of the *Benchbook for U.S. District Court Judges.* She said that she had met with Judge Paul L. Friedman, chairman of the Federal Judicial Center's Benchbook Committee, and a draft section had been prepared.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Fitzwater and Professor Capra presented the report of the advisory committee, as set forth in Judge Fitzwater's memorandum and attachments of November 28, 2011 (Agenda Item 11). Judge Fitzwater noted that the advisory committee had no action items to present.

Information Items

SYMPOSIUM ON THE RESTYLED FEDERAL RULES OF EVIDENCE

Judge Fitzwater reported that the restyled Federal Rules of Evidence had taken effect on December 1, 2011. The advisory committee, he said, had held its October 2011 meeting in Williamsburg, Virginia, at the William and Mary Marshall-Wythe College of Law. The meeting was preceded by a symposium on the restyled rules, hosted by William and Mary at the committee's request.

FED. R. EVID. 801(d)(1)(B)

Judge Fitzwater noted that the advisory committee was considering a proposal to amend Rule 801(d)(1)(B) (hearsay exemption for certain prior consistent statements). It would make prior consistent statements admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility. The amendment, he said, was based on the premise that there is no meaningful distinction between substantive and rehabilitative use of prior consistent statements. The needed jury instruction, moreover, is almost impossible for jurors to understand.

He noted that there was a difference of opinion in the advisory committee on whether to pursue a change in the rule, and the members would appreciate receiving any further advice from the Standing Committee on the matter. He also noted that the committee, with the help of the Federal Judicial Center, was planning to send a questionnaire to all district judges soliciting their views on the advisability of the proposed amendment.

A member supported making the proposed change in Rule 801, but cautioned against sending out questionnaires to all judges on potential rule changes, especially where a proposed rule is not particularly significant. He said that it could set a bad precedent for other committees to send out surveys on a regular basis.

PRIVILEGES PROJECT

Judge Fitzwater reported that the advisory committee undertook a project several years ago to compile the federal common law on evidentiary privileges. The initiative, he said, was not intended to result in a codification of the evidentiary privileges or in new federal rules. Rather, it was expected to lead to a Federal Judicial Center monograph providing a restatement of the federal common law. Because of the potential sensitivity of the project, however, the committee decided not to proceed further without Standing Committee guidance and approval.

Professor Capra explained that the committee had undertaken similar types of projects in the past. For example, when Congress enacted the evidence rules in 1975, it made several changes in the rules proposed by the judiciary, but it did not change the accompanying committee notes. As a result, some of the notes are inconsistent with the text of the rules. At the committee's request, he compiled the inconsistencies and produced a Federal Judicial Center monograph under his own name. Later, the advisory committee authorized him to write a monograph on the discordance between some of the rules and the prevailing case law. Both publications were very helpful to the bar.

Professor Capra said that the law of privileges is very important, but it is not codified. The advisory committee began developing a set of privilege rules to reflect the federal common law. After initial efforts, the project, under the leadership of Professor Kenneth S. Broun, was deferred because of the committee's other priorities, such as restyling the rules. He added that the project was a low priority for the committee and would be put aside if other matters need attention. After having completed the restyling project, however, the committee now has a light pending agenda.

Members asked whether the advisory committee itself was planning to approve the work and whether the project was the best use of the committee's time and the judiciary's limited resources. Several agreed that it would be a beneficial project, but it should have a relatively low priority. Judge Kravitz added that it was fine to produce the paper, but he would not recommend giving it official advisory committee approval.

A participant recommended that the project continue because there has been recurring interest by Congress over the years in enacting privileges by law. Professor Capra added that since 1996, the advisory committee had been asked to comment on six different proposals dealing with privileges.

A member said that the Standing Committee should defer to the advisory committee's best judgment on the matter. If the advisory committee finds the project useful, especially since Congress may ask for input on privileges, it should continue.

Judge Fitzwater and Professor Capra suggested allowing Professor Broun to continue on the work on the matter and report to the advisory committee as needed at its meetings. A committee consensus developed to adopt their suggestion.

COMMITTEE JURISDICTIONAL REVIEW

The committee authorized Judge Kravitz and Professor Coquillette to complete for the committee a self-evaluation questionnaire for the Judicial Conference's Executive Committee on the need for the committee's continued existence, the scope of its jurisdiction, and its workload, composition, and operating processes.

PANEL DISCUSSION ON CLASS ACTIONS

Judge Rosenthal presided over a panel discussion on class actions with Dean Robert H. Klonoff, a member of the Advisory Committee on Civil Rules, Daniel C. Girard, Esquire, a former member of the advisory committee, and John H. Beisner, Esquire.

Judge Rosenthal noted that the discussion was in accord with the committee's tradition of spending time at its January meetings in examining long-term trends and issues that may affect the rules process in the future, but do not require immediate changes in the rules. She explained that the Class Action Fairness Act of 2005 (CAFA) had now been in place for seven years and the courts have issued several important class-action decisions in the last few years. In light of the committee's statutory obligation to monitor the continuing operation and effect of the federal rules, she said, it was an opportune time to start thinking about whether any changes in FED. R. CIV. P. 23 might be needed in the future. Class actions, she added, are a high profile area of the law and involve a great deal of money and interest.

The panel, she pointed out, consisted of an attorney who primarily represents plaintiffs and a lawyer and a law professor who normally have represented defendants. She asked them to focus on the impact of the recent cases on class-action practice and to identify any potential rule changes that might have a beneficial impact on class-action litigation.

The panel discussed a wide range of issues, but the exchange can be categorized as falling into the following four broad topics:

1. Front-loading of cases;
2. Class definition;
3. Settlement classes; and
4. Competing classes and counsel.

1. FRONT-LOADING OF CASES

In re Hydrogen Peroxide

The panel discussed the impact of *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3rd Cir. 2009). In the case, the Third Circuit held that the district court was obligated at the certification phase of a class action to apply a rigorous analysis of the available evidence and make findings supported by a preponderance of the evidence (rather than a mere threshold showing) that each element of Rule 23 has been met.

The district court was required to resolve all factual and legal disputes relevant to class certification, even if they overlap with the merits. Specifically, it should have resolved the battle of the experts over whether the alleged injury could be demonstrated by proof common to the class, rather than individual to its members. The decision, moreover, expressed concern that the district court's order certifying the class would place unwarranted pressure on the defendant to settle non-meritorious claims – elevating that concern, in effect, into a policy factor to consider in the certification process.

Although not all courts follow *Hydrogen Peroxide*, it was suggested that the practical impact of the case has been that plaintiffs are now confronted with an early merits-screening test. They must present their evidence at the certification stage or risk losing the case if the court denies certification. That conclusion, moreover, was seen as bolstered by several other cases, including the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

In *Wal-Mart*, the Supreme Court ruled that if the plaintiffs had evidence of company-wide employment discrimination, they had to present it by the time of the certification hearing. A key question, therefore, is whether the courts will now impose a higher standard of "commonality," as in *Wal-Mart*, which would necessitate more expansive discovery, or whether they will read *Wal-Mart* as limited to the unique employment setting and continue the traditional concept of commonality.

Discovery at certification

A panelist argued that *Hydrogen Peroxide* has created a much more expensive class-certification process, particularly in complex cases. He said that there is considerable uncertainty for the lawyers on how discovery is to take place after the pleading stage. Discovery may have to be conducted before certification is heard and expert witnesses may be subjected to a full *Daubert* analysis.

It was noted that expert testimony now is often a central feature at the certification stage, and extensive case law is developing on the subject, including whether *Daubert* applies at the class-certification stage. In *Wal-Mart*, the treatment of expert witnesses at certification was an important factor in the majority opinion, and *Hydrogen Peroxide* was largely a battle of the experts.

It was suggested that plaintiffs' lawyers often feel disadvantaged by the front-loading of discovery. At the same time, defendants traditionally have preferred to bifurcate discovery and avoid excessive costs by limiting discovery at certification and deferring full-blown discovery on the merits until later.

In front-loading the discovery, though, the recent decisions have raised questions about how much merits discovery is actually required up front and whether the discovery

can continue to be bifurcated if plaintiffs are now required to prove the merits of the certification issues. The discovery problems are complicated, moreover, because discovery is now largely electronic and does not lend itself very well to phasing.

A panelist said that the recent decisions have caused additional work and difficulties for the parties but have not created a crisis situation. It appears, for example, that meritorious class actions are not being killed in the cradle, as plaintiffs are afforded a fair chance to explain to the court why they believe that their class can be certified.

One panelist argued that what information both sides should put forward in class certification briefing is becoming much clearer. The information necessarily will vary from case to case, but much of the discovery is simply not relevant for certification purposes. The judges, he said, are closely managing the cases and overseeing the discovery.

The focus now for the parties, he said, is on providing useful information that a court needs to make the certification decision. Judges, for example, often ask the lawyers whether particular discovery is really needed for certification or can be deferred until later in order to meet the schedule for class certification. Some judges also indicate to the parties what sort of discovery will be needed for certification and set a time for certification briefing, leaving it up to the lawyers to figure out the details of what discovery must be exchanged for certification.

A panelist noted that *Hydrogen Peroxide* cited the advisory committee note to the 2003 amendments to Rule 23, which sets forth the concept of a "trial plan that describes the issues likely to be presented at trial and tests whether they are susceptible of class-wide proof." The recent cases, he said, have been sending a uniform message that the district court should instruct the parties to gather their available information and figure out what a class trial would look like. The court, thus, exercises the gateway function of deciding whether the jury will have the evidence it needs to make a decision that the entire class is entitled to relief. The key issue is whether the evidence varies so much among the individual plaintiffs that the jury is unable to decide that the defendant is liable to all members of the class.

Early practicable time for making the certification decision

In light of the additional information that now has to be gathered for certification, the panel discussed whether courts are being more flexible in applying Rule 23(c)(1)(A)'s requirement that certification occur at "an early practicable time." There appears to be little uniformity among the courts, however, as courts cite the language of the rule to support every conceivable outcome. Some make the certification decision very early in the case, while others defer it until much later. A few districts specify

categorically that a class certification motion be made within 90 days, while in others, the certification process occurs at the close of discovery.

Early dispositive motions

It was reported that the trend towards front-loading of class-action litigation has led to an increasing tendency to find ways to dispose of cases at an early stage. As a matter of good practice, therefore, a defendant who believes that a national class action cannot be certified under any circumstances should force the plaintiffs to come forward at an early stage and move for class certification.

Since CAFA, many more class-action cases are being brought in the federal courts that involve state laws, and more motions are being filed that challenge jurisdiction. Some state laws, moreover, appear to grant relief for class members in circumstances that may not meet the criteria for standing in the Article III federal courts.

It was suggested that there has been some drift away from analyzing class membership questions under the criteria specified in Rule 23(a) and (b) and framing them instead as matters of standing. A defendant, thus, moves to strike class allegations at the pleading stage, challenging the definition of the class through a dispositive motion, claiming that the class includes members who do not have standing. The trend may be a reaction to the sheer complexity of the issues in a multi-state post-CAFA class action, the high costs of conducting discovery, and a lack of clear guidance. In essence, the dispositive motions assert that there is some fundamental flaw in a particular class and, therefore, no need to go through the expense of discovery and the certification process.

In addition, there is some confusion over the ability of an individual plaintiff to act in a representative capacity. Some defendants claim that unless a plaintiff's claim is a mirror image of the claim of every other person in the class, in ways that do not necessarily relate to the presentation of common proof, the plaintiff does not have standing to act on behalf of others in a representative capacity.

2. CLASS DEFINITION

Preponderance and Commonality

It was suggested that there is uncertainty over what is meant by "preponderance" in Rule 23(b)(3). Under the current language of the rule, it was argued, plaintiffs are faced with a "winner take all" proposition. The court has to decide whether common issues of law and fact predominate. If they do, the court will certify the class. If they do not, certification will be denied.

It was noted that if common issues of law and fact do not predominate under Rule 23(b)(3), a court may still certify a class action under Rule 23(c)(4) for particular common issues. There is, however, very little guidance as to when a court may certify an issues class. Although a body of case law is developing on issues classes, it varies from circuit to circuit.

Recent cases show that the courts are sharply divided on Rule 23(c)(4). One circuit has ruled that an issues class is a housekeeping remedy, and predominance still must be shown. Another has held that predominance need not be shown, and a court only has to consider whether resolution of the issue will materially advance the case.

A panelist said that issues classes are not commonly invoked by counsel because lawyers prefer a more complete outcome to their litigation. They are not normally interested in litigating on a piece-meal basis. As a practical matter, there are too many complications in issues-class litigation, and it is generally not worth it for them. Another panelist disagreed, however, and suggested that issues classes are quite important and have been used effectively in environmental tort cases and employment cases.

It was recommended that the Advisory Committee on Civil Rules monitor the developing case law and ultimately evaluate whether to consider a rule amendment that adjusts the standards of Rule 23(c)(4) to give the courts greater guidance on when a class may be certified that has both common issues and individual issues. The panelists pointed out that courts that have wrestled with the rule have said that the matter is unclear. It was also noted that the ALI had spent a great deal of time on issues classes as part of its recent restatement project. If properly defined, it was argued, an amended federal rule on issues classes could be beneficial to the mass adjudication of cases.

It was pointed out that there is a mechanism for dealing with predominance issues arising from state-law variations, especially in post-CAFA cases involving consumer claims arising under the laws of multiple states. In these cases, defendants generally argue that the claims have to be considered individually under different state consumer protection laws. Although a national class action may still be maintained, as in the *De Beers* litigation in the Third Circuit, a case may effectively be divided into sub-classes on a state-by-state basis for litigation purposes. In the settlement context, the analysis of state law variations historically was an issue of "manageability." Defense counsel would argue that the court cannot litigate the case on a manageable basis because the jury would have to be charged on the law of 50 states.

It was pointed out that one factor that has increased the number of class-action cases in the federal courts is the strategy of plaintiffs – reinforced by a general skepticism of federal courts towards nationwide classes – to break down a class into several subclasses, such as a separate class action for each state. That tendency will continue to occur in employment cases, as classes are broken down into smaller class actions,

especially after *Wal-Mart v. Dukes*. The trend will result in more class actions, and multiple class actions on the same subject. The Judicial Panel on Multidistrict Litigation will routinely draw the federal cases together to conduct the discovery on a common basis. In the end, though, separate certification determinations will have to be made in each class action.

In the past, commonality was not an important issue and was often stipulated. The real issue, rather, was predominance. But the Supreme Court has now said that the common issue has to be central to the validity of each of the claims. It has to be a central, dispositive issue to class certification. Commonality, moreover, is used in other rules, such as Rule 20 (joinder), which contains the exact same language. So one issue for the future will be whether *Wal-Mart* will have an impact on joinder.

Rule 23(b)(2) classes

It was suggested that *Wal-Mart v. Dukes* represents a potential sea change, not only regarding "commonality" under Rule 23(a), but also for classes under Rule 23(b)(2). A panelist said that the most remarkable aspect of the *Wal-Mart* decision, and potentially the most important aspect, was the section dealing with Rule 23(b)(2). The Court's statements that back pay could not be brought as part of a (b)(2) action because it was not "incidental" were a major departure from the decisions of the courts of appeals. Moreover, the Supreme Court suggested that there may be a due process problem with any monetary claim in a (b)(2) action, even a claim for statutory damages or incidental damages.

Accordingly, many difficult questions arise as to the scope of Rule 23(b)(2) after *Wal-Mart*, and there will be a great deal of analysis of the decision and the ensuing case law. Questions will arise, for example, on whether some problems can be dealt with by allowing opt-out classes under (b)(2) or hybrid classes under (b)(2) and (b)(3).

Arbitration Clause Cases

It was argued that *AT&T Mobility v. Concepcion,* 131 S. Ct. 1740 (2011), may have the most important impact of any of the recent class-action cases, for it has been seen as effectively eviscerating many small claims cases. Although the Supreme Court noted in *Amchem* (which dealt with mass torts) that class actions are really about small claims cases, rather than mass torts, it later dealt a virtual death knell to many small claims cases in *Concepcion.*

It was suggested that one of the issues that plaintiffs thought was left open in *Concepcion* was whether a "no class-arbitration" clause may be invalidated if the plaintiffs can show that it is impossible to vindicate their rights other than through class

arbitration. One court of appeals ruled recently, however, that the argument could not survive after *Concepcion*.

3. SETTLEMENT CLASSES

The need for a Rule 23 amendment on settlement classes

A panelist said that many of the court decisions since *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), have wrestled with what must be shown in the context of certifying a settlement class. Although *Amchem* said that the district court does not have to worry about "manageability" in a settlement case under Rule 23(b)(3), the class must still meet the tests of preponderance, commonality, and adequacy, and the case has to be treated as if it were going to trial. In the Third Circuit's *De Beers* litigation, for example, the court's opinion noted that "(e)ver since the Supreme Court's landmark decisions in *Amchem Products Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), one of the most vexing questions in modern class action practice has been the proper treatment of settlement classes, especially in cases national in scope that may also implicate state law."

Judge Kravitz asked the panel whether FED. R. CIV. P. 23 should be amended to deal specifically with settlement classes.

The panelists agreed that the absence of a settlement-class provision has created problems and has tended to push settlements, especially in mass-tort cases, outside the court system. Since *Amchem*, the parties in these cases have had to construct work-around solutions to achieve settlements, often a settlement that lies outside judicial supervision under Rule 23(e).

The absence of a workable settlement-class device is seen as a major problem in mass torts because there is no supervision of the parties' actions or the attorney's fees. Defendants, moreover, are concerned about engaging in settlements outside the courts because they are left to their own devices. They must hope that the terms of the settlement stick because they have not been sanctioned by a court.

A panelist summarized three specific impacts of *Amchem*. First, he said, more cases are now proceeding to non-class settlements, where there are no criteria and no supervision. Second, several cases have struck down non-judicial settlements, forcing the parties to go back to the court and try cases that all the parties wanted to settle. Third, the requirements for a litigation class place defendants in an awkward position. If they claim under *Amchem* that the case is suitable for class certification and trial, and then fail to settle, they may have stipulated to something that will harm them for litigation purposes. The internal problem for the defendants is what they must do to support and

enforce a settlement after they have asserted to the court that the case is suitable for certification as a litigation class.

A panelist added that the absence of a clearly defined standard for certification of a settlement class is exploited by tactical, professional objectors. In essence, they want a financial reward in return for dropping their objections. Greater clarity in the rule, he said, would not solve the problem of non-meritorious objections entirely, but it would take an argument away from nuisance objectors.

Approval of Settlements

Judge Rosenthal reported that the rules committees retreated in the 1990s from the decision to seek approval of a separate provision for settlement classes because *Amchem* and *Ortiz* were pending in the Supreme Court. But there was also strong and negative reaction to the committee's published rule, especially from law professors who argued that it would unleash the forces of collusion and lead to rampant reverse auctions.

At the same time, defendants feared that loosening the standards for certification of settlement classes would bleed over inevitably to loosen the standards for litigation class actions. They warned that the proposal would invite more class actions because it would be easier for potential plaintiffs to obtain settlement awards. In light of these concerns, she said, there was no consensus for the committee to proceed with the proposal.

She added that the 2003 amendments to Rule 23 were designed to put rigor into the evaluation of a settlement's fairness, reasonableness and adequacy and to strengthen the oversight of attorney's fees. The amendments, though, deliberately did not address whether the standards for certifying a settlement class should be different from those for certifying a trial class. She asked whether conditions have changed since 2003 and whether the absence of a settlement class certification standard in Rule 23, coupled with other concerns raised by the panelists, are sufficiently acute to warrant pursuing rule amendments.

A panelist explained that effective brakes are currently in place to deal with abusive settlements. Most class actions, moreover, are litigated in a relatively small number of district courts. The judges are sophisticated and experienced and know how to deal with issues of fairness and compensation.

A panelist urged pursuing a distinct rule addressing settlement classes. He noted that the current requirements for certification are clear, perhaps too clear, and are inconsistent with the realities of the settlement process. The defendants, in reality, are waiving their defenses and do not have a trial plan because their objective is a settlement without a trial. Nevertheless, *Amchem* requires them to go through a certification process

that does not make a lot of sense for them. Another panelist did not see a pressing need for a settlement-class rule in anti-trust, securities, and financial services cases, but agreed that it could be helpful in mass-tort cases.

A panelist argued that the primary focus of a proposed settlement-class rule should not be on the class-certification process. He pointed out that settlements in mass-tort cases do not reach the stage of court approval under Rule 23(e)(2) because the plaintiffs cannot meet the certification requirements of Rule 23(a) and (b).

Rather, an amended rule should build on Rule 23(e)(2), which specifies that a settlement must be "fair, reasonable, and adequate." The rule would alter *AmChem's* statement that Rule 23(e) is not a substitute for Rule 23(a) and (b). Instead, the inquiry in a settlement-class case would proceed directly to Rule 23(e), essentially skipping over Rule 23(a) and (b).

The amendment could augment the court's inquiry under Rule 23(e)(2) by requiring it to examine the fairness of compensation among the different members of the class and determine whether variations in individual entitlement are adequately reflected in the proposed settlement. Injuries of class members, for example, may well range from mere fear of injury to permanent disability. It was pointed out that most mass-tort settlements do in fact consider those distinctions and typically provide a grid of different compensation levels for different levels of injury. They also establish some sort of due process arrangements for making the awards.

The recent ALI principles of aggregate litigation deal with certification of a settlement class and provide that a settlement class does not have to meet the standards for a litigation class. They specify the various fairness factors that must be applied to settlements and address second opt-outs and objectors. It was recommended that the civil advisory rules committee review the ALI deliberations to see whether any of the proposals it considered would be suitable for a federal rule change.

It was reported that the ALI also had taken a hard look at cy-près cases. Its principles of aggregate litigation create a presumption that undistributed money is given to the class. If there is a cy-près issue, it is normally because it is difficult to distribute the money, and a recipient or recipients must be selected that mirrors the purpose of the class.

Although just one part of the larger ALI project to address settlement classes, the cy-près portion of the new principles has been cited more often than all other provisions of the principles combined. It has recently been adopted as the law of a federal circuit and cited by two other circuits. A panelist recommended that if the advisory committee decides to proceed with amendments to address settlement classes, cy-près should be an important component of them.

Role of the state attorneys general in class settlements

It was pointed out that the attorneys general of the states review class-action settlements carefully and play a useful and appropriate role. The attorneys general have a sharing arrangement and work well together in reviewing settlements and taking action where appropriate.

Under CAFA a defendant has to give notice of a settlement to the attorneys general of the affected states within 90 days. After the notice, the lawyers may receive calls from a group of attorneys general inquiring into the facts and details of the case and the settlement. They are also often asked to present supporting information to justify their fees. In addition, when a truly abusive settlement is announced, law professors, concerned lawyers who may have had competing cases, as well as the attorneys general, normally come forward to object.

It was agreed that the impact of the efforts of the attorneys general has been to raise the bar generally for negotiating and presenting settlements. Courts, moreover, are very conscious in overseeing how much money is distributed to the class, how soon it is distributed, and how much the lawyers receive in fees.

In light of the effectiveness of the review of settlements by the attorneys general, the panel was asked whether there is still a need for Rule 23(e)'s requirement that the presiding judge review and approve all settlements. The panelists replied that judicial supervision is still appropriate and pointed out that the attorneys general do not intervene in every case.

4. COMPETING CLASSES AND COUNSEL

Duplication of efforts

A panelist pointed to the problems arising when many different counsel file similar class actions, as often occurs under the federal anti-trust laws. Historically, the cases have been coordinated by having the Multidistrict Litigation Panel sweep them into a single proceeding for pretrial purposes. Recently, though, lawyers for both plaintiffs and defendants have been invoking the "first-filed" rule. Thus, if the defendants have no objection to the location of the first-filed case, their lawyers file motions to stay or dismiss all other class actions, and the matter never reaches the MDL panel. Likewise, plaintiffs who file the first case defend their turf by filing motions to stay or dismiss all later cases.

It was reported that law firms filing class-action cases have a significant problem in controlling the work of other, competing lawyers. When a law firm representing a class of plaintiffs reaches the point of resolving the case with the defendants, it is often

confronted with other lawyers seeking fees for having performed unnecessary or counter-productive services. The lawyers were not asked to perform the work for the class, and their intervention may in fact be an impediment to resolution of the case. Defendants should not have to pay for the unnecessary services, nor should fees be diverted from the lawyers who actually handled the important work on the case.

It was pointed out that the Southern District of New York has developed a body of case law specifying that before class counsel is appointed, services that duplicate the work rendered by other counsel are not compensable. And after the appointment of counsel, only services performed at the direction of lead counsel are compensable. That process was said to be working effectively and might be considered for inclusion in an amended rule.

Appointment of Counsel

It was reported that Rule 23(g), part of the 2003 rule amendments, has worked very well and is beneficial for practitioners. It allows the court to appoint interim class counsel after a case has been filed to represent the class up through certification. Then at certification the court decides whom to appoint as class counsel. There is some question, though, as to whether the rule applies when there is just one case.

A panelist said that Rule 23(g) should be applied early and often, for it is essential for the courts to control the appointment of counsel and the payment of attorney fees. In many CAFA cases, for example, a lawyer must negotiate with other lawyers who have filed duplicative cases in order to reach agreement on the hard policy decisions on how best to frame the case to achieve court certification. It leads to a good deal of tactical behavior among counsel that has little to do with the presentation of the case for certification. To make those hard policy decisions, he said, it is important to have only one lead lawyer, or maybe two lawyers, in charge of the case. Better outcomes are reached when a court asserts strong control at the front end of a case, and Rule 23(g) is the perfect vehicle to achieve that control.

A panelist said that when there is an MDL proceeding, which brings many class actions together, some courts forgo Rule 23(g) and rely on their inherent authority and do one of two things. On the one hand, they may instruct the counsel of all the many overlapping cases that they should get together and file a consolidated complaint that is, in effect, an amalgam of all the actions. Usually, as a part of that process, a management team emerges to take responsibility for the new complaint, which essentially initiates a new action. On the other hand, where there are many single-state actions in the MDL proceeding, the cases will not be combined because each state wants to stand on its own. Typically a liaison counsel is appointed by the court to bring all the counsel together. He added that counsel are not usually brought together for fee-sharing purposes, although they generally have made some arrangements on their own.

Federal-State coordination

Judge Rosenthal noted that CAFA has increased the number of federal class actions and affected the nature and extent of federal-state issues. She asked whether the pre-CAFA problems have abated and whether Rule 23 is adequate in dealing with current federal-state coordination issues.

It was agreed that CAFA is working much as its proponents intended. Cases with interstate implications are migrating to the federal courts, while those involving local controversies remain in the state courts.

A panelist said that the remaining coordination problems arise mostly in one state. When there is a multi-state controversy after CAFA, most class actions will be filed in the federal courts. But if a group of plaintiffs live in the same state as the defendant, their class action will be heard in the state courts. He said that it is common to have a national MDL proceeding that consolidates class actions proceedings for all the federal cases, except those in one state. In that state, there will be a parallel class action in the state courts for local residents. Despite the separate proceedings, coordination normally occurs among counsel and the courts.

The panelists noted that the federal MDL judges have become very proficient in handling MDL proceedings and in reaching out to work cooperatively with the state courts in mass-tort cases. They added that state court judges have their own difficult issues to resolve, and coordination with their federal colleagues has been very beneficial.

CONCLUSIONS

Judge Rosenthal summarized the various concerns voiced by the panelists and asked each to pick the single most promising potential rule amendment that would have a beneficial impact on class-action practice.

Front-loading of cases

One panelist cited the front-loading of cases after *Hydrogen Peroxide* as an important issue that needs to be addressed. He suggested drafting a rule to give the parties and the courts more guidance on exactly what information a plaintiff must produce for class certification. The parties, he said, are uncertain about the impact of all the recent cases. They want an early ruling on class certification, but they also want to avoid discovery costs and prefer to continue with some form of bifurcated discovery.

Class definition

Another panelist suggested a rule that revisits the issue of predominance and acknowledges that most cases appropriate for class adjudication in fact have individual issues. To pretend that such is not the case, he said, results in a waste of time and much unproductive behavior. There is, moreover, a difficult intersection among several class-definition issues, including the current ambiguity over issues classes under Rule 23(c)(4), the use of (b)(2)-(b)(3) hybrid classes, certification of settlement-only classes, and handling (b)(3) classes that have some individual issues with bifurcated liability and damages.

Rather than having an "all or nothing" approach to certification based on whether common issues predominate or not, the committee might prepare a rule that gives the courts direction and discretion in class-actions that have individual issues. As a starting point, he suggested examining the case law on issues-classes under Rule 23(c)(4). A wide variety of cases, he said, can be adjudicated very effectively on a class basis. But many of the most important – those where group adjudication will confer the most social benefit – will likely have individual issues as well as common issues. He also suggested developing a rule that is flexible enough to accommodate a lower bar for certification of classes for settlement purposes.

Settlement classes

Another panelist's choice was for a distinct settlement-class rule. It might be similar to the advisory committee's proposed amendments to Rule 23(b)(4) in the 1990s. Regardless of the details of the rule, though, it should contain a specific provision that creates a clear basis for a district court to approve and supervise mass-tort settlements under Rule 23.

NEXT MEETING

The committee will hold its next meeting on Monday and Tuesday, June 11 and 12, 2012, in Washington, D.C.

Respectfully submitted,

Peter G. McCabe,
Secretary

TAB 1D

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REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

September 13, 2011

The Judicial Conference of the United States convened in Washington, D.C., on September 13, 2011, pursuant to the call of the Chief Justice of the United States issued under 28 U.S.C. § 331. The Chief Justice presided, and the following members of the Conference were present:

First Circuit:

Chief Judge Sandra L. Lynch
Chief Judge Mark L. Wolf,
District of Massachusetts

Second Circuit:

Chief Judge Dennis Jacobs
Chief Judge Carol Bagley Amon,
Eastern District of New York

Third Circuit:

Chief Judge Theodore A. McKee
Judge Harvey Bartle III,
Eastern District of Pennsylvania

Fourth Circuit:

Chief Judge William B. Traxler, Jr.
Judge James P. Jones,
Western District of Virginia

Fifth Circuit:

Chief Judge Edith Hollan Jones
Chief Judge Sarah S. Vance,
Eastern District of Louisiana

Sixth Circuit:

Chief Judge Alice M. Batchelder
Judge Thomas A. Varlan,
Eastern District of Tennessee

Seventh Circuit:

Chief Judge Frank H. Easterbrook
Chief Judge Richard L. Young,
Southern District of Indiana

Eighth Circuit:

Chief Judge William Jay Riley
Judge Rodney W. Sippel,
Eastern District of Missouri

Ninth Circuit:

Chief Judge Alex Kozinski
Judge Robert S. Lasnik,
Western District of Washington

Tenth Circuit:

Chief Judge Mary Beck Briscoe
Judge Robin J. Cauthron,
Western District of Oklahoma

Eleventh Circuit:

Chief Judge Joel F. Dubina
Judge Myron H. Thompson,
Middle District of Alabama

District of Columbia Circuit:

Chief Judge David Bryan Sentelle
Chief Judge Royce C. Lamberth,
District of Columbia

Federal Circuit:

Chief Judge Randall R. Rader

Court of International Trade:

Chief Judge Donald C. Pogue

The following Judicial Conference committee chairs attended the Conference session: Circuit Judges Julia Smith Gibbons, Michael S. Kanne, Diarmuid F. O'Scannlain, Reena Raggi (incoming chair), Jeffrey S. Sutton, and John Walker, Jr.; District Judges Robert Holmes Bell, Rosemary M. Collyer, Joy Flowers Conti, Claire V. Eagan, Sidney A. Fitzwater, Janet C. Hall, D. Brock Hornby, George H. King, Mark R. Kravitz, J. Frederick Motz, Julie A. Robinson, Lee H. Rosenthal, and George Z. Singal; and Bankruptcy Judge Eugene R. Wedoff. Bankruptcy Judge Rosemary Gambardella and Magistrate Judge Thomas C. Mummert, III, were also in attendance, and Cathy Catterson of the Ninth Circuit represented the circuit executives.

James C. Duff, Director of the Administrative Office of the United States Courts, attended the session of the Conference, as did Jill C. Sayenga, Deputy Director; William R. Burchill, Jr., Associate Director and General Counsel; Laura C. Minor, Assistant Director, and Wendy Jennis, Deputy Assistant Director, Judicial Conference Executive Secretariat; Cordia A. Strom, Assistant Director, Legislative Affairs; and David A. Sellers, Assistant Director, Public Affairs. District Judge Barbara Jacobs Rothstein, Director, and John S. Cooke, Deputy Director, as well as District Judge Jeremy D. Fogel, incoming Director, Federal Judicial Center, and District Judge Patti B. Saris, Chairman, and Judith W. Sheon, Staff Director, United States Sentencing Commission, were in attendance at the session of the Conference, as was Jeffrey P. Minear, Counselor to the Chief Justice. Scott Harris, Supreme Court Counsel, and the 2011-2012 Supreme Court Fellows also observed the Conference proceedings.

Attorney General Eric H. Holder, Jr., addressed the Conference on matters of mutual interest to the judiciary and the Department of Justice. Senators Patrick J. Leahy, Amy Klobuchar, and Jeff Sessions, and Representatives Lamar S. Smith, John S. Conyers, Jr., Howard Coble, and Steve Cohen spoke on matters pending in Congress of interest to the Conference.

REPORTS

Mr. Duff reported to the Conference on the judicial business of the courts and on matters relating to the Administrative Office (AO). Judge Rothstein spoke to the Conference about Federal Judicial Center (FJC) programs, and Judge Saris reported on Sentencing Commission activities. Judge Gibbons, Chair of the Committee on the Budget, presented a special report on the budget outlook.

EXECUTIVE COMMITTEE

RESOLUTIONS

Outgoing chairs. The Judicial Conference approved a recommendation of the Executive Committee to adopt the following resolution recognizing the substantial contributions made by the Judicial Conference committee chairs whose terms of service end in 2011:

> The Judicial Conference of the United States recognizes with appreciation, respect, and admiration the following judicial officers:
>
> **HONORABLE M. MARGARET MCKEOWN**
> Committee on Codes of Conduct
>
> **HONORABLE JANET C. HALL**
> Committee on Federal-State Jurisdiction
>
> **HONORABLE BOBBY R. BALDOCK**
> Committee on Financial Disclosure
>
> **HONORABLE GEORGE Z. SINGAL**
> Committee on Judicial Resources
>
> **HONORABLE MICHAEL S. KANNE**
> Committee on Judicial Security
>
> **HONORABLE LEE H. ROSENTHAL**
> Committee on Rules of Practice and Procedure

HONORABLE MARK R. KRAVITZ
Advisory Committee on Civil Rules

HONORABLE RICHARD C. TALLMAN
Advisory Committee on Criminal Rules

Appointed as committee chairs by the Chief Justice of the United States, these outstanding jurists have played a vital role in the administration of the federal court system. These judges served with distinction as leaders of their Judicial Conference committees while, at the same time, continuing to perform their duties as judges in their own courts. They have set a standard of skilled leadership and earned our deep respect and sincere gratitude for their innumerable contributions. We acknowledge with appreciation their commitment and dedicated service to the Judicial Conference and to the entire federal judiciary.

Director of the Administrative Office. The Judicial Conference approved a recommendation of the Executive Committee to adopt the following resolution to mark the departure of James C. Duff from the position of Director of the Administrative Office of the United States Courts:

The Judicial Conference of the United States recognizes with appreciation, admiration, and respect

JAMES C. DUFF
Director of the Administrative Office
2006-2011

James C. Duff's service as the Director of the Administrative Office (AO) over the last five years is the culmination of many years of distinguished service to the federal judiciary. He began his career in the judiciary as an assistant to Chief Justice Warren E. Burger, serving from 1975-1979, while also attending law school. He returned to the judiciary in 1996 to serve for four years as the Administrative Assistant to Chief Justice William H. Rehnquist, and then again in July 2006, when he was appointed Director of the Administrative Office by Chief Justice John G. Roberts, Jr. As Director of the Administrative Office, Jim Duff has proven to be a tenacious

advocate for the judiciary and for ensuring that the American judicial system maintains its reputation for excellence.

Jim Duff devoted his tenure at the Administrative Office to his goal of making the AO the most effective service organization in government. He worked to strengthen the ties between the AO and the courts it serves by creating exchanges between AO and court staff and by ensuring that the courts have a strong voice on the AO's advisory councils and groups. He focused on teamwork and collaboration both within the AO and between the AO and the agencies with which it partners to administer the nation's judicial system. Under his leadership, the judiciary forged strong working relationships with the General Services Administration and the United States Marshals Service to ensure that the judiciary had adequate facilities to carry out its mission and to secure the safety of the judicial community.

Jim Duff has also been a powerful voice for the judiciary before Congress. By partnering strong advocacy for the judiciary's budgetary and legislative needs with equally strong emphasis on good stewardship in managing the judiciary's resources, he has made sure that the judiciary's requests to Congress are heard. He has also been a champion for maintaining the independence of the Third Branch and preserving the unique aspects of service in the federal judiciary that guarantee its ability to administer fair and impartial justice. As a key part of this effort, he has worked tirelessly to obtain fair compensation for members of the judiciary so that the courts can continue to attract the highest caliber of judges and staff. As a further part of this effort, he has worked to strengthen the judiciary's internal oversight program to ensure the public's continued confidence in the integrity of the judiciary. Under his leadership, the Committee on the Administrative Office was renamed the Committee on Audits and Administrative Office Accountability and restructured to focus on the significant areas of audit, review, and investigative assistance.

Jim Duff has led the Administrative Office during a period of great challenges – workload and security risks in the border

courts, mammoth bankruptcy cases in the wake of the 2008-2009 financial crisis, and an increasingly austere fiscal environment. His great gift as a leader is that he has faced these challenges with grace and optimism, as a consensus builder, a mediator, and a motivator. His warm personal qualities, including his humility, approachability, and sense of humor make working with Jim a true pleasure. His sharp intellect, excellent judgment, and devotion to cause make working with him an honor.

The Judicial Conference expresses its great appreciation to Jim Duff for his strong leadership and dedicated service and wishes the best to him and his family in his new undertakings.

PROFESSIONAL LIABILITY INSURANCE

The Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, Public Law No. 105-277, as amended by Public Law No. 106-58, requires the judiciary to provide reimbursement for up to one half of the cost of professional liability insurance to certain groups within the judiciary, including supervisors and managers as authorized by the Judicial Conference. In September 1999, the Conference delegated authority to court unit executives and federal public defenders to designate eligible positions in their respective units, consistent with Conference guidelines (JCUS-SEP 99, pp. 61-62, 66-67). At this session, the Conference delegated to the Director of the Administrative Office of the United States Courts, the Director of the Federal Judicial Center, and the Chair of the United States Sentencing Commission the authority to designate supervisors and managers of their respective agencies with regard to eligibility for professional liability insurance reimbursement, and provided that the authority may be re-delegated to executives or human resources officials of the respective judicial branch agencies.

JUDICIAL CONDUCT AND DISABILITY ACT

The Department of Justice has proposed legislation that would loosen the confidentiality requirements of the Judicial Conduct and Disability Act so that information developed in complaint proceedings under the Act could be disclosed to law enforcement officials if it relates to a potential criminal

offense. In July 2011, the Committee on Judicial Conduct and Disability endorsed a recommendation that the Conference support the proposal if it were modified to include protections drawn from the concept of a "reporter's privilege." Because the legislation was moving quickly through Congress, the Executive Committee was asked to consider the matter. On recommendation of the Committee on Judicial Conduct and Disability, the Executive Committee adopted the following position on behalf of the Conference:

> The Judicial Conference supports amending the confidentiality provisions of the Judicial Conduct and Disability Act to recognize that the judiciary controls the disclosure of information developed in connection with proceedings under the Act ("Act information") and to permit the disclosure of Act information to a law enforcement agency (a) as pertaining only to possible criminal activity and (b) subject to requirements paralleling those described in the Department of Justice's "Policy with regard to issuance of subpoenas to members of the news media," 28 C.F.R. § 50.10. Those requirements include that (1) there must be a compelling need for the Act information for the investigation of a crime reasonably believed to have occurred; (2) the substance of the Act information must be unavailable from other sources; (3) the requester must give reasonable and timely notice of the request and negotiate with the judiciary over the disclosure's scope, timing, and manner; (4) the Attorney General of the United States or of the applicable state must give permission for the request; and (5) the requester must take effective precautions to prevent the disclosed Act information from being disseminated to unauthorized persons or for improper purposes.

FISCAL YEAR 2012 INTERIM FINANCIAL PLANS

Pending final congressional action on the judiciary's appropriations for the 2012 fiscal year, the Executive Committee approved fiscal year 2012 interim financial plans for the Salaries and Expenses, Defender Services, Court Security, and Fees of Jurors and Commissioners accounts. The plans reflect many "quick hit" cost-containment items, suggested by Conference committees and others, that will significantly reduce fiscal year 2012 requirements. In approving the interim plan for the Salaries and Expenses

account, the Committee also endorsed a strategy for distributing court allotments among the court programs. In addition, the Committee affirmed that its approval of the interim plans included a determination not to allow step increases and routine promotions, and to allow other promotions only in extraordinary circumstances with approval of the Administrative Office Director, for all circuit unit, court, chambers, and defender organization staff.

MISCELLANEOUS ACTIONS

The Executive Committee —

- On recommendation of the Committee on Rules of Practice and Procedure and on behalf of the Conference, with regard to a proposed package of style amendments to the Federal Rules of Evidence approved by the Conference in September 2010 and pending before the Supreme Court, restored certain language to Rule 408(a)(1) to avoid a risk that the amendment might be interpreted as substantive, and to Rule 804(b)(4) for clarity and completeness;

- Approved final fiscal year 2011 financial plans for the Salaries and Expenses, Defender Services, Court Security, and Fees of Jurors and Commissioners accounts, as well as an allotment distribution strategy for the Salaries and Expenses account;

- Revised the policy related to the locations for Judicial Conference committee meetings to provide that meetings should be held only in hub cities and that committees that meet semi-annually must hold one of those meetings in Washington, D.C.;

- Agreed to ask every circuit to ensure that they have an up-to-date written policy in place for providing staff to senior judges and that the policy is being enforced; and

- Approved on behalf of the Conference resolutions in honor of Judge Barbara Jacobs Rothstein, who is ending her eight-year tenure as Director of the Federal Judicial Center, and William R. Burchill, Jr., who has served the judiciary for 38 years and is retiring from his position as Administrative Office Associate Director and General Counsel.

COMMITTEE ON AUDITS AND ADMINISTRATIVE OFFICE ACCOUNTABILITY

COMMITTEE ACTIVITIES

The Committee on Audits and Administrative Office Accountability reported that it received detailed briefings from three of the judiciary's independent audit firms regarding the following: cyclical financial audits of the courts and federal defender offices, audits of community defender organization grantees, audits of Chapter 7 bankruptcy trustees in bankruptcy administrator districts, and audits of debtors in Chapter 7 and Chapter 11 filings in bankruptcy administrator districts. The Committee considered ways in which the judiciary can ensure that audit issues are addressed and resolved in a timely manner, and it emphasized the importance of appropriate actions by court unit executives, chief judges and circuit judicial councils to address audit findings and recommendations. The Committee also asked the AO to focus on its follow-up efforts and to provide assistance to the courts and federal defender offices when needed. The Committee passed a resolution honoring the service of AO Director James C. Duff.

COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM

OFFICIAL DUTY STATIONS

On recommendation of the Bankruptcy Committee, and in accordance with 28 U.S.C. 152(b)(1), the Conference took the following actions with regard to official duty stations of bankruptcy judges:

a. Approved a request from the Central District of California and the Ninth Circuit Judicial Council to designate Los Angeles as the official duty station for a vacant bankruptcy judgeship in that district; and

b. Approved a request from the District of South Carolina and the Fourth Circuit Judicial Council to transfer the official duty station for Chief Judge John E. Waites from Columbia to Charleston.

COMMITTEE ACTIVITIES

The Committee on the Administration of the Bankruptcy System reported that it is exploring ways to more effectively use existing bankruptcy judicial resources to address severe judicial workload pressures occurring in several districts. To assist the judiciary in weathering the projected budgetary shortfall, the Committee examined multiple short- and long-term cost-containment ideas, and provided its views to the Budget Committee. In addition, the Committee informed the Committee on Court Administration and Case Management that it (a) endorses, with several qualifications, recommendations for certain inflationary fee increases; (b) recommends that the two committees work together, with assistance from the Federal Judicial Center, to study the impact and feasibility of implementing additional fees for claims transfers in bankruptcy cases and for filing publicly traded and/or mega cases; and (c) recommends approval of a proposed policy on courtroom sharing in the bankruptcy courts. The Committee also recommended that the Director approve certain reports required by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Public Law No. 111-203.

COMMITTEE ON THE BUDGET

FISCAL YEAR 2013 BUDGET REQUEST

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Noting the limited funding that Congress is likely to have available in 2013 and after considering the funding levels proposed by the program committees, the Committee on the Budget recommended to the Judicial Conference a fiscal year 2013 budget request that is 3.3 percent over assumed fiscal year 2012 appropriations. This request is $118.6 million below the funding requested by the program committees. The Conference approved the budget request subject to amendments necessary as a result of (a) new legislation, (b) actions of the Judicial Conference, or (c) any other reason the Executive Committee considers necessary and appropriate.

BUDGET DECENTRALIZATION RULES

Under existing budget decentralization rules, courts can reprogram funds among court operating funds within their own units, among court units within a judicial district, and among circuit and court of appeals units within a

judicial circuit, which allows these units to share administrative services and maximize resource utilization. However the rules do not permit reprogramming across districts or circuits or even between appellate and district units within a circuit. To achieve additional efficiencies, the Committee recommended expansion of reprogramming authority so that local funds can be reprogrammed among court units regardless of type, geographical location, or judicial district or circuit for voluntary shared services arrangements. The new reprogramming authority would be subject to the approval of the Administrative Office, with semi-annual reports provided to the Budget Committee. The Conference approved the Committee's recommendation.

COMMITTEE ACTIVITIES

The Committee on the Budget reported that it reviewed over 100 cost-containment ideas that had been generated through the Administrative Office's court advisory process as well as ideas that various Judicial Conference committees are pursuing. The Committee participated in a "summit" of committee chairs held on September 12, 2011 to discuss the significant cost-containment ideas the judiciary must consider as it faces a serious budget crisis. In addition, the Committee discussed efforts to focus its congressional outreach program on key members of the judiciary's appropriations subcommittees and to provide court-specific impacts of the fiscal year 2012 House of Representatives mark to judges and members of Congress.

COMMITTEE ON CODES OF CONDUCT

MODEL FORMS FOR WAIVER OF JUDICIAL DISQUALIFICATION

On recommendation of the Committee on Codes of Conduct, the Judicial Conference approved three versions of a Model Form for Waiver of Judicial Disqualification: one for civil pro se cases, one for other civil cases, and one for criminal cases. These forms replace a form originally adopted in September 1985, commonly known as the "remittal" form, which was used by judges to request a waiver of disqualification under Canon 3D of the Code of Conduct for United States Judges. The Conference delegated to the

Committee the authority to make technical, conforming, and non-controversial changes to the forms, as necessary.

MODEL CONFIDENTIALITY STATEMENT

The Model Confidentiality Statement (Form AO-306) is intended for use by courts and judges to promote awareness among judicial employees of their confidentiality obligations under Canon 3D of the Code of Conduct for Judicial Employees. On recommendation of the Committee, the Judicial Conference approved revisions to the Model Confidentiality Statement to reflect new developments, such as the use by judicial employees of electronic social media, and delegated to the Committee on Codes of Conduct the authority to make technical, conforming, and non-controversial changes, as necessary.

FORM FOR APPROVAL OF COMPENSATED TEACHING

Judges who wish to engage in compensated teaching are required to obtain approval from their circuit chief judge, using Form AO-304, Application for Approval of Compensated Teaching Activities. On recommendation of the Committee, the Conference approved a revised Form AO-304 to clarify that a judge may be compensated for time spent grading examinations and term papers. The Conference also delegated to the Committee on Codes of Conduct the authority to make technical, conforming, and non-controversial changes to the form, as necessary.

COMMITTEE ACTIVITIES

The Committee on Codes of Conduct reported that since its last report to the Judicial Conference in March 2011, the Committee received 19 new written inquiries and issued 19 written advisory responses. During this period, the average response time for requests was 13 days. In addition, the Committee chair responded to 135 informal inquiries, individual Committee members responded to 99 informal inquiries, and Committee counsel responded to 381 informal inquiries.

COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT

FEES

Miscellaneous Fees. The Judicial Conference prescribes miscellaneous fees for the courts of appeals, district courts, United States Court of Federal Claims, bankruptcy courts, and Judicial Panel on Multidistrict Litigation, pursuant to 28 U.S.C. §§ 1913, 1914, 1926, 1930, and 1932, respectively. On recommendation of the Court Administration and Case Management Committee, the Conference determined to raise many of these fees to account for inflation, as set forth below, effective November 1, 2011. These fees have not been adjusted for inflation since 2003.

Court of Appeals Miscellaneous Fee Schedule

Item	Current Fee	New Fee
2. Record Search	$26	$30
3. Certification	$9	$11
5. Audio Recording	$26	$30
6. Record Reproduction	$71	$83
7. Record Retrieval	$45	$53
8. Returned Check Fee	$45	$53
13. Attorney Admission Fee	$150	$176
Certificate of Good Standing	$15	$18

District Court Miscellaneous Fee Schedule

Item	Current Fee	New Fee
1. Document Filing/Indexing	$39	$46
2. Record Search	$26	$30
3. Certification	$9	$11
5. Reproduction of Proceedings	$26	$30
6. Microfiche	$5	$6

7. Record Retrieval	$45	$53
8. Returned Check Fee	$45	$53
9. Misdemeanor Appeal	$32	$37
10. Attorney Admission Fee Certificate of Good Standing	$150 $15	$176 $18
13. Cuban Liberation Civil Filing Fee	$5431	$6355

Bankruptcy Court Miscellaneous Fee Schedule

Item	Current Fee	New Fee
2. Certification Exemplification	$9 $18	$11 $21
3. Audio Recording	$26	$30
4. Amended Bankruptcy Schedules	$26	$30
5. Record Search	$26	$30
6. Adversary Proceeding Fee	$250	$293
7. Document Filing/Indexing	$39	$46
8. Title 11 Administrative Fee	$39	$46
12. Record Retrieval Fee	$45	$53
13. Returned Check Fee	$45	$53
14. Notice of Appeal Fee	$250	$293
19. Lift/Stay Fee	$150	$176

United States Court of Federal Claims Miscellaneous Fee Schedule

Item	Current Fee	New Fee
3. Certification	$9	$11
4. Attorney Admission Fee Certificate of Good Standing	$150 $15	$176 $18

5. Sale of Monthly Listing of Court Orders and Opinions	$19	$22
7. Returned Check Fee	$45	$53
9. Audio Recording	$26	$30
10. Document Filing/Indexing	$39	$46
11. Record Retrieval Fee	$45	$53

Judicial Panel on Multidistrict Litigation Miscellaneous Fee Schedule

Item	Current Fee	New Fee
1. Record Search	$26	$30
2. Certification	$9	$11
4. Record Retrieval Fee	$45	$53
5. Returned Check Fee	$45	$53

Electronic Public Access Fees. Pursuant to statute and Judicial Conference policy, the electronic public access (EPA) fee is set to be commensurate with the costs of providing existing services and developing enhanced services. Noting that the current fee has not increased since 2005 and that for the past three fiscal years the EPA program's obligations have exceeded its revenue, the Committee recommended that the EPA fee be increased from $.08 to $.10 per page. The Committee also recommended that the current waiver of fees of $10 or less in a quarterly billing cycle be changed to $15 or less per quarter so that 75 to 80 percent of all users would still receive fee waivers. Finally, in recognition of the current fiscal austerity for government agencies, the Committee recommended that the fee increase be suspended for local, state, and federal and government entities for a period of three years. The Conference adopted the Committee's recommendations.

COURTROOM SHARING

Based on a comprehensive study of district courtroom usage conducted by the FJC at the Committee's request, the Judicial Conference adopted courtroom sharing policies for senior district judges and magistrate judges in new courthouse and/or courtroom construction (JCUS-SEP 08,

pp. 10-11; JCUS-MAR 09, pp. 14-16; JCUS-SEP 09, pp. 9-11). It also asked the Committee to study the usage of bankruptcy courtrooms, and if usage levels so indicated, to develop an appropriate sharing policy for bankruptcy courtrooms (JCUS-SEP 08, pp. 10-11). At this session, following completion of the bankruptcy study, conducted for the Committee by the FJC, the Court Administration and Case Management Committee in consultation with the Bankruptcy and Space and Facilities Committees recommended a courtroom sharing policy for bankruptcy judges in new courthouse and courtroom construction, for inclusion in the *U.S. Courts Design Guide*. The Conference approved the policy as follows:

SHARING POLICY FOR BANKRUPTCY JUDGES IN NEW COURTHOUSE AND COURTROOM CONSTRUCTION

New courtrooms for bankruptcy judges will be provided as follows:

a. In court facilities with one or two bankruptcy judges, one courtroom will be provided for each bankruptcy judge.

b. In court facilities with three or more bankruptcy judges, one courtroom will be provided for every two bankruptcy judges. In court facilities where the application of this formula will result in a fraction (i.e., those with an odd number of bankruptcy judges), the number of courtrooms allocated will remain at the next lower whole number. In addition, one courtroom will be provided for emergency matters, such as Chapter 11 first-day hearings.

Exemption Policy

In the event this sharing arrangement would cause substantial difficulty in the secure, effective and efficient disposition of cases, a court, as a whole, with the approval of its circuit judicial council, may seek an individual exemption to this sharing policy from the Judicial Conference's Space and Facilities Committee. Such exemptions should be considered the exception and not the rule.

In order to be considered for an exemption, a court must first show that the bankruptcy judge's courtroom is in use over 75 percent of the work day for case-related purposes. Thereafter, a court should demonstrate that deviation from the basic sharing policy is necessary, based on the following:

a. An assessment of the number and type of courtroom events anticipated to be handled by the bankruptcy judge that would indicate that sharing a courtroom would pose a significant burden on the secure, effective and efficient management of that judge's docket.

b. An assessment of the current complement of courtrooms and their projected use in the facility and throughout the district, to reaffirm the necessity of constructing an additional courtroom.

c. Whether a special proceedings, visiting judge, or other courtroom is available for the bankruptcy judge's use in the facility.

Many bankruptcy judges are housed in leased facilities where security concerns may arise due to the configuration of the space. Because of this unique situation, an alternative exemption to the sharing policy, notwithstanding the exemption requirements of the previous paragraph, may be considered for bankruptcy judges in leased facilities based on an assessment of the security of a bankruptcy judge's access from chambers to a shared courtroom.

RECORDS DISPOSITION SCHEDULES

Electronic records. The district court records disposition schedule for civil and criminal case files provides for the transfer of electronic records to the National Archives and Records Administration (NARA) three years after case closing. Noting that this is an inadequate amount of time to maintain the records at the court and that further study on disposition of electronic records was needed, the Committee recommended that the three-year transfer reference be removed from the schedule for civil and criminal case files. Once removed, electronic records will be considered unscheduled and can not

be disposed of until a new disposition schedule is adopted. The Conference approved the Committee's recommendation, and the schedule will be transmitted to NARA for acceptance of the change.

Criminal cases. In March 2011, the Judicial Conference approved a revised district court records disposition schedule for criminal cases that, like the schedule for civil cases, sets retention periods largely by case type (JCUS-MAR 11, p. 10). NARA published this proposed schedule for public comment. On recommendation of the Committee, which considered the public comments, the Judicial Conference approved amending the disposition schedule for criminal case files to designate additional non-trial case types – those pertaining to embezzlement, fraud, or bribery by a public official – as permanent. The schedule will be transmitted to NARA for acceptance of the change.

Bankruptcy cases. Similarly, amendments to the bankruptcy court records disposition schedule approved by the Conference in March 2011 were published by NARA for public comment. After consideration of those comments, the Committee recommended that the Judicial Conference approve amending the schedule to classify as permanent a sample of 2.5 percent of non-trial bankruptcy cases[1] and 2.5 percent of temporary adversary proceedings cases retired by each district each year. The amendments would also reduce the retention period for temporary non-trial adversary proceedings cases from 20 to 15 years after case closing. The Conference approved the Committee's recommendation, and the schedule will be transmitted to NARA for acceptance of the change.

PACER ACCESS TO CERTAIN BANKRUPTCY FILINGS

In September 2010, the Judicial Conference adopted a policy limiting public electronic access to bankruptcy records filed before December 1, 2003 that had been closed for more than one year. The policy was intended to prevent the dissemination of personal information that might be contained in documents that were filed before the judiciary's privacy policy for bankruptcy cases was fully implemented. Under the September 2010 policy, the public could access docket sheets through PACER for these older cases, but full

[1]This would replace a provision in the existing schedule that designates as permanent 25 percent of non-trial bankruptcy cases retired by nine judicial districts, selected each year on a rotational basis.

documents would be available only at clerks' offices (JCUS-SEP 10, pp. 12-13). At this session, on recommendation of the Committee, the Conference adopted an exception to that policy for counsel or parties who are developing potential class actions, as follows:

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

SEALING AN ENTIRE CIVIL CASE FILE

On recommendation of the Committee on Court Administration and Case Management, in consultation with the Committee on Rules of Practice and Procedure, the Judicial Conference adopted the following standards for sealing an entire civil case:

> An entire civil case file should only be sealed consistent with the following criteria:
>
> a. Sealing the entire civil case file is required by statute or rule or justified by a showing of extraordinary circumstances and the absence of narrower feasible and

effective alternatives (such as sealing discrete documents or redacting information), so that sealing an entire case file is a last resort;

b. A judge makes or promptly reviews the decision to seal a civil case;

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

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

COMMITTEE ACTIVITIES

The Committee on Court Administration and Case Management reported that it devoted a significant amount of its June 2011 meeting to cost-containment initiatives for fiscal year 2012 and beyond, and considered more than 40 different ideas and proposals. The Committee also discussed several policy issues related to the development of the Next Generation CM/ECF system to ensure that the system's requirements are synchronized across various court units and court types. The Committee endorsed 14 courts to participate in the pilot project on cameras in the courtroom, which began on July 18, 2011 and selected 14 courts to participate in a 10-year, statutorily required pilot project regarding the assignment of patent cases in U.S. district courts, to begin on September 19, 2011.

COMMITTEE ON CRIMINAL LAW

STANDARD CONDITIONS OF PROBATION AND SUPERVISED RELEASE

A judgment in a criminal case as well as other national forms contains a set of standard conditions that are automatically imposed in probation and supervised release sentences, including one condition that requires offenders to submit a written report to the probation officer within the first five days of each month. However, such reports may not be necessary in all cases because the information is available from other means, and in those cases in which reports are needed, spreading out the submission dates would provide officers with

greater flexibility to manage their caseloads. Noting this, the Committee recommended that the condition be amended in national forms (AO forms 7A, 7A-S, 245, 245B-D, 245I and 246) to state that the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer. The Conference adopted the Committee's recommendation.

RESEARCH AND DATA SHARING

The Administrative Office collects statistical and other information concerning the work of probation officers pursuant to statute and Judicial Conference policy. Criminal justice researchers frequently request this information, as do executive branch agencies such as the Bureau of Prisons. On recommendation of the Committee, the Conference authorized the Director of the AO to adopt proposed regulations governing the disclosure of federal probation system data to outside entities that establish procedures for handling requests for such data, including factors to consider in evaluating the merits of a request and conditions to be imposed to ensure the continued confidentiality of information released.

SUPERVISION OF CONDITIONALLY RELEASED SEXUALLY DANGEROUS PERSONS

The Committee recommended that the Judicial Conference seek legislation that would amend 18 U.S.C. § 3154 (Functions and powers relating to pretrial services) and § 3603 (Duties of probation officers) to specifically authorize probation and pretrial services officers to supervise sexually dangerous persons who have been conditionally released following a period of civil commitment pursuant to 18 U.S.C. § 4248. While §§ 3154 and 3603 both contain a general provision authorizing officers to perform other duties as assigned by the courts, providing explicit authorization will remove any ambiguity about an officer's role and allow for the development of standardized policies and procedures specifically designed for this population. The Conference adopted the Committee's recommendation.

COMMITTEE ACTIVITIES

The Committee on Criminal Law reported that it reviewed and endorsed a new sex offender management procedures manual for probation and pretrial services officers. The manual provides detailed instructions on how officers should investigate and supervise persons charged with or convicted of a sex offense. The Committee also considered the U.S. Sentencing Commission's proposed amendments to the sentencing guidelines manual and submitted testimony supporting the Commission's proposal to apply retroactively the amendments to the drug quantity table that implement the Fair Sentencing Act of 2010. In addition, the Committee discussed and submitted recommendations on various cost-containment proposals under consideration for fiscal years 2012 and 2013.

COMMITTEE ON DEFENDER SERVICES

CRIMINAL JUSTICE ACT GUIDELINES

The Committee on Defender Services recommended revisions to chapters 2 and 3 of the Criminal Justice Act Guidelines (*Guide to Judiciary Policy*, Vol. 7A) to provide principles and procedures on the proration of claims by attorneys and other service providers and on the billing of interpreting services. The Judicial Conference approved the recommendation.

COMMITTEE ACTIVITIES

The Committee on Defender Services reviewed the status of its long-range cost-containment initiatives (including the recently completed circuit case-budgeting pilot project and the ongoing federal defender organization staffing study) and received a report on the shorter-term cost-reduction efforts undertaken over the past six months by strategic planning groups and by program administrators. The Committee reviewed additional short- and longer-term cost-containment ideas that were suggested for its consideration and identified possible new areas to explore. It approved a reduced training plan for FY 2012, which is limited to the FY 2010 Committee-authorized level.

COMMITTEE ON FEDERAL-STATE JURISDICTION

COMMITTEE ACTIVITIES

The Committee on Federal-State Jurisdiction reported that it was updated on the progress of patent reform legislation and discussed jurisdictional provisions in the proposed legislation. The Committee also considered a proposal to amend 28 U.S.C. § 1447(d) to provide for a right of appeal from any order remanding an action to state court and determined not to support a change to existing law. The Committee received a report on discussions involving the Judicial Panel on Multidistrict Litigation, the Federal Judicial Center, the Conference of Chief Justices, and the National Center for State Courts concerning means of promoting cooperation between federal and state judges presiding over related cases filed in multiple jurisdictions.

COMMITTEE ON FINANCIAL DISCLOSURE

COMMITTEE ACTIVITIES

The Committee on Financial Disclosure reported that on March 29, 2011, it launched the Financial Disclosure Online Reporting System (FiDO). This transition from paper to an exclusively electronic format should significantly reduce judiciary expenses related to the printing, mailing, processing, and records management of financial disclosure reports. As of July 8, 2011, the Committee had received 3,990 financial disclosure reports and certifications for calendar year 2010, including 1,246 reports and certifications from Supreme Court justices, Article III judges, and judicial officers of special courts; 327 reports from bankruptcy judges; 534 reports from magistrate judges; and 1,883 reports from judicial employees.

COMMITTEE ON INFORMATION TECHNOLOGY

LONG RANGE PLAN FOR INFORMATION TECHNOLOGY

Pursuant to 28 U.S.C. § 612 and on recommendation of the Committee on Information Technology, the Judicial Conference approved the fiscal year 2012 update to the *Long Range Plan for Information Technology in the*

Federal Judiciary. Funds for the judiciary's information technology program will be spent in accordance with this plan.

COMMITTEE ACTIVITIES

The Committee on Information Technology reported that it endorsed the Judiciary Information Security Framework, which provides a high-level approach to information security risk management, and strongly encourages its use by all courts. The Committee concurred in the recommendation of the Committee on Court Administration and Case Management to raise the judiciary's electronic public access user fee (*see* "Miscellaneous Fees, " p. 16). The Committee also discussed a number of initiatives that both strengthen the judiciary's information technology program and promote cost containment, such as the national telephone service on the judiciary's new communications network.

COMMITTEE ON INTERCIRCUIT ASSIGNMENTS

COMMITTEE ACTIVITIES

The Committee on Intercircuit Assignments reported that 117 intercircuit assignments were undertaken by 90 Article III judges from January 1, 2011, to June 30, 2011. During this time, the Committee continued to disseminate information about intercircuit assignments and aided courts requesting assistance by identifying and obtaining the assistance of judges willing to take assignments.

COMMITTEE ON INTERNATIONAL JUDICIAL RELATIONS

COMMITTEE ACTIVITIES

The Committee on International Judicial Relations reported on its involvement in rule of law and judicial reform programs throughout the world. The Committee also reported on its continued participation in the rule of law component of the legislative branch's Open World Program for jurists from Russia, Ukraine, Georgia, Kazakhstan, and Moldova. The Committee received briefings about international rule of law activities involving federal public

defenders, U.S. court administrators, the Federal Judicial Center, the U.S. Department of State, officials from several embassies, the U.S. Department of Justice, the U.S. Agency for International Development, the U.S. Patent and Trademark Office, the World Bank, and the International Association of Judges. In addition, the Committee reported on foreign delegations of jurists and judicial personnel briefed at the Administrative Office.

COMMITTEE ON THE JUDICIAL BRANCH

JUDGES' TRAVEL REGULATIONS

Senior Judges on National Courts. The Committee on the Judicial Branch recommended that the Judicial Conference amend section 220.30.10(g)(3)(B) of the Travel Regulations for United States Justices and Judges, *Guide to Judiciary Policy* (*Guide*), Vol. 19, to provide that if a senior judge is commissioned to a court of national jurisdiction and the judge intends to travel a distance of more than 75 miles from his or her residence to hold court or to transact official business for that court and to claim reimbursement for any expenses associated with that travel, such travel must be authorized by the chief judge of the court. The Conference adopted the Committee's recommendation.

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Senior Judges' Commuting-Type Expenses. To make consistent certain travel authorization procedures for senior judges, the Committee recommended, and the Conference approved, an amendment to section 220.30.10(g)(3)(A) of the judges' travel regulations, *Guide*, Vol. 19, to require the authorization of the circuit judicial council rather than the chief circuit judge when a senior judge relocates his or her residence outside the district or circuit of the judge's original commission and intends to seek reimbursement for travel back to the court for official business.

Actual Expense Reimbursement for Meals. On recommendation of the Committee and after discussion, the Judicial Conference approved amendments to sections 250.20.20, 250.20.30, 250.20.50, 250.20.60, and 250.40.20 of the judges' travel regulations, *Guide*, Vol. 19, to limit judges' actual expense reimbursement for meals in connection with official travel, and provided that the limits will be subject to annual and automatic adjustment for inflation in the same manner as the judges' alternative maximum subsistence allowance.

COMMITTEE ACTIVITIES

The Committee on the Judicial Branch reported that it discussed in detail the problem of the recruitment and retention of federal judges. Salary stagnation and salary inversion continue to threaten the federal judiciary's ability to recruit and retain judges. The Committee also reported that it is organizing a program with the Freedom Forum and its First Amendment Center that will bring together a small group of judges and journalism educators to support continued and enhanced education on the coverage of the courts in journalism schools.

COMMITTEE ON JUDICIAL CONDUCT AND DISABILITY

COMMITTEE ACTIVITIES

The Committee on Judicial Conduct and Disability reported that it asked the Executive Committee to act on behalf of the Conference with regard to pending legislation proposed by the Department of Justice that would loosen the confidentiality requirements of the Judicial Conduct and Disability Act so that information developed in proceedings under the Act could be disclosed to law enforcement officers if it related to a potential criminal offense (*see supra*, "Judicial Conduct and Disability Act," pp. 7-8).

COMMITTEE ON JUDICIAL RESOURCES

EXECUTIVE GRADING PROCESS

Court-sizing formulas are used to determine the appropriate grades and salaries of district and bankruptcy clerks of court and chief probation and pretrial services officers. On recommendation of the Committee on Judicial Resources, the Conference agreed to approve a new grading process for determining the target grades for these executives. The new executive grading process consists of two steps: a) applying a formula that includes a constant factor for core competencies that accounts for 70 percent of the formula and

weighted factors that account for 30 percent of the formula;[2] and b) assigning target grades for these executive positions in Judiciary Salary Plan (JSP) grades 16, 17, and 18, using the 2011 distribution of JSP target grades.

SAVED PAY

The saved pay policy provides salary protection to court employees downgraded through no fault of their own, e.g., when a chambers staff member takes a lower graded position within the judiciary as result of the death of a federal judge. The employee receives the same rate of basic pay that was payable immediately before the reduction to the lower grade or classification level, 50 percent of each employment cost index (ECI) adjustment, and 100 percent of any applicable locality pay increase until the employee's saved rate of pay can be matched in the lower grade or classification level. Noting that the policy can have a negative effect on morale when two employees performing the same job earn different rates of pay and that elimination of the policy would help to contain costs, the Committee recommended that the Judicial Conference eliminate the saved pay policy for the courts, but grandfather for two years any employees currently in a saved pay status under the policy. After two years, the Administrative Office would place those employees who remained in a saved pay status at the top step of their respective grade or classification level. The Conference adopted the Committee's recommendation. The saved pay policy for federal public defender organization personnel is not affected by this change.

TEMPORARY PAY ADJUSTMENTS

An appointing authority may grant a temporary pay adjustment to a non-supervisory Court Personnel System (CPS) employee temporarily assigned leadership responsibilities. Currently, that pay adjustment is set at the lowest step in the employee's current classification level that exceeds the employee's existing rate of pay by three percent. At the time this pay rate was established,

[2]For district and bankruptcy court clerks' offices, the weighted factors include the number of authorized judgeships (15 percent), the number of authorized staff at 100 percent of formula (10 percent), and total allotments (5 percent). For probation and pretrial services offices, the weighted factors include the number of authorized staff at 100 percent of formula (15 percent) and total allotments (15 percent).

the CPS promotion rate was a flat rate of six percent. Since that time, the CPS promotion rate has been changed to be a range from not less than one percent to not more than six percent, to be applied on a uniform, unit-wide basis. On recommendation of the Committee, the Conference agreed to amend the pay rate for CPS temporary pay adjustments from a flat rate of three percent to a range from one to three percent, to be determined by the appointing authority on a case-by-case basis as set forth below:

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

TIME-OFF AWARDS

Time-off awards allow excused absences with pay (*Guide*, Vol. 12, Ch. 8, § 830.35(c)). Considering that the judiciary bases an intermittent employee's pay on hours actually worked with no provision for paid time off, the Committee recommended that the Judicial Conference approve a clarification to the policy for granting awards to court employees to prohibit time-off awards for intermittent employees. The Conference adopted the Committee's recommendation.

TELEWORK

In March 1999, the Judicial Conference adopted a telework policy for the courts that provided for voluntary employee participation in telework (JCUS-MAR 99, p. 28). In 2004, that policy was extended to federal public defender organizations (JCUS-SEP 04, p. 8). In order for courts and federal public defender organizations to have employees available to telework during a continuity of operations (COOP) event or similar emergency situation, on recommendation of the Committee, the Judicial Conference approved a revision to the telework policy to state that a court or federal public defender

organization, at its discretion, may require eligible employees to telework as needed during a continuity of operations event, inclement weather, or similar situation (*Guide*, Vol. 12, Ch. 10, § 1020.20(a)).

TYPE II CHIEF DEPUTY CLERK

In September 2004, the Judicial Conference authorized any unit in a district or bankruptcy court with ten or more authorized judgeships to establish a second JSP-16 Type II deputy position upon notification to the Administrative Office, to be funded with the court's decentralized funds (JCUS-SEP 04, p. 23). The District of Idaho has requested a JSP-16 Type II chief deputy clerk for its consolidated bankruptcy and district court clerk's office even though it does not qualify for one under the policy, citing special circumstances, including the broad span of operational knowledge required in a consolidated court and geographic challenges. The court requested funding, noting that as a small court it does not have the salary flexibility to pay for an additional executive salary. On recommendation of the Committee, the Judicial Conference authorized a second fully funded JSP-16 Type II chief deputy clerk position for the District of Idaho, subject to any budget-balancing reductions.

COURT INTERPRETER POSITION

Using established criteria, the Committee recommended, and the Conference approved, one additional Spanish staff court interpreter position beginning in fiscal year 2013 for the District of Arizona based on the Spanish language interpreting workload in this court. The Conference also approved accelerated funding in fiscal year 2012 for that position.

REALTIME TRANSCRIPT FEES

In March 1999, the Judicial Conference amended the maximum realtime transcript rate policy to include a requirement that a litigant who orders realtime services in the courtroom must also purchase, at the regular rates, a certified transcript (original or copy) of the same pages that were received as realtime unedited transcript (JCUS-MAR 99, p. 25). The policy was adopted to address concerns about the unprofitability of providing realtime services and about the circulation of unedited transcripts that are not backed up

by certified transcripts. At this session, the Committee noted that the requirement has resulted in an increased administrative burden to litigants and court staff, and serves as a disincentive for litigants to use realtime services. Moreover the concerns which led to development of the policy can be addressed through other means. On recommendation of the Committee, the Judicial Conference agreed to eliminate the requirement effective January 1, 2012.

COMMITTEE ACTIVITIES

The Committee on Judicial Resources reported that it submitted to the Committee on the Budget a fiscal year 2013 budget request derived from existing work measurement data using alternative staffing formulas calculated at the 70 percent level, which would result in a 3.9 percent increase over the assumed 2012 funding levels. The Committee considered short-term and longer-term cost-containment ideas and provided its recommendations to the Budget Committee. The Committee supported requests from the Administrative Office's Bankruptcy and District Clerks Advisory Groups to accelerate by one year the delivery dates of the staffing formula updates for bankruptcy and district clerks' offices. Those updates will now be due to the Committee in June 2012 and June 2013, respectively.

COMMITTEE ON JUDICIAL SECURITY

COMMITTEE ACTIVITIES

The Committee on Judicial Security reported that it decided to convene a cost-containment task force comprised of members of the Committee and the U.S. Marshals Service (USMS) staff to gather data and identify cost-containment initiatives in the short, medium, and long term based on the projected budgetary shortfalls in FY 2012 and beyond. The Committee was also briefed on the status of the perimeter security pilot program at seven courthouses where the USMS has assumed responsibility for perimeter security guarding and equipment. The Committee was informed that a follow-up report on the program would be sent to Congress, and was advised that further congressional direction is required to define the future of the program.

COMMITTEE ON THE ADMINISTRATION OF THE MAGISTRATE JUDGES SYSTEM

CHANGES IN MAGISTRATE JUDGE POSITIONS

After consideration of the report of the Committee on the Administration of the Magistrate Judges System and the recommendations of the Director of the Administrative Office, the district courts, and the judicial councils of the circuits, and after discussion on the Conference floor on whether to authorize three new full-time magistrate judge positions, the Judicial Conference approved the following recommendations that involved courts that had requested new magistrate judge positions. Changes with a budgetary impact are to be effective when appropriated funds are available.

THIRD CIRCUIT

District of Delaware

1. Authorized an additional full-time magistrate judge position at Wilmington; and

2. Made no other change in the number, location, or arrangements of the magistrate judge positions in the district.

FOURTH CIRCUIT

Middle District of North Carolina

1. Authorized an additional full-time magistrate judge position for the district, to be located at Durham; and

2. Made no other change in the number, locations, or arrangements of the magistrate judge positions in the district.

ELEVENTH CIRCUIT

Middle District of Florida

1. Authorized an additional full-time magistrate judge position at Orlando or Tampa; and

2. Made no other change in the number, locations, or arrangements of the magistrate judge positions in the district.

Southern District of Georgia

Made no change in the number, locations, or arrangements of the magistrate judge positions in the district.

The Conference also agreed to make no change in the number, locations, salaries, or arrangements of the magistrate judge positions in the Western District of North Carolina; Middle District of Louisiana; Eastern District of Michigan; District of Alaska; District of Idaho; and Northern District of Alabama.

ACCELERATED FUNDING

On recommendation of the Committee and after discussion on the Conference floor, the Judicial Conference agreed to designate for accelerated funding, effective April 1, 2012, the new full-time magistrate judge positions at Wilmington in the District of Delaware, Durham in the Middle District of North Carolina, and Orlando or Tampa in the Middle District of Florida.

MAGISTRATE JUDGE POSITION VACANCY

The Middle District of Louisiana requested permission to fill an upcoming magistrate judge position vacancy at Baton Rouge. Noting the decline in the court's per judgeship caseload since a third magistrate judge was appointed, the Committee recommended that the Conference not authorize the district to fill the position when it becomes vacant in May 2012. The Conference adopted the Committee's recommendation and declined to approve filling the vacancy.

COMMITTEE ACTIVITIES

The Committee on the Administration of the Magistrate Judges System reported that it considered short-term and longer-term cost-containment ideas. In response to one short-term idea identified for its consideration, involving reducing or discontinuing staff travel to conduct magistrate judge surveys, the

Committee confirmed the value of staff visits to the courts and agreed that the benefits from visits to the courts exceed the relatively small cost. For the longer term, the Committee agreed to explore cost-containment ideas for the magistrate judge recall program and to work with other committees on various other initiatives.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

FEDERAL RULES OF BANKRUPTCY PROCEDURE

The Committee on Rules of Practice and Procedure submitted to the Judicial Conference proposed amendments to Bankruptcy Rules 1007 (Lists, Schedules, Statements, and Other Documents; Time Limits), 2015 (Duty to Keep Records, Make Reports, and Give Notice of Case or Change of Status), 3001 (Proof of Claim), 7054 (Judgments; Costs), and 7056 (Summary Judgment), together with committee notes explaining their purpose and intent. The Judicial Conference approved the proposed rules amendments and authorized their transmission to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

The Committee also submitted to the Judicial Conference proposed revisions to Official Forms 1 (Voluntary Petition), 9A–9I (Notices of Commencement of Case Under the Bankruptcy Code, Meeting of Creditors, and Deadlines), 10 (Proof of Claim), and 25A (Plan of Reorganization in Small Business Case Under Chapter 11) and new Official Forms 10, Attachment A (Mortgage Proof of Claim), 10, Supplement 1 (Notice of Mortgage Payment Change), and 10, Supplement 2 (Notice of Postpetition Mortgage Fees, Expenses, and Charges). The Judicial Conference approved the revised forms to take effect on December 1, 2011.

FEDERAL RULES OF CRIMINAL PROCEDURE

The Committee on Rules of Practice and Procedure submitted to the Judicial Conference proposed amendments to Criminal Rules 5 (Initial Appearance), 15 (Depositions), and 58 (Petty Offenses and Other Misdemeanors), and proposed new Rule 37 (Indicative Ruling on a Motion for Relief That is Barred by a Pending Appeal), together with committee notes explaining their purpose and intent. The Judicial Conference approved the

proposed rules amendments and new rule and authorized their transmission to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

PROCEDURES GOVERNING THE WORK OF THE RULES COMMITTEE

On recommendation of the Committee, the Judicial Conference approved revised *Procedures for the Judicial Conference's Committee on Rules of Practice and Procedure and Its Advisory Rules Committees*. The revised procedures take into account the impact of the internet on committee functions, propose ways to make the rules process more efficient, and follow the style protocols used in drafting the rules.

COMMITTEE ACTIVITIES

The Committee on Rules of Practice and Procedure reported that it approved publishing for public comment proposed amendments to Appellate Rules 13, 14, 24, 28, and 28.1, and Form 4; Bankruptcy Rules 1007, 3007, 5009, and 9006, and Forms 6C, 7, 22A, and 22C; Civil Rules 37 and 45; Criminal Rules 11, 12, and 34; and Evidence Rule 803. Among the proposals is an amendment to Civil Rule 45, governing both trial and discovery subpoenas, to make the rule clearer and easier to apply; and a proposed amendment to Criminal Rule 12 to address motions that must be raised before trial and the consequences of untimely motions. The proposals were published in August 2011; the comment period closes on February 15, 2012.

COMMITTEE ON SPACE AND FACILITIES

FIVE-YEAR COURTHOUSE PROJECT PLAN

The Committee on Space and Facilities recommended that the Judicial Conference approve the *Five-Year Courthouse Project Plan for Fiscal Years* 2013-2017 and grant the Committee authority to remove the Los Angeles project from the *Plan* when appropriate. The Committee indicated that the Los Angeles project requires no additional funding and therefore should be removed from the *Plan* once a contract for design and construction has been awarded. The Conference approved the Committee's recommendation.

FEASIBILITY STUDY

A new courthouse project has been authorized and is underway in Salt Lake City, Utah. The Committee recommended, and the Conference approved, requesting a General Services Administration (GSA) feasibility study for the backfill of the existing Moss Courthouse in Salt Lake City, contingent upon final court approval of the District of Utah long-range facilities plan.

U.S. COURTS DESIGN GUIDE

Over the last several years, the Judicial Conference has adopted a number of policies that affect the planning and design of new courthouses and courtrooms, including asset management planning (a new long-range facilities planning methodology), the circuit rent budget (CRB) program, and courtroom sharing policies for senior and magistrate judges. These policies, as well as the new planning approach discussed immediately below, supersede a number of factors and planning assumptions in the *U. S. Courts Design Guide*. On recommendation of the Committee, the Judicial Conference agreed to update the *Design Guide* to reflect the changes made by these policies.

PLANNING THE SIZE OF NEW COURTHOUSES

On recommendation of the Committee, the Judicial Conference agreed to adopt a new approach to planning the size of new courthouses that reassesses the manner in which space is planned for projected judgeships. The approach includes the following assumptions:

> New courthouse construction projects will be designed to provide space for the existing circuit, district, bankruptcy and magistrate judges (including vacant judgeship positions), and senior judges, as well as space to account for judges who will be eligible for senior status within the 10-year planning period for the project consistent with Judicial Conference policy and congressional direction.

Space for Judicial Conference-approved judgeships not yet created by Congress will be taken into consideration at the design concept phase in that the architects will show how space for these judgeships could fit into the design. Architects will not, however, complete a detailed design that includes space for these judgeships because they have not yet been created by Congress. Should the positions be created by Congress during the design phase, the design documents would be amended to include the new positions and space would be constructed for them.

Space for judgeships that the judiciary projects will be needed, but that have not yet been recommended to the Judicial Conference for approval, will be considered by GSA as part of future expansion plans for the building. Space will not be designed for these projected positions.

COMMITTEE ACTIVITIES

The Committee on Space and Facilities reported that with regard to the circuit rent budget program, it approved 17 Component B requests, and that due to the delay in the approval of a fiscal year 2011 budget, circuits will be allowed to extend the availability of fiscal year 2011 Component C funding through FY 2013 on a one-time basis. The Committee discussed potential short- and long-term cost-containment initiatives involving the space and facilities program, and determined to gather the data necessary to quantify the cost savings and determine the operational impact of the proposed initiatives. In addition, the Committee was updated on the efforts underway to develop an implementation strategy for the Capital Security Program, should that program be funded by Congress in FY 2012 or in subsequent years. The program is intended to assist courts at locations that have security deficiencies, but that may not qualify for a new building.

FUNDING

All of the foregoing recommendations that require the expenditure of funds for implementation were approved by the Judicial Conference subject to the availability of funds and to whatever priorities the Conference might establish for the use of available resources.

Chief Justice of the United States
Presiding

TAB 2

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MEMORANDUM

DATE: March 28, 2012

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: *Gonzalez v. Thaler*

For several years, the Committee has periodically considered the implications, for appellate practice, of the Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007).[1] In this memo, I briefly summarize relevant aspects of the Court's January 2012 decision in *Gonzalez v. Thaler*, 132 S. Ct. 641 (2012),[2] concerning certificates of appealability (COAs), and consider the possible relevance of that case to the treatment of appeal-related procedural requirements more generally. In *Gonzalez*, the Court held (eight to one) that 28 U.S.C. § 2253(c)(3)'s requirement that a COA "indicate which specific issue or issues satisfy the showing required by" 28 U.S.C. § 2253(c)(2) is mandatory[3] but not jurisdictional. This holding is of interest for two reasons. First, the COA requirement is an aspect of appellate procedure in habeas and Section 2255 proceedings and is treated in Appellate Rule 22. Second, the Court (in explaining its holding) and Justice Scalia (in dissenting from that holding) both discuss the broader question of the nature of requirements for taking an appeal.

Under Section 2253(c)(1), a habeas or Section 2255 petitioner must obtain a COA in order to appeal. "This is a jurisdictional prerequisite because the COA statute mandates that '[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals ....' § 2253(c)(1)."[4] 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)."

Where the district court has found a procedural barrier to the petitioner's assertion of a

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[1] This topic appears on the Committee's agenda as Item No. 07-AP-E.

[2] I enclose a copy of the *Gonzalez* opinions.

[3] Thus, "[i]f a party timely raises the COA's failure to indicate a constitutional issue, the court of appeals panel must address the defect by considering an amendment to the COA or remanding to the district judge for specification of the issues." *Gonzalez*, 132 S. Ct. at 651.

[4] *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

constitutional claim, the petitioner should seek a COA on both the procedural issue and the constitutional claim.[5] After Gonzalez's habeas petition was dismissed as time-barred, he duly sought a COA on both the timeliness ruling and his underlying Sixth Amendment claim. The COA granted by a judge of the court of appeals mentioned only the timeliness issue. This defect in the COA went unmentioned until Gonzalez petitioned for certiorari review of the court of appeals' ensuing judgment (the court of appeals having agreed with the district court that his petition was time-barred). In its opposition to the certiorari petition, the State argued that the COA's failure to mention the underlying Sixth Amendment claim posed a jurisdictional bar to Gonzalez's appeal to the court of appeals.

In rejecting the State's contention that this defect in the COA was jurisdictional, the *Gonzalez* Court applied the clear statement rule set by *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006).[6] In Section 2253(c), the Court held, "the only 'clear' jurisdictional language ... appears in § 2253(c)(1)."[7] Section 2253(c)(1) sets a requirement for the taking of an appeal ("an appeal may not be taken" without a COA), whereas Sections 2253(c)(2) and 2253(c)(3) merely set requirements for the issuance of a COA (the COA "may issue ... only if" the petitioner has made a substantial showing of a constitutional claim, and the COA "shall indicate" which issues meet the substantial-showing test).

The Court adduced several reasons in support of its linguistic analysis. "[I]t would be passing strange if, after a COA has issued, each court of appeals adjudicating an appeal were dutybound to revisit the threshold showing and gauge its 'substantial[ity]' to verify its jurisdiction. That inquiry would be largely duplicative of the merits question before the court."[8] In addition, the Court observed, the petitioner "has no control over how the judge drafts the COA and, as in Gonzalez's case, may have done everything required of him by law."[9] And the inefficiencies that would flow from characterizing the issue-specification requirement as

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[5] *See Slack v. McDaniel*, 529 U.S. 473, 478 (2000) ("[W]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue ... if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.").

[6] *See Gonzalez*, 132 S. Ct. at 648 ("A rule is jurisdictional '[i]f the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional.'" (quoting *Arbaugh*, 546 U.S. at 515)).

[7] *Gonzalez*, 132 S. Ct. at 649.

[8] *Id.*

[9] *Id.* at 650.

jurisdictional would thwart Congress's purpose of streamlining habeas litigation.[10]

The Court rebuffed the State's attempt to analogize the required contents of the COA to the required contents of a notice of appeal:

> We construed the content requirements for notices of appeal as jurisdictional because we were "convinced that the harshness of our construction [wa]s 'imposed by the legislature.'" *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 318 ... (1988). Rule 4, we noted, establishes mandatory time limits for filing a notice of appeal. Excusing a failure to name a party in a notice of appeal, in violation of Rule 3, would be "equivalent to permitting courts to extend the time for filing a notice of appeal," in violation of Rule 4. *Id*., at 315 .... And "time limits for filing a notice of appeal have been treated as jurisdictional in American law for well over a century." *Bowles v. Russell*, 551 U.S. 205, 209, n. 2 ... (2007). Accordingly, the Advisory Committee Note "makes no distinction among the various requirements of Rule 3 and Rule 4," treating them "as a single jurisdictional threshold." *Torres*, 487 U.S., at 315 ...; *see also id.*, at 316 ... ("the Advisory Committee viewed the requirements of Rule 3 as jurisdictional in nature"). Here, we find no similar basis for treating the paragraphs of § 2253(c) as a single jurisdictional threshold.[11]

The Court further distinguished *Torres*'s ruling (concerning the naming of the appellants in the notice of appeal) by observing that appellants control the contents of the notice of appeal but habeas petitioners do not control the contents of the COA, and by arguing that a defect in the notice of appeal may occasion unfair surprise to the appellee but a failure to specify an issue in the COA does not.[12]

Justice Scalia's dissent vigorously criticized the majority's analysis of Section 2253(c)(3),[13] and argued that the majority's reasoning might cause two sets of problems: First, the majority's reasoning could be used to argue, in future, that a statutory clear statement requirement could be met by finding the requisite clear statement in legislative history (because the Court in *Torres* relied on the Committee Note to Appellate Rule 3); and second, the majority could be read to have overruled *Torres* sub silentio and thereby to have authorized courts in

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[10] *See id.*

[11] *Id.* at 652.

[12] *See id.*

[13] *See id.* at 656 (Scalia, J., dissenting) (arguing that the majority "makes a hash of the statute"); *id.* at 657 ("To call something a valid certificate of appealability which does not contain the central finding that is the whole purpose of a certificate of appealability is quite absurd.").

future to recharacterize jurisdictional appeal requirements as mere claims processing rules.

The first of these concerns extends well beyond the context of the case; as Justice Scalia observed, the Court has articulated clear statement rules in diverse contexts, and a view that a clear statement rule can be met by recourse to legislative history[14] might affect the application of such rules in settings beyond those concerning the requirements for an appeal. The debate over the role (if any) of legislative history in the application of a clear statement rule is not new.[15] I will not attempt to delve into that debate here; rather, I will only observe that one might question Justice Scalia's view concerning the implications of the majority's reasoning. Unlike Justice Scalia, the *Gonzalez* majority showed no inclination to discuss the significance of *Torres* for the application of the *Arbaugh* clear statement rule.[16] One might argue that *Torres*, decided in 1988

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[14] It is not self-evident that Committee Notes are precisely equivalent to legislative history. Certainly, Committee Notes perform some of the same informational functions as a legislative committee report: for example, explaining what the drafters of a given textual phrase had in mind. But unlike legislative history – which famously is not subject to the same requirements of bicameralism and presentment as statutory text – Committee Notes undergo the same promulgation process as Rule text. Draft Notes accompany the draft Rule text during publication; comments may address Notes as well as text; Notes are discussed and subjected to Advisory Committee approval; Notes are sometimes altered in the Standing Committee; and the resulting Notes accompany the proposed Rule text through the ensuing stages of approval by the Judicial Conference and the Supreme Court. I believe as well that the Notes are included in the package transmitted to Congress, though I am not sure whether this is the current practice; other readers of this memo can easily answer that question. In any event, at each stage when action is required in order to promulgate a Rule amendment, the Notes as well as the Rule text are subject to scrutiny. In addition, though some Notes fail to achieve the brevity sought by some Committee members, they are typically far shorter than a legislative committee report. It is therefore possible to question whether the usual arguments against the use of legislative history to interpret statutes apply with equal strength to the use of Committee Notes to interpret Rules.

[15] *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593, 597 (1992) (noting the emergence of "super-strong clear statement rules [which] require a clearer, more explicit statement from Congress in the text of the statute, without reference to legislative history, than prior clear statement rules have required").

[16] In this respect, I read the majority's opinion differently than Justice Scalia. Justice Scalia characterizes the majority's reading of *Torres* thus:

> The Court claims that the jurisdictional consequences of Rule 3(c) were "'imposed by the legislature,'" ante, at 652 (quoting *Torres*, supra, at 318, 108 S. Ct. 2405), which according to the Court's analysis "'clearly state[d],'" ante, at 648 (quoting *Arbaugh*, 546 U.S., at 515 ...), that Rule 3(c) is jurisdictional.

– prior both to *Arbaugh* and to the Court's more recent project of clarifying the difference between claim-processing and jurisdictional procedural requirements, *see Kontrick v. Ryan*, 540 U.S. 443 (2004) – is not directly relevant to the question of how to apply the *Arbaugh* clear statement rule.

Justice Scalia's second warning relates more directly to the Appellate Rules. It is worth quoting his reasoning in detail:

> The Court is not willing to say that *Torres* is no longer good law, but I doubt whether future litigants will be so coy. They know that in the past, to avoid the uncongenial rigidity of the rule that procedures attending court-to-court appeals are jurisdictional, we have performed wondrous contortions to find compliance with those rules. For example, in *Smith v. Barry*, 502 U.S. 244, 248 ... (1992), we held that an "informal brief" filed after a defective notice of appeal counted as a valid notice of appeal. In *Foman v. Davis*, 371 U.S. 178, 181 ... (1962), we held that a notice of appeal from the denial of a motion to vacate the judgment was also a notice of appeal from the underlying judgment. And in *Houston v. Lack*, 487 U.S. 266, 270 ... (1988), we held that a prisoner's notice of appeal was "filed" when it was delivered to prison authorities for forwarding to the district court. These (shall we say) creative interpretations of the procedural requirements were made necessary by the background principle that is centuries old: "[I]f the mode prescribed for removing cases by writ of error or appeal be too strict and technical, and likely to produce inconvenience or injustice, it is for Congress to provide a remedy by altering the existing laws; not for the court." *United States v. Curry*, 6 How. 106, 113 ... (1848). But if we have been willing to expose ourselves to ridicule in order to approve implausible compliance with procedural prerequisites to appeal, surely we may be willing to continue and expand the process of simply converting those obnoxious prerequisites into the now favored "claims processing rules," enabling us to avoid unseemly contortions by simply invoking the ever-judge-friendly principles of equity.[17]

As Justice Scalia points out, the line of cases holding a timely notice of appeal to be a jurisdictional requirement has long coexisted with another line of cases taking a forgiving approach to the question what constitutes compliance with that requirement. The list set out in the quotation above is not exhaustive. In *Becker v. Montgomery*, 532 U.S. 757 (2001), the Court held that failure to sign the notice of appeal as required by Civil Rule 11 is not a jurisdictional

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Gonzalez, 132 S. Ct. at 661 (Scalia, J., dissenting). However, the *Gonzalez* Court did not discuss whether the *Torres* Court's analysis was consistent with the *Arbaugh* clear statement rule; the discussion of *Arbaugh* appears in the Court's analysis of Section 2253 and does not recur in the Court's discussion of *Torres*. *Torres* itself made no mention of such a clear statement rule.

[17] *Gonzalez*, 132 S. Ct. at 663 (Scalia, J., dissenting).

defect and thus can be cured after the appeal time has run.[18] A line of modern cases continues to bear out the Court's observation – made prior to the adoption of the Appellate Rules – that "[a]lthough the timely filing of a notice of appeal is a jurisdictional prerequisite for perfecting an appeal ... a liberal view of papers filed by indigent and incarcerated defendants, as equivalents of notices of appeal, has been used to preserve the jurisdiction of the Courts of Appeals."[19] And in a case the facts and outcome of which prefigured *Houston v. Lack*,[20] the Court held an appeal timely based on its views that the incarcerated appellant "did all he could under the circumstances" and that the Rules should not be read "so rigidly as to bar a determination of his appeal on the merits."[21]

I take Justice Scalia's *Gonzalez* dissent to suggest that the Court might in the future accommodate fairness concerns (in cases where a litigant reasonably tried but failed to comply with the requirement of a notice of appeal) by transmuting the flouted requirement from a jurisdictional one into a nonjurisdictional one. One might argue that, to some extent, this has already occurred. In *Becker*, for example, the Court reasoned that the signing requirement was not itself jurisdictional. And in at least some instances, such a transition in the caselaw may be more semantic than substantive: The caselaw already permits a litigant (especially an uncounseled, incarcerated litigant) to meet the notice-of-appeal requirement through the filing of a document that contains the substantial equivalent of a notice of appeal; to that extent, the formalities that would distinguish a formal notice of appeal from its substantial equivalent (*e.g.*, a brief, an i.f.p. motion, a petition for permission to appeal, or the like) must already be viewed as nonjurisdictional. For this reason (and because the *Gonzalez* Court distinguished *Torres* rather than disavowing it) I do not expect that the Court's decision in *Gonzalez* will materially alter the lower courts' approach to the question of whether a document (not denominated a notice of appeal but filed within the time for taking an appeal) suffices as the substantial equivalent of a notice of appeal. Of course, I will monitor the caselaw to watch for such developments.

It is also worth asking whether the way in which the *Gonzalez* Court parsed Section 2253(c)'s requirements might affect the lower courts' analysis of *Bowles*'s implications for the timing of appeals (as distinct from the contents of the notice of appeal). As the Committee is aware, cases decided since *Bowles* have distinguished between appeal-related deadlines set by

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[18] *See Becker*, 532 U.S. at 760.

[19] *Coppedge v. United States*, 369 U.S. 438, 442 n.5 (1962).

[20] At sentencing, the court assured the defendant that he had a right to an appeal. After the appeal time expired, the clerk received letters (dated prior to the appeal deadline) from the defendant seeking both a new trial and an appeal. After the court of appeals held both documents untimely, the Supreme Court reversed. *See Fallen v. United States*, 378 U.S. 139, 140-42, 144 (1964).

[21] *Id.* at 144.

statute and those set only by rule. Consistent with *Bowles*, courts hold that the deadlines set by Rules 4(a)(1) are jurisdictional.[22] The government's Rule 4(b)(1)(B) deadline (for criminal cases) has been characterized as jurisdictional in a case in which that deadline was also set by statute.[23] But a number of courts have held that a criminal defendant's appeal deadline – set only by Rule 4(b)(1)(B) and not by statute – is nonjurisdictional.[24]

One of the trickier questions, post-*Bowles*, concerns the status of motions that, under Rule 4(a)(4)(A), toll the time to appeal. The deadlines for postjudgment motions under Civil Rules 50, 52, and 59 are purely rule-based; thus it would seem that the deadlines for those motions are mandatory[25] but not jurisdictional, at least when the question at hand concerns the district court's power to entertain a tardy motion when no litigant has raised the question of the motion's untimeliness.[26] But the district court's power to entertain such a motion does not settle the question of whether an untimely motion, addressed on its merits despite its untimeliness, suffices to toll appeal time. Rule 4(a)(4)(A) refers to a "timely" motion,[27] so one might conclude

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[22] *See, e.g., Napoli v. Town of New Windsor*, 600 F.3d 168, 170-71 (2d Cir. 2010); *Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 795 (D.C. Cir. 2010); *St. Marks Place Hous. Co., Inc. v. U.S. Dept. of Hous. & Urban Dev.*, 610 F.3d 75, 79 (D.C. Cir. 2010); *Harmston v. City of San Francisco*, 627 F.3d 1273, 1281 (9th Cir. 2010).

[23] Quoting *Bowles*, the court characterized as "mandatory and jurisdictional" the 30-day deadline for government appeals set by 18 U.S.C. § 3731 and Appellate Rule 4(b)(1)(B). *United States v. Cook*, 599 F.3d 1208, 1212 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 331 (2010). The government's appeal in *Cook*, however, was timely because the government's reconsideration motion had re-started the appeal time. *See id.* at 1212-13.

In In re *Grand Jury Proceedings*, 616 F.3d 1186 (10th Cir. 2010), the court of appeals concluded that the 30-day appeal time limit set for the government by 18 U.S.C. § 3731 is jurisdictional, but held that this deadline can be extended by the district court under Appellate Rule 4(b)(4). *See id.* at 1195-96.

[24] *See, e.g., United States v. Neff*, 598 F.3d 320, 323 (7th Cir. 2010); *Virgin Islands v. Martinez*, 620 F.3d 321, 328 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 1489 (2011); *United States v. Watson*, 623 F.3d 542, 545-46 (8th Cir. 2010).

[25] Indeed, those deadlines are particularly emphatic because they are non-extendable. *See* Civil Rule 6(b)(2) ("A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b).").

[26] *See, e.g., Lizardo v. United States*, 619 F.3d 273, 278 (3d Cir. 2010); *Advanced Bodycare Solutions, LLC v. Thione Intern.*, Inc., 615 F.3d 1352, 1359 n. 15 (11th Cir. 2010).

[27] Rule 4(a)(4)(A)(vi) accords tolling effect to a Civil Rule 60 motion "if the motion is filed no later than 28 days after the judgment is entered."

that a late motion fails to meet this test even when the district court overlooks its lateness and addresses the motion on its merits.[28] But even if that is correct (and not all courts agree that it is correct),[29] the question arises whether Rule 4(a)(4)(A)'s timeliness requirement is jurisdictional. If the motion's untimeliness goes unnoticed by the courts and all parties, can the appellee be viewed as having waived the Rule 4(a)(4)(A) timeliness requirement, such that the motion tolls the appeal time? One might argue that the timeliness requirement in Rule 4(a)(4)(A) is jurisdictional because Rule 4(a)(4)(A)'s tolling provision operates to alter the concededly jurisdictional deadlines set by Rule 4(a)(1).[30] But, on the other hand, one might argue that Rule 4(a)(4)(A)'s provisions, not being set by statute,[31] are merely nonjurisdictional claim-processing provisions.[32]

A litigant might cite *Gonzalez* in support of the latter argument. Just as the *Gonzalez* Court was willing to consider requirements concerning the COA's contents to be separable from the basic requirement that there be a COA, so too a litigant might contend that Rule 4(a)(4)'s tolling provisions are conceptually separable from Rule 4(a)(1)'s time limits. On the other hand, one might argue that *Gonzalez* should not affect the treatment of appeal *timing* requirements, in the light of the *Gonzalez* Court's efforts to distinguish such questions from those concerning the

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[28] *See, e.g.*, *Lizardo*, 619 F.3d at 274. Another way to look at the problem is to view a motion styled as one under Rule 59(e), but made outside the 28-day deadline, as a Civil Rule 60(b) motion that, under Appellate Rule 4(a)(4)(A)(vi), lacks tolling effect. *See National Ecological Found. v. Alexander*, 496 F.3d 466, 481-82 (6th Cir. 2007) (Sutton, J., concurring in the judgment).

[29] *See National Ecological Found. v. Alexander*, 496 F.3d 466, 475-76 (6th Cir. 2007).

[30] *See, e.g., United States v. Comprehensive Drug Testing, Inc.*, 513 F.3d 1085, 1101 ("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.... If Fed. R.App. P. 4(a)(4) is non jurisdictional, satisfaction of that provision (or forfeiture of a claim that the government failed to satisfy it) would not enable us to ignore the jurisdictional 60-day rule of Fed. R.App. P. 4(a)(1)."), *reh'g en banc granted*, 545 F.3d 1106 (9th Cir. 2008). *See United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, 1167 (9th Cir. 2010) (en banc) (adopting panel's reasoning on this point).

[31] It is interesting to note that Rule 4(a)(4)'s provisions are not mirrored in Section 2107. However, at the time that Section 2107 was enacted the tolling-motion mechanism was a well-established feature of the doctrinal landscape.

[32] *See, e.g.*, *Wilburn v. Robinson*, 480 F.3d 1140, 1147 (D.C. Cir. 2007) (N.B.: *Wilburn* was decided shortly prior to the Supreme Court's decision in *Bowles* and rehearing was denied in *Wilburn* shortly after *Bowles*); *Lizardo*, 619 F.3d at 280 (Jordan, J., concurring and dissenting).

contents of the COA.[33] It will be interesting to see how the caselaw on tolling motions continues to develop, and whether the *Gonzalez* decision affects the way in which the courts approach the topic.

Encl.

[33] The majority stated that *Gonzalez* "involves a different type of procedural condition," *Gonzalez*, 132 S. Ct. at 650 n.6, than the cases which Justice Scalia described as addressing "procedural conditions for appealing a case from one Article III court to another," *id.* at 659 (Scalia, J., dissenting). The majority stated that all of those cases except *Torres* "involved time limits." *Gonzalez*, 132 S. Ct. at 650 n.6.

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132 S.Ct. 641, 181 L.Ed.2d 619, 80 BNA USLW 4045, 12 Cal. Daily Op. Serv. 360, 2012 Daily Journal D.A.R. 269, 23 Fla. L. Weekly Fed. S 23
(Cite as: 132 S.Ct. 641)

H

Supreme Court of the United States
Rafael Arriaza GONZALEZ, Petitioner
v.
Rick THALER, Director, Texas Department of Criminal Justice, Correctional Institutions Division.

No. 10–895.
Argued Nov. 2, 2011.
Decided Jan. 10, 2012.

623 F.3d 222, affirmed.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C.J., and KENNEDY, THOMAS, GINSBURG, BREYER, ALITO, and KAGAN, JJ., joined. SCALIA, J., filed a dissenting opinion.
Patricia A. Millett, Washington, DC, for Petitioner.

Jonathan F. Mitchell, Solicitor General, Austin, TX, for Respondent.

Ann O'Connell, for the United States as amicus curiae, by special leave of the Court, supporting the Respondent.

Amit Kurlekar, Akin, Gump, Strauss, Hauer & Feld LLP, San Francisco, CA, John B. Capehart, Akin, Gump, Strauss, Hauer & Feld LLP, Dallas, TX, Patricia A. Millett, Counsel of Record, Akin, Gump, Strauss, Hauer & Feld LLP, Washington, DC, J. Carl Cecere, Hankinson Levinger LLP, Dallas, TX, for Petitioner.

Greg Abbott, Attorney General of Texas, Daniel T. Hodge, First Assistant Attorney General, Don Clemmer, Deputy Attorney General for Criminal Justice, Edward L. Marshall, Chief, Postconviction Litigation Division, Jonathan F. Mitchell, Solicitor General, Counsel of Record, James P. Sullivan***646** , Arthur C. D'Andrea, Assistant Solicitors General, Office of the Attorney General, Austin, TX, for Respondent.

For U.S. Supreme Court Briefs, See:2011 WL 3488993 (Pet.Brief)2011 WL 4352237 (Resp.Brief)2011 WL 4957385 (Reply.Brief)

Justice SOTOMAYOR delivered the opinion of the Court.

This case interprets two provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The first, 28 U.S.C. § 2253(c), provides that a habeas petitioner must obtain a certificate of appealability (COA) to appeal a federal district court's final order in a habeas proceeding. § 2253(c)(1). The COA may issue only if the petitioner has made a "substantial showing of the denial of a constitutional right," § 2253(c)(2), and "shall indicate which specific issue" satisfies that showing. § 2253(c)(3). We hold that § 2253(c)(3) is not a jurisdictional requirement. Accordingly, a judge's failure to "indicate" the requisite constitutional issue in a COA does not deprive a court of appeals of subject-matter jurisdiction to adjudicate the habeas petitioner's appeal.

The second provision, 28 U.S.C. § 2244(d)(1)(A), establishes a 1–year limitations period for state prisoners to file federal habeas petitions, running from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." We hold that, for a state prisoner who does not seek review in a State's highest court, the judgment becomes "final" on the date that the time for seeking such review expires.

I

Petitioner Rafael Gonzalez was convicted of murder in Texas state court. The intermediate state appellate court, the Texas Court of Appeals, affirmed Gonzalez's conviction on July 12, 2006. Gonzalez then allowed his time for seeking discretionary review with the Texas Court of Criminal Appeals (Texas CCA)—the State's highest court for criminal appeals—to expire on August 11, 2006. Tex. Rule App. Proc. 68.2(a) (2011). The Texas Court of Appeals issued its mandate on September 26, 2006.

After Gonzalez, proceeding *pro se*, petitioned unsuccessfully for state habeas relief, he filed a federal habeas petition under 28 U.S.C. § 2254 on January 24, 2008, in the U.S. District Court for the Northern Dis-

132 S.Ct. 641, 181 L.Ed.2d 619, 80 BNA USLW 4045, 12 Cal. Daily Op. Serv. 360, 2012 Daily Journal D.A.R. 269, 23 Fla. L. Weekly Fed. S 23
(Cite as: 132 S.Ct. 641)

trict of Texas. His petition alleged, *inter alia*, that the nearly 10–year delay between his indictment and trial violated his Sixth Amendment right to a speedy trial. The District Court, without discussing Gonzalez's constitutional claims, dismissed Gonzalez's petition as time barred by the 1–year statute of limitations in § 2244(d)(1)(A). Although Gonzalez argued that his judgment had not become final until the Texas Court of Appeals issued its mandate, the District Court held that Gonzalez's judgment had become final when his time for seeking discretionary review in the Texas CCA expired on August 11, 2006. Counting from that date, and tolling the limitations period for the time during which Gonzalez's state habeas petition was pending, Gonzalez's limitations period elapsed on December 17, 2007—over a month before he filed his federal habeas petition. The District Court denied a COA.

Gonzalez applied to the U.S. Court of Appeals for the Fifth Circuit for a COA on two grounds: (1) his habeas petition was timely, and (2) his Sixth Amendment speedy-trial right was violated. A Court of Appeals judge granted a COA on the question "whether the habeas application ***647** was timely filed because Gonzalez's conviction became final, and thus the limitations period commenced, on the date the intermediate state appellate court issued its mandate." App. 347. The COA did not mention the Sixth Amendment question.

The Court of Appeals affirmed. 623 F.3d 222 (2010). Acknowledging that a sister Circuit had run the limitations period from the date of a state court's issuance of a mandate, the Court of Appeals deemed the mandate's issuance "irrelevant" to determining finality under § 2244(d)(1)(A). *Id.*, at 224, 226 (disagreeing with *Riddle v. Kemna*, 523 F.3d 850 (C.A.8 2008) (en banc)). The Court of Appeals held that because a judgment becomes final at "the conclusion of direct review or the expiration of the time for seeking such review," § 2244(d)(1)(A), the limitations period begins to run for petitioners who fail to appeal to a State's highest court when the time for seeking further direct review in the state court expires. The Court of Appeals therefore concluded that Gonzalez's conviction became final on August 11, 2006, and his habeas petition was time barred.

The Court of Appeals did not address Gonzalez's Sixth Amendment claim or discuss whether the COA had been improperly issued. Nor did the State allege any defect in the COA or move to dismiss for lack of jurisdiction.

Gonzalez petitioned this Court for a writ of certiorari. In its brief in opposition, the State argued for the first time that the Court of Appeals lacked jurisdiction to adjudicate Gonzalez's appeal because the COA identified only a procedural issue, without also "indicat[ing]" a constitutional issue as required by § 2253(c)(3). We granted certiorari to decide two questions, both of which implicate splits in authority: (1) whether the Court of Appeals had jurisdiction to adjudicate Gonzalez's appeal, notwithstanding the § 2253(c)(3) defect; [FN1] and (2) whether Gonzalez's habeas petition was time barred under § 2244(d)(1) due to the date on which his judgment became final.[FN2] 564 U.S. ——, 131 S.Ct. 2989, 180 L.Ed.2d 820 (2011).

FN1. The Circuits have divided over whether a defect in a COA is a jurisdictional bar. Compare, *e.g.*, *Phelps v. Alameda*, 366 F.3d 722, 726 (C.A.9 2004) (no); *Porterfield v. Bell*, 258 F.3d 484, 485 (C.A.6 2001) (no); *Young v. United States*, 124 F.3d 794, 798–799 (C.A.7 1997) (no), with *United States v. Cepero*, 224 F.3d 256, 259–262 (C.A.3 2000) (en banc) (yes).

FN2. The Circuits have divided over when a judgment becomes final if a petitioner forgoes review in a State's highest court. Compare, *e.g.*, 623 F.3d 222, 226 (C.A.5 2010) (case below) (date when time for seeking such review expires); *Hemmerle v. Schriro*, 495 F.3d 1069, 1073–1074 (C.A.9 2007) (same), with *Riddle v. Kemna*, 523 F.3d 850, 855–856 (C.A.8 2008) (en banc) (date when state court issues its mandate).

II

We first consider whether the Court of Appeals had jurisdiction to adjudicate Gonzalez's appeal.

A

[1] Section 2253, as amended by AEDPA, governs appeals in habeas corpus proceedings. The first subsection, § 2253(a), is a general grant of jurisdiction, providing that district courts' final orders in habeas proceedings "shall be subject to review, on ap-

peal, by the court of appeals." 28 U.S.C. § 2253(a). The second, § 2253(b), limits jurisdiction over a particular type of final order. See § 2253(b) ("There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant [of] remov[al] ..."). This case concerns the third, § 2253(c), which provides:

> ***648** "(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals ...
>
> .....
>
> "(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> "(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2)."

When, as here, the district court denies relief on procedural grounds, the petitioner seeking a COA must show both "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000).

In this case, the Court of Appeals judge granted a COA that identified a debatable procedural ruling, but did not "indicate" the issue on which Gonzalez had made a substantial showing of the denial of a constitutional right, as required by § 2253(c)(3). The question before us is whether that defect deprived the Court of Appeals of the power to adjudicate Gonzalez's appeal. We hold that it did not.

[2][3][4][5] This Court has endeavored in recent years to "bring some discipline" to the use of the term "jurisdictional." *Henderson v. Shinseki*, 562 U.S. ——, ——, 131 S.Ct. 1197, 1202–1203, 179 L.Ed.2d 159 (2011). Recognizing our "less than meticulous" use of the term in the past, we have pressed a stricter distinction between truly jurisdictional rules, which govern "a court's adjudicatory authority," and nonjurisdictional "claim-processing rules," which do not. *Kontrick v. Ryan*, 540 U.S. 443, 454–455, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004). When a requirement goes to subject-matter jurisdiction, courts are obligated to consider *sua sponte* issues that the parties have disclaimed or have not presented. See *United States v. Cotton*, 535 U.S. 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002). Subject-matter jurisdiction can never be waived or forfeited. The objections may be resurrected at any point in the litigation, and a valid objection may lead a court midway through briefing to dismiss a complaint in its entirety. "[M]any months of work on the part of the attorneys and the court may be wasted." *Henderson*, 562 U.S., at ——, 131 S.Ct., at 1202. Courts, we have said, should not lightly attach those "drastic" consequences to limits Congress has enacted. *Ibid.*

[6][7][8] We accordingly have applied the following principle: A rule is jurisdictional "[i]f the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006). But if "Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional." *Id.*, at 516, 126 S.Ct. 1235.[FN3] That ***649** clear-statement principle makes particular sense in this statute, as we consider—against the backdrop of § 2253(a)'s clear jurisdictional grant to the courts of appeals and § 2253(b)'s clear limit on that grant—the extent to which Congress intended the COA process outlined in § 2253(c) to further limit the courts of appeals' jurisdiction over habeas appeals.

> FN3. We have also held that "context, including this Court's interpretation of similar provisions in many years past, is relevant to whether a statute ranks a requirement as jurisdictional." *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. ——, ——, 130 S.Ct. 1237, 1248, 176 L.Ed.2d 18 (2010). Here, however, even though the requirement of a COA (or its predecessor, the certificate of probable cause (CPC)) dates back to 1908, Congress did not enact the indication requirement until 1996. There is thus no "long line of this Court's decisions left undisturbed by Congress" on which to rely. *Union Pacific R. Co. v. Locomotive Engineers and Trainmen Gen. Comm. of Adjustment, Central*

Region, 558 U.S. ——, ——, 130 S.Ct. 584, 597, 175 L.Ed.2d 428 (2009).

> The issuance of a CPC, like the issuance of a COA, was jurisdictional. Contrary to the dissent's assertions, *post*, at 660 – 661 (opinion of SCALIA, J.), that fact does not suggest that the indication requirement is jurisdictional as well. If anything, the inference runs the other way. For nearly a century, a judge's granting or withholding of a CPC, absent any indication of issues, was the fully effective "expression of opinion," *post*, at 660, required for an appeal to proceed. AEDPA's new requirement that judges indicate the specific issues to be raised on appeal has no predecessor provision—indeed, it is the primary difference between a CPC and COA.

[9] Here, the only "clear" jurisdictional language in § 2253(c) appears in § 2253(c)(1). As we explained in *Miller–El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003), § 2253(c)(1)'s plain terms—"Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals"—establish that "until a COA has been issued federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners." *Id.*, at 336, 123 S.Ct. 1029. The parties thus agree that § 2253(c)(1) is jurisdictional.

[10] The parties also agree that § 2253(c)(2) is nonjurisdictional. [FN4] That is for good reason. Section 2253(c)(2) speaks only to *when* a COA may issue—upon "a substantial showing of the denial of a constitutional right." It does not contain § 2253(c)(1)'s jurisdictional terms. See *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally ..."). And it would be passing strange if, after a COA has issued, each court of appeals adjudicating an appeal were dutybound to revisit the threshold showing and gauge its "substantial[ity]" to verify its jurisdiction. That inquiry would be largely duplicative of the merits question before the court.

> FN4. The United States as *amicus curiae* contends that § 2253(c)(2) is jurisdictional, but the State concedes that it is not. Tr. of Oral Arg. 31.

[11] It follows that § 2253(c)(3) is nonjurisdictional as well. Like § 2253(c)(2), it too reflects a threshold condition for the issuance of a COA—the COA's indication of "which specific issue or issues satisfy the showing required by paragraph (2)." It too "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the [appeals] courts." *Arbaugh*, 546 U.S., at 515, 126 S.Ct. 1235 (internal quotation marks omitted). The unambiguous jurisdictional terms of §§ 2253(a), (b), and (c)(1) show that Congress would have spoken in clearer terms if it intended § 2253(c)(3) to have similar jurisdictional force. Instead, the contrast underscores that the failure to obtain a COA is jurisdictional, while a COA's failure to indicate an issue is not. A defective COA is not equivalent to the lack of any COA.

[12] It is telling, moreover, that Congress placed the power to issue COAs in the hands of a "circuit justice or judge." [FN5] ***650** It would seem somewhat counterintuitive to render a panel of court of appeals judges powerless to act on appeals based on COAs that Congress specifically empowered one court of appeals judge to grant. Indeed, whereas § 2253(c)(2)'s substantial-showing requirement at least describes a burden that "the applicant" seeking a COA bears, § 2253(c)(3)'s indication requirement binds only the judge issuing the COA. Notably, Gonzalez advanced both the timeliness and Sixth Amendment issues in his application for a COA. A petitioner, having successfully obtained a COA, has no control over how the judge drafts the COA and, as in Gonzalez's case, may have done everything required of him by law. That fact would only compound the "unfai[r] prejudice" resulting from the *sua sponte* dismissals and remands that jurisdictional treatment would entail. *Henderson*, 562 U.S., at ——, 131 S.Ct., at 1202. [FN6]

> FN5. The courts of appeals uniformly interpret "circuit justice or judge" to encompass district judges. See *United States v. Mitchell*, 216 F.3d 1126, 1129 (C.A.D.C.2000) (collecting cases); Fed. Rule App. Proc. 22(b). Habeas Corpus Rule 11(a) requires district judges to decide whether to grant or deny a COA in the first instance.

> FN6. That fact also distinguishes the indica-

tion requirement from every " 'similar provisio[n]' " that the dissent claims we have deemed jurisdictional. *Post,* at 658 – 659. None of our cases addressing those provisions, moreover, recognized or relied on the sweeping "rule" that the dissent now invokes, whereby this Court should enforce as jurisdictional all "procedural conditions for appealing a case from one Article III court to another." *Ibid.;* but see, *e.g., post,* at 659, n. 2 (conceding that the "rule" does not apply to criminal appeals); *Becker v. Montgomery,* 532 U.S. 757, 763, 121 S.Ct. 1801, 149 L.Ed.2d 983 (2001) (failure to sign notice of appeal is a nonjurisdictional omission). All the cases, meanwhile, involved time limits (save one involving Federal Rule of Appellate Procedure 3(c)(1), which we address *infra*). In *Bowles v. Russell,* 551 U.S. 205, 127 S.Ct. 2360, 168 L.Ed.2d 96 (2007), we emphasized our "century's worth of precedent" for treating statutory time limits on appeals as jurisdictional, *id.,* at 209, n. 2, 127 S.Ct. 2360, but even " *Bowles* did not hold ... that all statutory conditions imposing a time limit should be considered jurisdictional," *Reed Elsevier,* 559 U.S., at ——, 130 S.Ct., at 1247. This case, in any event, involves a different type of procedural condition.

[13] Treating § 2253(c)(3) as jurisdictional also would thwart Congress' intent in AEDPA "to eliminate delays in the federal habeas review process." *Holland v. Florida,* 560 U.S. ——, ——, 130 S.Ct. 2549, 2562, 177 L.Ed.2d 130 (2010). The COA process screens out issues unworthy of judicial time and attention and ensures that frivolous claims are not assigned to merits panels. Once a judge has made the determination that a COA is warranted and resources are deployed in briefing and argument, however, the COA has fulfilled that gatekeeping function. Even if additional screening of already-issued COAs for § 2253(c)(3) defects could further winnow the cases before the courts of appeals, that would not outweigh the costs of further delay from the extra layer of review. This case, in which the alleged defect would be dispositive, exemplifies those inefficiencies; the State requests that we vacate and remand with instructions to dismiss the appeal based on a § 2253(c)(3) defect that it raised for the first time in response to a petition for certiorari. And delay would be particularly fruitless in the numerous cases where, as here, the district court dismissed the petition on procedural grounds and the court of appeals affirms, without having to address the omitted constitutional issue at all.

B

The State, aided by the United States as *amicus curiae,* makes several arguments in support of jurisdictional treatment of § 2253(c)(3). None is persuasive.

***651** First, the State notes that although § 2253(c)(3) does not speak in jurisdictional terms, it refers back to § 2253(c)(1), which does. The State argues that it is as if § 2253(c)(1) provided: "Unless a circuit justice or judge issues a certificate of appealability *that shall indicate the specific issue or issues that satisfy the showing required by paragraph (2),* an appeal may not be taken to the court of appeals." The problem is that the statute provides no such thing. Instead, Congress set off the requirements in distinct paragraphs and, rather than mirroring their terms, excluded the jurisdictional terms in one from the other. Notably, the State concedes that § 2253(c)(2) is nonjurisdictional, even though it too cross-references § 2253(c)(1) and is cross-referenced by § 2253(c)(3).

[14][15][16] Second, the State seizes on the word "shall" in § 2253(c)(3), arguing that an omitted indication renders the COA no COA at all. But calling a rule nonjurisdictional does not mean that it is not mandatory or that a timely objection can be ignored. If a party timely raises the COA's failure to indicate a constitutional issue, the court of appeals panel must address the defect by considering an amendment to the COA or remanding to the district judge for specification of the issues.[FN7] This Court, moreover, has long "rejected the notion that 'all mandatory prescriptions, however emphatic, are ... properly typed jurisdictional.' " *Henderson,* 562 U.S., at ——, 131 S.Ct., at 1205; see also *Dolan v. United States,* 560 U.S. ——, ——, 130 S.Ct. 2533, 2539, 177 L.Ed.2d 108 (2010) (statute's reference to "shall" alone does not render statutory deadline jurisdictional). Nothing in § 2253(c)(3)'s prescription establishes that an omitted indication should remain an open issue throughout the case.

FN7. The dissent's insistence that there is "no practical, real-world effect" to treating this rule as mandatory, *post,* at 658, ignores the

> real world. Courts of appeals regularly amend COAs or remand for specification of issues, notwithstanding the supposed potential to "embarras[s] a colleague." *Post*, at 658; see, *e.g.*, *Saunders v. Senkowski*, 587 F.3d 543, 545 (C.A.2 2009) *(per curiam)* (amending COA to add issue); *United States v. Weaver*, 195 F.3d 52, 53 (C.A.D.C.1999) (remanding for specification of issues). The government frequently alleges COA defects as grounds for dismissal (as the State did here, at this late stage), apparently not sharing the dissent's concern that such efforts "yield nothing but additional litigation expenses." *Post*, at 658; see, *e.g.*, *Porterfield*, 258 F.3d, at 485; *Cepero*, 224 F.3d, at 257. Habeas petitioners, too, have every incentive to request that defects be resolved, not only to defuse potential problems later in the litigation, but also to ensure that the issue on which they sought appeal is certified and will receive full briefing and consideration.

[17] Third, the United States argues that the placement of § 2253(c)(3) in a section containing jurisdictional provisions signals that it too is jurisdictional. In characterizing certain requirements as nonjurisdictional, we have on occasion observed their " 'separat[ion]' " from jurisdictional provisions. *E.g.*, *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. ——, ——, 130 S.Ct. 1237, 1244–1245, 176 L.Ed.2d 18 (2010); *Arbaugh*, 546 U.S., at 515, 126 S.Ct. 1235. The converse, however, is not necessarily true: Mere proximity will not turn a rule that speaks in nonjurisdictional terms into a jurisdictional hurdle. In fact, § 2253(c)(3)'s proximity to §§ 2253(a), (b), and (c)(1) highlights the absence of clear jurisdictional terms in § 2253(c)(3).

[18] Finally, the State analogizes a COA to a notice of appeal, pointing out that both a notice and its contents are jurisdictional prerequisites. Federal Rule of Appellate Procedure 3(c)(1) provides that a notice of appeal must: "(A) specify the party or parties taking the appeal"; ***652** "(B) designate the judgment, order, or part thereof being appealed"; and "(C) name the court to which the appeal is taken." We have held that "Rule 3's dictates are jurisdictional in nature." *Smith v. Barry*, 502 U.S. 244, 248, 112 S.Ct. 678, 116 L.Ed.2d 678 (1992).

We reject this analogy. We construed the content requirements for notices of appeal as jurisdictional because we were "convinced that the harshness of our construction [wa]s 'imposed by the legislature.' " *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 318, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988). Rule 4, we noted, establishes mandatory time limits for filing a notice of appeal. Excusing a failure to name a party in a notice of appeal, in violation of Rule 3, would be "equivalent to permitting courts to extend the time for filing a notice of appeal," in violation of Rule 4. *Id.*, at 315, 108 S.Ct. 2405. And "time limits for filing a notice of appeal have been treated as jurisdictional in American law for well over a century." *Bowles v. Russell*, 551 U.S. 205, 209, n. 2, 127 S.Ct. 2360, 168 L.Ed.2d 96 (2007). Accordingly, the Advisory Committee Note "makes no distinction among the various requirements of Rule 3 and Rule 4," treating them "as a single jurisdictional threshold." *Torres*, 487 U.S., at 315, 108 S.Ct. 2405; see also *id.*, at 316, 108 S.Ct. 2405 ("the Advisory Committee viewed the requirements of Rule 3 as jurisdictional in nature"). Here, we find no similar basis for treating the paragraphs of § 2253(c) as a single jurisdictional threshold.

Moreover, in explaining why the naming requirement was jurisdictional in *Torres*, we reasoned that an unnamed party leaves the notice's "intended recipient[s]"—the appellee and court—"unable to determine with certitude whether [that party] should be bound by an adverse judgment or held liable for costs or sanctions." *Id.*, at 318, 108 S.Ct. 2405. The party could sit on the fence, await the outcome, and opt to participate only if it was favorable. That possibility of gamesmanship is not present here. Unlike the party who fails to submit a compliant notice of appeal, the habeas petitioner who obtains a COA cannot control how that COA is drafted.[FN8] And whereas a party's failure to be named in a notice of appeal gives absolutely no "notice of [his or her] appeal," a judge's issuance of a COA reflects his or her judgment that the appeal should proceed and supplies the State with notice that the habeas litigation will continue.

> FN8. The dissent claims that we fail to give *stare decisis* effect to *Torres*. *Post*, at 661. Setting aside the fact that *Torres* involved an unrelated Federal Rule featuring a different textual, contextual, and historical backdrop, the dissent notably fails to grapple with—indeed, its opinion is bereft of quota-

> tion to—any supporting reasoning in that opinion. That reasoning is simply not applicable here.

Because we conclude that § 2253(c)(3) is a nonjurisdictional rule, the Court of Appeals had jurisdiction to adjudicate Gonzalez's appeal.

III

We next consider whether Gonzalez's habeas petition was time barred. AEDPA establishes a 1–year limitations period for state prisoners to file for federal habeas relief, which "run[s] from the latest of" four specified dates. [FN9] § 2244(d)(1). This ***653** case concerns the first of those dates: "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." § 2244(d)(1)(A). The question before us is when the judgment becomes "final" if a petitioner does not appeal to a State's highest court.

FN9. Title 28 U.S.C. § 2244(d)(1) provides:

> "A 1–year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
>
> "(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> "(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> "(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> "(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence."

A

[19] In construing the language of § 2244(d)(1)(A), we do not write on a blank slate. In *Clay v. United States*, 537 U.S. 522, 123 S.Ct. 1072, 155 L.Ed.2d 88 (2003), we addressed AEDPA's statute of limitations for federal prisoners seeking postconviction relief. See § 2255(f)(1) (2006 ed., Supp. III) (beginning 1–year period of limitations from "the date on which the judgment of conviction becomes final"). We held that the federal judgment becomes final "when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari," or, if a petitioner does not seek certiorari, "when the time for filing a certiorari petition expires." *Id.*, at 527, 123 S.Ct. 1072. In so holding, we rejected the argument that, if a petitioner declines to seek certiorari, the limitations period "starts to run on the date the court of appeals issues its mandate." *Id.*, at 529, 123 S.Ct. 1072.

In *Jimenez v. Quarterman*, 555 U.S. 113, 129 S.Ct. 681, 172 L.Ed.2d 475 (2009), we described *Clay*'s interpretation as comporting "with the most natural reading of the statutory text" and saw "no reason to depart" from it in "construing the similar language of § 2244(d)(1)(A)." 555 U.S., at 119, 129 S.Ct. 681. The state court had permitted Jimenez to file an out-of-time direct appeal. We held that this "reset" the limitations period; Jimenez's judgment would now become final at "the conclusion of the out-of-time direct appeal, or the expiration of the time for seeking review of that [out-of-time] appeal." *Id.*, at 120–121, 129 S.Ct. 681. Because Jimenez did not seek certiorari, we made no mention of when the out-of-time appeal "conclu [ded]." Rather, we held that his judgment became final when his "time for seeking certiorari review in this Court expired." *Id.*, at 120, 129 S.Ct. 681. Nor did we mention the date on which the state court issued its mandate. Both *Clay* and *Jimenez* thus suggested that the direct review process either "concludes" or "expires," depending on whether the petitioner pursues or forgoes direct appeal to this Court.

[20] We now make clear what we suggested in those cases: The text of § 2244(d)(1)(A), which marks finality as of "the conclusion of direct review or the expiration of the time for seeking such review," con-

sists of two prongs. Each prong—the "conclusion of direct review" and the "expiration of the time for seeking such review"—relates to a distinct category of petitioners. For petitioners who pursue direct review all the way to this Court, the judgment becomes final at the "conclusion of direct review"—when this Court affirms a conviction on the merits or denies a petition for certiorari. For all other petitioners, the judgment becomes final at the "expiration of the time for seeking such review"—when the time for pursuing ***654** direct review in this Court, or in state court, expires. We thus agree with the Court of Appeals that because Gonzalez did not appeal to the State's highest court, his judgment became final when his time for seeking review with the State's highest court expired.

B

Gonzalez offers an alternative reading of § 2244(d)(1)(A): Courts should determine both the "conclusion of direct review" and the "expiration of the time for seeking such review" for every petitioner who does not seek certiorari, then start the 1–year clock from the "latest of" the two dates. Gonzalez rejects our uniform definition of the "conclusion of direct review" as the date on which this Court affirms a conviction on the merits or denies a petition for certiorari. In his view, whenever a petitioner does not seek certiorari, the "conclusion of direct review" is the date on which state law marks finality—in Texas, the date on which the mandate issues. *Ex parte Johnson*, 12 S.W.3d 472, 473 (Crim.App.2000) *(per curiam)*. Applying this approach, Gonzalez contends that his habeas petition was timely because his direct review "concluded" when the mandate issued (on September 26, 2006), later than the date on which his time for seeking Texas CCA review "expired" (August 11, 2006). We find his construction of the statute unpersuasive.

First, Gonzalez lacks a textual anchor for his later-in-time approach. The words "latest of" do not appear anywhere in § 2244(d)(1)(A). Rather, they appear in § 2244(d)(1) and refer to the "latest of" the dates in subparagraphs (A), (B), (C), and (D)—the latter three of which are inapplicable here. Nothing in § 2244(d)(1)(A) contemplates any conflict between the "conclusion of direct review" and the "expiration of the time for seeking such review," much less instructs that the later of the two shall prevail.

Nor is Gonzalez's later-in-time reading necessary to give both prongs of § 2244(d)(1)(A) full effect. Our reading does so by applying one "or" the other, depending on whether the direct review process concludes or expires. Treating the judgment as final on one date "or" the other is consistent with the disjunctive language of the provision.

Second, Gonzalez misreads our precedents. Gonzalez asserts that in *Jimenez*, we made a later-in-time choice between the two prongs. That is mistaken. Rather, we chose between two "expiration" dates corresponding to different appeals: Jimenez initially failed to appeal to the Texas Court of Appeals and that appeal became final when his "time for seeking discretionary review ... expired." 555 U.S., at 117, 119, 129 S.Ct. 681. When Jimenez was later allowed to file an out-of-time appeal, he pursued appeals with both the Texas Court of Appeals and Texas CCA; the out-of-time appeal thus became final when his "[t]ime for seeking certiorari review ... with this Court expired." *Id.*, at 116, 120, 129 S.Ct. 681. We adopted the out-of-time appeal's date of finality over the initial appeal's date of finality. *Id.*, at 119–121, 129 S.Ct. 681. Critically, by deeming the initial appeal final at the expiration of time for seeking review in state court, and the out-of-time appeal final at the expiration of time for seeking certiorari in this Court, we reinforced *Clay* 's suggestion that the "expiration" prong governs all petitioners who do not pursue direct review all the way to this Court. [FN10]

FN10. Gonzalez also argues that *Lawrence v. Florida*, 549 U.S. 327, 127 S.Ct. 1079, 166 L.Ed.2d 924 (2007), supports his focus on the state court's issuance of the mandate because it referred to a mandate in determining when state postconviction proceedings were no longer pending. *Lawrence*, however, is inapposite. The case involved a different provision, 28 U.S.C. § 2244(d)(2), which by its terms refers to "State" procedures.

***655** Third, Gonzalez argues that AEDPA's federalism concerns and respect for state-law procedures mean that we should not read § 2244(d)(1)(A) to disregard state law. We agree. That is why a state court's reopening of direct review will reset the limitations period. 555 U.S., at 121, 129 S.Ct. 681. That is also why, just as we determine the "expiration of the time for seeking [direct] review" from this Court's filing deadlines when petitioners forgo certiorari, we look to

state-court filing deadlines when petitioners forgo state-court appeals. Referring to state-law procedures in that context makes sense because such deadlines are inherently court specific. There is no risk of relying on "state-law rules that may differ from the general federal rule." *Clay*, 537 U.S., at 531, 123 S.Ct. 1072.

By contrast, Gonzalez urges us to scour each State's laws and cases to determine how it defines finality for every petitioner who forgoes a state-court appeal. That approach would usher in state-by-state definitions of the conclusion of direct review. It would be at odds with the uniform definition we adopted in *Clay* and accepted in the § 2244(d)(1)(A) context in *Jimenez*. And it would pose serious administrability concerns. Even if roughly "half of the States define the conclusion of direct review as the issuance of the mandate or similar process," Brief for Petitioner 40, that still leaves half with either different rules or no settled rules at all. [FN11]

> FN11. Compare, *e.g.*, *PSL Realty Co. v. Granite Inv. Co.*, 86 Ill.2d 291, 304, 56 Ill.Dec. 368, 427 N.E.2d 563, 569 (1981) (judgment is final "when entered"); *Gillis v. F & A Enterprises*, 934 P.2d 1253, 1256 (Wyo.1997) (judgment is final when "opinion is filed with the clerk"), with *Ex parte Johnson*, 12 S.W.3d 472, 473 (Texas CCA 2000) *(per curiam)* (judgment is final at "issuance of the mandate").

Fourth, Gonzalez speculates that our reading will rob some habeas petitioners of the full 1–year limitations period. Gonzalez asserts that our reading starts the clock running from the date that his time for seeking Texas CCA review expired, even though, under Texas law, he could not file for state habeas relief until six weeks later, on the date the Texas Court of Appeals issued its mandate. Tex.Code Crim. Proc. Ann., Art. 11.07, § 3(a) (Vernon Supp.2011). His inability to initiate state habeas proceedings during those six weeks, he argues, reduced his 1–year federal habeas filing period by six weeks. We expect, however, that it will be a rare situation where a petitioner confronting similar state laws faces a delay in the mandate's issuance so excessive that it prevents him or her from filing a federal habeas petition within a year.[FN12] A petitioner who has exhausted his or her claims in state court need not await state habeas proceedings to seek federal habeas relief on those claims. To the extent a petitioner has had his or her federal filing period severely truncated by a delay in the mandate's issuance and has unexhausted claims that must be raised on state habeas review, such a petitioner could file a request for a stay and abeyance from the federal district court. See ***656***Rhines v. Weber*, 544 U.S. 269, 277, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005).

> FN12. We note that Gonzalez waited four months from the date of the mandate's issuance before filing a state habeas petition. See 623 F.3d, at 223. When that petition was dismissed as improperly filed, Gonzalez waited another three months before refiling. *Ibid.* Even then, his state habeas proceedings concluded several weeks before his 1–year federal deadline elapsed. *Id.*, at 225.

Finally, Gonzalez argues, as an alternative to his later-in-time construction, that his petition should be considered timely because it was filed within a year of when his time for seeking this Court's review—as opposed to the Texas CCA's review—expired. We can review, however, only judgments of a "state court of last resort" or of a lower state court if the "state court of last resort" has denied discretionary review. This Court's Rule 13.1; see also 28 U.S.C. § 1257(a) (2006 ed.). Because Gonzalez did not appeal to the Texas CCA, this Court would have lacked jurisdiction over a petition for certiorari from the Texas Court of Appeals' decision affirming Gonzalez's conviction. We therefore decline to incorporate the 90–day period for seeking certiorari in determining when Gonzalez's judgment became final.

* * *

In sum, we hold that § 2253(c)(3) is a mandatory but nonjurisdictional rule. Here, the COA's failure to "indicate" a constitutional issue did not deprive the Court of Appeals of jurisdiction to adjudicate Gonzalez's appeal. We further hold that, with 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—here, August 11, 2006. We thus agree with the Court of Appeals that Gonzalez's federal habeas petition was time barred.

For the reasons stated, the judgment of the Court

132 S.Ct. 641, 181 L.Ed.2d 619, 80 BNA USLW 4045, 12 Cal. Daily Op. Serv. 360, 2012 Daily Journal D.A.R. 269, 23 Fla. L. Weekly Fed. S 23
(Cite as: 132 S.Ct. 641)

of Appeals for the Fifth Circuit is

Affirmed.

Justice SCALIA, dissenting.

The obvious, undeniable, purpose of 28 U.S.C. § 2253(c) is to spare three-judge courts of appeals the trouble of entertaining (and the prosecution the trouble of defending against) appeals from the denials of relief in habeas and § 2255 proceedings, unless a district or circuit judge has identified an issue on which the applicant has made a substantial showing of a constitutional violation. Where no such constitutional issue has been identified, an appeal on other, nonconstitutional, issues (such as the statute of limitations issue that the Court decides today) will not lie.

Today's opinion transforms this into a provision that allows appeal so long as a district or circuit judge, for whatever reason or for no reason at all, approves it. This makes a hash of the statute. The opinion thinks this alchemy required by the Court's previously expressed desire to " 'bring some discipline' to the use of the term 'jurisdictional,' " *ante*, at 648 (quoting *Henderson v. Shinseki*, 562 U.S. ——, ——, 131 S.Ct. 1197, 1202, 179 L.Ed.2d 159 (2011)). If that is true, discipline has become a code word for eliminating inconvenient statutory limits on our jurisdiction. I would reverse the judgment below for want of jurisdiction.

I

Fair Meaning of the Text

Congress amended § 2253 to its current form in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). In its entirety, the section reads as follows:

"(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

"(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment ***657** or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

"(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

"(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

"(B) the final order in a proceeding under section 2255.

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

"(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2)."

As the Court acknowledges, *ante*, at 648 – 649, all three subsections—(a), (b), and (c)—clearly speak to the jurisdiction of the courts of appeals. Subsection (a) gives appellate jurisdiction to "the court of appeals for the circuit in which the proceeding is held"; subsection (b) carves out certain classes of cases from that appellate jurisdiction; and subsection (c) imposes a procedural hurdle to the exercise of that appellate jurisdiction—a judge's issuance of a certificate of appealability, see *Miller–El v. Cockrell*, 537 U.S. 322, 336, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003).

Paragraph 2253(c)(3) says that a certificate of appealability must "indicate" which issue or issues in the case involve a substantial showing of a constitutional violation. Everyone agrees that the certificate issued below contains no such indication. See *ante*, at 648. It appears, in fact, that the issuing judge never considered whether any of Gonzalez's constitutional claims satisfied paragraph (2). As far as we know, *no* federal judge has ever determined that Gonzalez "has made a substantial showing of the denial of a constitutional right." § 2253(c)(2). The Court *does not even suggest that he has*—but it goes on to decide the statute-of-limitations issue in the case.

Its basis for proceeding in this fashion is the remarkable statement that "[a] defective COA is not equivalent to the lack of any COA." *Ante*, at 649. That

132 S.Ct. 641, 181 L.Ed.2d 619, 80 BNA USLW 4045, 12 Cal. Daily Op. Serv. 360, 2012 Daily Journal D.A.R. 269, 23 Fla. L. Weekly Fed. S 23
(Cite as: 132 S.Ct. 641)

is simply not true with respect to a significant defect in a legal document. Would one say that a deed which lacks the words of conveyance is not equivalent to the lack of a deed? Or that a passport which lacks the Secretary of State's affirmance of the bearer's citizenship is not equivalent to the lack of a passport? Minor technical defects are one thing, but a defect that goes to the whole purpose of the instrument is something else. And the *whole purpose* of the certificate-of-appealability procedure is to make sure that, before a case can proceed to the court of appeals, a judge has made the determination that it presents a substantial showing of the denial of a constitutional right. To call something a valid certificate of appealability which does not contain the central finding that is the whole purpose of a certificate of appealability is quite absurd.

The Court says that "[o]nce a judge has made the determination that a COA is warranted and resources are deployed in briefing and argument, ... the COA has fulfilled [its] gatekeeping function." *Ante,* at 650. But of course it has *not* done so—it has performed no gatekeeping function whatever—if "the determination that a COA is warranted" has not been accompanied by the issuing judge's opinion required to support the determination: that there is an issue as to which the applicant has made a "substantial showing of the denial of a constitutional right," ***658** § 2253(c)(2). As the very next sentence of today's opinion discloses, what the *Court* means by "has fulfilled [its] gatekeeping function" is simply that it will not be worth the trouble of going back, since that would "not outweigh the costs of further delay," *ante,* at 650.

That is doubtless true, and it demonstrates the hollowness of the Court's assurance that "calling a rule nonjurisdictional does not mean that it is not mandatory or that a timely objection can be ignored," *ante,* at 651. That statement is true enough as a general proposition: Calling the numerosity requirement in *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006), nonjurisdictional, for example, did not eliminate it, where protest was made, as a continuing mandatory requirement for relief on the merits, *id.*, at 516, 126 S.Ct. 1235. Even the time-of-filing requirement in *Eberhart v. United States*, 546 U.S. 12, 126 S.Ct. 403, 163 L.Ed.2d 14 (2005) *(per curiam)*, continued to have "bite" even though it was held nonjurisdictional: It prevented relief when the failure to observe it was properly challenged, *id.*, at 19, 126 S.Ct. 403. But the Court has managed to create today a "mandatory" requirement which—precisely because it will not be worth the trouble of going back—has no practical, real-world effect. [FN1] What is the consequence when the issuing judge, over properly preserved objection, produces a COA like the one here, which does not contain the required opinion? None whatever. The habeas petitioner already has what he wants, argument before the court of appeals. The government, for its part, is either confident in its view that there has been no substantial showing of denial of a constitutional right—in which case it is just as easy (if not easier) to win before three judges as it is before one; or else it is not—in which case a crusade to enforce § 2253(c) is likely to yield nothing but additional litigation expenses. As for the three-judge panel of the court of appeals, it remains free, as always, to choose whichever mandatory-but-not-jurisdictional basis it wishes for resolving the case. Cf. *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 93–94, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). Why not choose the one that is sure to be final and that might avoid embarrassing a colleague? No one has any interest in enforcing the "mandatory" requirement. Which is perhaps why, as I proceed to discuss, mandatory requirements for court-to-court appeal are always made jurisdictional.

> FN1. The Court suggests that I "ignor[e] the real world," *ante,* at 651, n. 7, in which litigants and courts *have* taken steps to correct a defective COA. But these actions are unsurprising in a world in which there was the possibility that this Court would treat § 2253(c)(3) as a jurisdictional requirement and a court of appeals had already done so. The New World of the Court's making, in which it is *certain* that an issuing judge's failure to identify any issue justifying a COA will not have jurisdictional consequences, is yet unexplored.

Past Treatment of Similar Provisions

As the Court acknowledges, " 'context, including this Court's interpretation of similar provisions in many years past, is relevant to whether a statute ranks a requirement as jurisdictional.' " *Ante,* at 648 – 649, n. 3 (quoting *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. ——, ——, 130 S.Ct. 1237, 1248, 176 L.Ed.2d 18 (2010)). Thus, we have said that a requirement prescribed as a condition to obtaining judicial review

of agency action is quite different (nonjurisdictional) from a requirement prescribed as a condition to appeal from one court to another (jurisdictional). See ***659** *Henderson*, 562 U.S., at ——— – ———, 131 S.Ct., at 1203–1204. We have always—*always*, *without exception*—held that procedural conditions for appealing a case from one Article III court to another are jurisdictional. When an appeal is "not taken within the time prescribed by law," the "Court of Appeals [is] without jurisdiction." *George v. Victor Talking Machine Co.*, 293 U.S. 377, 379, 55 S.Ct. 229, 79 L.Ed. 439 (1934) *(per curiam);* see also *United States v. Robinson*, 361 U.S. 220, 229–230, 80 S.Ct. 282, 4 L.Ed.2d 259 (1960). When a party's name is not listed in the notice of appeal, as the Federal Rules of Appellate Procedure require, the court has no jurisdiction over that party's appeal. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 314–315, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988).

When this Court reviewed cases by writ of error, the law required that the lower-court record be filed with the Court "before the end of the term next succeeding the issue of the writ." *Edmonson v. Bloomshire*, 7 Wall. 306, 309, 19 L.Ed. 91 (1869). The Court routinely dismissed cases that did not comply with that requirement. See, *e.g.*, *Mesa v. United States*, 2 Black 721, 721–722, 17 L.Ed. 350 (1863) *(per curiam); Edmonson, supra,* at 309–310; *Steamer Virginia v. West*, 19 How. 182, 183, 15 L.Ed. 594 (1857). The same jurisdictional treatment was accorded to failure to serve notice on the defendant in error within the succeeding term, see, *e.g.*, *United States v. Curry*, 6 How. 106, 112–113, 12 L.Ed. 363 (1848); *Villabolos v. United States*, 6 How. 81, 88, 91, 12 L.Ed. 352 (1848), and to failure to file the writ of error with the clerk of the lower court, see, *e.g.*, *Credit Co. v. Arkansas Central R. Co.*, 128 U.S. 258, 261, 9 S.Ct. 107, 32 L.Ed. 448 (1888); *Scarborough v. Pargoud*, 108 U.S. 567, 2 S.Ct. 877, 27 L.Ed. 824 (1883). Today, when a petition for certiorari in a civil case is not filed within the time prescribed by 28 U.S.C. § 2101(c), this Court lacks jurisdiction. *Federal Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88, 90, 115 S.Ct. 537, 130 L.Ed.2d 439 (1994) (citing *Missouri v. Jenkins*, 495 U.S. 33, 45, 110 S.Ct. 1651, 109 L.Ed.2d 31 (1990)); see also *Matton S.S. Co. v. Murphy*, 319 U.S. 412, 415, 63 S.Ct. 1126, 87 L.Ed. 1483 (1943) *(per curiam)*. [FN2]

FN2. Since the time limits for filing petitions for certiorari in *criminal* cases are "not enacted by Congress but [are] promulgated by this Court under authority of Congress to prescribe rules," we have held that they may "be relaxed by the Court in the exercise of its discretion when the ends of justice so require." *Schacht v. United States*, 398 U.S. 58, 64, 90 S.Ct. 1555, 26 L.Ed.2d 44 (1970). The indication requirement of § 2253(c)(3), of course, has been "imposed by the legislature and not by the judicial process." *Schiavone v. Fortune*, 477 U.S. 21, 31, 106 S.Ct. 2379, 91 L.Ed.2d 18 (1986).

So strict has been the rule enforcing as jurisdictional those requirements attached to court-from-court appeals, that we have applied it to a requirement contained in a statute not even addressed to the courts. Section 518(a) of Title 28 charges the Solicitor General with "conduct[ing] and argu[ing] suits and appeals in the Supreme Court ... in which the United States is interested." We held that, absent independent statutory authority, an agency's petition for certiorari filed without authorization from the Solicitor General does not suffice to invoke our jurisdiction. *NRA Political Victory Fund, supra,* at 98–99.[FN3]

FN3. The Court cites *Becker v. Montgomery*, 532 U.S. 757, 121 S.Ct. 1801, 149 L.Ed.2d 983 (2001), as a counter-example. *Ante*, at 650, n. 6. We held there that an appellant's failure to sign his notice of appeal, see Fed. Rule Civ. Proc. 11(a), within the time prescribed for filing a notice of appeal, see Fed. Rule App. Proc. 4(a)(1), did not require dismissal where the notice itself was timely filed. 532 U.S., at 762–763, 121 S.Ct. 1801. We did not hold, however, that the signing requirement was nonjurisdictional; we had no occasion to do so. We held that Becker had complied with Civil Rule 11(a) because the error was " 'corrected promptly after being called to [his] attention,' " *id.*, at 764, 121 S.Ct. 1801 (quoting Fed. Rule Civ. Proc. 11(a)).

***660** Jurisdictional enforcement of procedural requirements for appeal has deep roots in our jurisprudence. Chief Justice Taney dismissed an appeal in which the citation was not issued and served in time, because "we have no power to receive an appeal in

132 S.Ct. 641, 181 L.Ed.2d 619, 80 BNA USLW 4045, 12 Cal. Daily Op. Serv. 360, 2012 Daily Journal D.A.R. 269, 23 Fla. L. Weekly Fed. S 23
(Cite as: 132 S.Ct. 641)

any other mode than that provided by law." *Villabolos, supra*, at 90. And Chief Justice Chase wrote, in a case dismissing an appeal for failure to file in time:

> "In the Judiciary Act of 1789, and in many acts since, Congress has provided for [appellate courts'] exercise [of jurisdiction] in such cases and classes of cases, and under such regulations as seemed to the legislative wisdom convenient and appropriate. The court has always regarded appeals in other cases as excepted from the grant of appellate power, and has always felt itself bound to give effect to the regulations by which Congress has prescribed the manner of its exercise." *Castro v. United States*, 3 Wall. 46, 49, 18 L.Ed. 163 (1866).

Jurisdictional Nature of Predecessor Provision

But similarity to a general type of provision that has always been held jurisdictional is not all that supports the jurisdictional character of § 2253(c)(3). Its very predecessor statute made a judge's expression of opinion a condition of appellate jurisdiction. The certificate of probable cause, of which the COA was born, arrived on the scene over 100 years ago in "An Act Restricting in certain cases the right of appeal to the Supreme Court in habeas corpus proceedings," Act of Mar. 10, 1908, ch. 76, 35 Stat. 40:

> "[F]rom a final decision by a court of the United States in a proceeding in habeas corpus where the detention complained of is by virtue of process issued out of a State court no appeal to the Supreme Court shall be allowed unless the United States court by which the final decision was rendered or a justice of the Supreme Court shall be of opinion that there exists probable cause for an appeal, in which event, on allowing the same, the said court or justice shall certify that there is probable cause for such allowance."

The last version of this statute, before it was amended to its current form in AEDPA, provided for issuance of the certificate of probable cause by a circuit judge instead of a justice. See § 2253, 62 Stat. 967 (codified at 28 U.S.C. § 2253). Even applying the Court's simplistic rule that the jurisdictional restriction must be contained in the very same paragraph as the procedural requirement, there is no doubt that under this statute a judge's certification *that there was probable cause for an appeal* was jurisdictional. See, *e.g.*, *Ex parte Patrick*, 212 U.S. 555, 29 S.Ct. 686, 53 L.Ed. 650 (1908) *(per curiam); Bilik v. Strassheim*, 212 U.S. 551, 29 S.Ct. 684, 53 L.Ed. 649 (1908) *(per curiam).* There is no reason whatever to think that Congress rendered the statement of opinion unnecessary for jurisdiction by (1) extending the requirement for it to § 2255 proceedings; (2) requiring the opinion to address a more specific point (not just probable cause for an appeal but presence of an issue presenting a "substantial showing of the denial of a constitutional right") [FN4]; and (3) giving ***661** the document in which the judge *is required to express the opinion* a name ("certificate of appealability")—so that now a "certificate of appealability" without opinion will suffice. Neither any one of these steps, nor all of them combined, suggest elimination of jurisdictional status for the required expression of opinion.[FN5] It would be an entirely strange way of achieving that result. It was not a strange way, however, of dividing the now more complex and lengthy provision into manageable subsections.

FN4. The Court believes that the fact that this "new requirement ... has no predecessor provision" suggests that it is nonjurisdictional. *Ante*, at 648 – 649, n. 3. To begin with, it is not *that* new, and it *has* a predecessor provision; it merely adds detail to the jurisdictional opinion that was previously required. But even if the requirement were entirely unprecedented, when it appears within a textual structure that makes it jurisdictional (as our opinion in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988), held, see *infra*, at 650 – 652), it would be an entirely unprecedented jurisdictional provision.

FN5. The Court's opinion suggests that "[i]t would seem somewhat counterintuitive to render a panel of court of appeals judges powerless to act on appeals based on COAs that Congress specifically empowered one court of appeals judge to grant." *Ante*, at 650. To begin with, we do not think that an anomaly. It makes entire sense to enable a single circuit judge to nip improper appeals in the bud, sparing parties the trouble of an appeal, and courts the expenditure of three times as much judicial energy. But if it were an anomaly, it would be one that existed as well under the prior statute, which was held

132 S.Ct. 641, 181 L.Ed.2d 619, 80 BNA USLW 4045, 12 Cal. Daily Op. Serv. 360, 2012 Daily Journal D.A.R. 269, 23 Fla. L. Weekly Fed. S 23
(Cite as: 132 S.Ct. 641)

to be jurisdictional.

Stare Decisis* Effect of *Torres

In addition to the fact that conditions attached to court-to-court appeal have always been held jurisdictional, and the fact that this statute's predecessor was held to be so, we have considered, and found to be jurisdictional, a statute presenting *precisely* what is at issue here: a provision governing court-to-court appeals which made particular content a required element of a document that the statute said was necessary for jurisdiction; and which did that in a separate section that "excluded the jurisdictional terms," *ante,* at 651. That case flatly contradicts today's holding. In *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 108 S.Ct. 2405, 101 L.Ed.2d 285, we dealt with Rule 3(c)(1) of the Federal Rules of Appellate Procedure. Rule 3(a) of those Rules makes a notice of appeal necessary to appellate jurisdiction—just as § 2253(c)(1) makes a certificate of appealability necessary. And Rule 3(c)(1), which, like § 2253(c)(3), does not contain jurisdictional language, says what the requisite notice of appeal must contain—just as § 2253(c)(3) says what the requisite certificate of appealability must contain:

"The notice of appeal must:

"(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice ...;

"(B) designate the judgment, order, or part thereof being appealed; and

"(C) name the court to which the appeal is taken."

In *Torres* we held that the Court of Appeals lacked jurisdiction over the appeal of a party not properly named in the notice of appeal. 487 U.S., at 314–315, 108 S.Ct. 2405. The parallel is perfect.

The Court claims that the jurisdictional consequences of Rule 3(c) were " 'imposed by the legislature,' " *ante,* at 652 (quoting *Torres, supra*, at 318, 108 S.Ct. 2405), which according to the Court's analysis " 'clearly state [d],' " *ante,* at 648 (quoting *Arbaugh*, 546 U.S., at 515, 126 S.Ct. 1235), that Rule 3(c) is jurisdictional. But the legislature there did *precisely* what it did here: made a particular document necessary to jurisdiction and then specified what ***662** that document must contain.[FN6] I certainly agree that that is a clear statement that a document with the requisite content is necessary to jurisdiction. But the Court does not. So to distinguish *Torres* it has to find something *else* in Rule 3(c) that provided a "clear statement" of what "Congress intended," *ante,* at 648 – 649. The best it can come up with, *ante,* at 652, is an *un* clear statement, and that not from Congress but from Advisory Committee Notes referred to in the *Torres* opinion. Such Notes are (of course) "the product of the Advisory Committee, and not Congress," and "they are transmitted to Congress before the rule is enacted into law." *United States v. Vonn*, 535 U.S. 55, 64, n. 6, 122 S.Ct. 1043, 152 L.Ed.2d 90 (2002). They are, in other words, a species of legislative history. I know of no precedent for the proposition that legislative history can satisfy a clear-statement requirement imposed by this Court's opinions. Does today's distinguishing of *Torres* mean that legislative history can waive the sovereign immunity of the United States? See *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33–34, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992). Or abrogate the sovereign immunity of the States? See *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985). Or give retroactive effect to new legislation? See *Greene v. United States*, 376 U.S. 149, 160, 84 S.Ct. 615, 11 L.Ed.2d 576 (1964). Or foreclose review of agency actions? See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). Today's opinion is in this respect a time-bomb.

FN6. The Court's claim that " *Torres* involved ... a different textual, contextual, and historical backdrop," *ante,* at 652, n. 8, does not withstand scrutiny. First, consider the "textual backdrop." The Court cannot really believe that Rule 3(c)(1)'s statement that a notice of appeal "must ... specify" the appealing party is " 'clear' jurisdictional language," *ante,* at 649, while § 2253(c)(3)'s "shall indicate" the issue or issues is not. If it did, it would say as much, since that would readily distinguish *Torres.* And then consider the "contextual" (whatever that means) and "historical backdrop." Each provision, in mandatory-but-not-jurisdictional language, specifies what another document, itself jurisdictional in light of statutory text and history, must contain. The two cases are, of course, literally "different," *ante,* at 652, n. 8,

but not in any legally relevant way.

To make matters worse, the Advisory Committee Note considered by the *Torres* Court—as "support for [its] view," 487 U.S., at 315, 108 S.Ct. 2405—did *not* clearly say that Rule 3(c)'s requirements were jurisdictional. It said this:

> " 'Rule 3 and Rule 4 combine to require that a notice of appeal be filed with the clerk of the district court within the time prescribed for taking an appeal. Because *the timely filing of a notice of appeal* is "mandatory and jurisdictional," *United States v. Robinson*, [361 U.S. 220, 224, 80 S.Ct. 282, 4 L.Ed.2d 259 (1960)], compliance with the provisions of those rules *is of the utmost importance*.' " 487 U.S., at 315 [108 S.Ct. 2405] (quoting 28 U.S.C.App., p. 467; alteration omitted and emphasis added).

To say that timely filing of a notice of appeal is jurisdictional, and that placing within the notice of appeal what Rule 3 says it must contain is "*of the utmost importance*," does not remotely add up to a clear statement that placing within the notice of appeal what Rule 3 says it must contain is *jurisdictional*. There is simply no principled basis for saying that *Torres* satisfies the "clear-statement principle," *ante*, at 649, except the commonsense notion that when a document is made jurisdictional, and the required contents of that document specified, a document that does ***663** not contain those contents cannot confer jurisdiction.[FN7]

> FN7. The Court also tries to distinguish *Torres* on the ground that failure to comply with Rule 3 presented a different "possibility of gamesmanship," *ante*, at 652, from that presented here. I fail to see the relevance of that happenstance. The premise of the Court's opinion is that the question of jurisdiction *vel non* is governed by a "clear-statement principle," *ante*, at 649. The statement here is precisely as clear as the statement in *Torres*. Do we enforce clear statements only when there is a "possibility of gamesmanship"? The Court's free-wheeling purposivism defies textual analysis.

The Court is not willing to say that *Torres* is no longer good law, but I doubt whether future litigants will be so coy. They know that in the past, to avoid the uncongenial rigidity of the rule that procedures attending court-to-court appeals are jurisdictional, we have performed wondrous contortions to find compliance with those rules. For example, in *Smith v. Barry*, 502 U.S. 244, 248, 112 S.Ct. 678, 116 L.Ed.2d 678 (1992), we held that an "informal brief" filed after a defective notice of appeal counted as a valid notice of appeal. In *Foman v. Davis*, 371 U.S. 178, 181, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962), we held that a notice of appeal from the denial of a motion to vacate the judgment was also a notice of appeal from the underlying judgment. And in *Houston v. Lack*, 487 U.S. 266, 270, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988), we held that a prisoner's notice of appeal was "filed" when it was delivered to prison authorities for forwarding to the district court. These (shall we say) creative interpretations of the procedural requirements were made necessary by the background principle that is centuries old: "[I]f the mode prescribed for removing cases by writ of error or appeal be too strict and technical, and likely to produce inconvenience or injustice, it is for Congress to provide a remedy by altering the existing laws; not for the court." *United States v. Curry*, 6 How. 106, 113, 12 L.Ed. 363 (1848). But if we have been willing to expose ourselves to ridicule in order to approve implausible compliance with procedural prerequisites to appeal, surely we may be willing to continue and expand the process of simply converting those obnoxious prerequisites into the now favored "claims processing rules," enabling us to avoid unseemly contortions by simply invoking the ever-judge-friendly principles of equity.

What began as an effort to " 'bring some discipline' to the use of the term 'jurisdictional,' " *ante*, at 648 (quoting *Henderson*, 562 U.S., at ——, 131 S.Ct., at 1202), shows signs of becoming a libertine, liberating romp through our established jurisprudence.

II

A few remaining points raised by the Court's opinion warrant response.

The Court holds that the requirement imposed by paragraph (c)(2) (that a COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right") is not jurisdictional, and says that "[i]t follows that § 2253(c)(3) is nonjurisdictional as well." *Ante*, at 649. I need not reach the issue whether (c)(2) is jurisdiction-

132 S.Ct. 641, 181 L.Ed.2d 619, 80 BNA USLW 4045, 12 Cal. Daily Op. Serv. 360, 2012 Daily Journal D.A.R. 269, 23 Fla. L. Weekly Fed. S 23
(Cite as: 132 S.Ct. 641)

al—though it seems to me that the Court disposes rather summarily of the Solicitor General's view that it is. And I need not confront the Court with the back-at-you argument that if (c)(3) is jurisdictional (as I think) then (c)(2) is as well. For whether one runs it backwards or forwards, the argument is a bad one. Assuming that (c)(2) is nonjurisdictional, it does not at all "follow" that (c)(3) is nonjurisdictional as well. Paragraph (c)(3) is jurisdictional not because it is located in subsection (c), but ***664** because it describes the required content of a COA. Paragraph (c)(2) does not; it sets forth the criterion for a COA's issuance. A judge may apply that criterion erroneously but still produce a COA that (as paragraph (c)(3) requires) "indicate[s] which specific issue or issues satisfy the showing required by paragraph (2)." It no more follows that the erroneousness of the judge's indication must destroy the jurisdiction that the COA creates, than it followed under the predecessor statute that the erroneousness of the certification of probable cause for an appeal destroyed the jurisdiction that the certification created.[FN8] The two issues are quite separate: what the judge must find, and what the COA (or certification) must contain.

FN8. We held in *Nowakowski v. Maroney*, 386 U.S. 542, 543, 87 S.Ct. 1197, 18 L.Ed.2d 282 (1967) *(per curiam)*, that "when a district judge grants [a certificate of probable cause], the court of appeals must grant an appeal ... and proceed to a disposition of the appeal in accord with its ordinary procedure." See also *Carafas v. LaVallee*, 391 U.S. 234, 242, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968) (*Nowakowski* requires "that the appeal [be] considered on its merits ... in cases where a certificate of probable cause has been granted").

The Court points out that Gonzalez raised the Sixth Amendment issue in his application for a COA, that "[a] petitioner, having successfully obtained a COA, has no control over how the judge drafts the COA," and that the petitioner, "as in Gonzalez's case, may have done everything required of him by law." *Ante*, at 650. Perhaps it is true that the defective COA was not at all Gonzalez's fault—though he could have promptly moved to amend it. But no-fault elimination of jurisdiction is not forbidden. In *Bowles v. Russell*, 551 U.S. 205, 127 S.Ct. 2360, 168 L.Ed.2d 96 (2007), we enforced a time limit on notice of appeal where the district court had purported to extend the time to file and the appellant had complied with the court's order. *Id.*, at 207, 213–214, 127 S.Ct. 2360. It did not matter that the fault lay with the court.

Finally, the Court points out that treating § 2253(c)(3) as jurisdictional would waste a lot of time. "Even if additional screening of already-issued COAs for § 2253(c)(3) defects could further winnow the cases before the courts of appeals, that would not outweigh the costs of further delay from the extra layer of review." *Ante*, at 650. But that is not an argument directed to the statute before us; it is an argument directed against enforcement of *all* jurisdictional requirements (*all* of which, I suspect, are the object of the Court's mounting disfavor). And the argument may not even be true, except in the (presumably rare) case where the jurisdictional prescription is disregarded. Over the long term, the time saved to judges and lawyers by an *enforceable* requirement that appeals be screened by a single judge may vastly outweigh the time wasted by the occasional need for enforcement. That, it seems to me, is what Congress believed.

* * *

Terminology is destiny. Today's holding, and the erosion of our prior jurisprudence that will perhaps follow upon it, is foreshadowed and facilitated by the unfortunate terminology with which we have chosen to accompany our campaign to "bring some discipline" to determinations of jurisdiction. We have said that the universe of rules placing limitations upon the courts is divided into (1) "claims processing rules," and (2) jurisdiction-removing rules. Unless our prior jurisprudence is to be repudiated, that is a false dichotomy. The requirement that the unsuccessful litigant file a timely notice of appeal, for example, is (if the term is to have any meaning) a claims-processing rule, ordering***665** the process by which claims are adjudicated. Yet as discussed above, that, and all procedures that must be followed to proceed from one court to another, have always been deemed jurisdictional. The proper dichotomy is between claims processing rules that are jurisdictional, and those that are not. To put it otherwise suggests a test for jurisdiction that is not to be found in our cases.[FN9]

FN9. It may well be that what I have called a false dichotomy was indeed meant to revise

132 S.Ct. 641, 181 L.Ed.2d 619, 80 BNA USLW 4045, 12 Cal. Daily Op. Serv. 360, 2012 Daily Journal D.A.R. 269, 23 Fla. L. Weekly Fed. S 23
(Cite as: 132 S.Ct. 641)

> our jurisprudence. In *Kontrick v. Ryan*, 540 U.S. 443, 455, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004), we said by way of dictum the following: "Clarity would be facilitated 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." Unless an appeal lacking a timely filing of a notice of appeal can be considered one that falls outside the appellate court's "subject-matter jurisdiction" (which would be an odd usage), *Kontrick* 's dictum effectively announced today's decision, the overruling of *Torres* and *Browder v. Director, Dept. of Corrections of Ill.*, 434 U.S. 257, 98 S.Ct. 556, 54 L.Ed.2d 521 (1978), and the elimination of jurisdictional treatment for all procedural requirements for appeal. That the announcement has not been heeded is demonstrated by *Bowles v. Russell*, 551 U.S. 205, 127 S.Ct. 2360, 168 L.Ed.2d 96 (2007) (decided after *Kontrick*), which (over the dissent of the author of *Kontrick*) reaffirmed *Browder.* I confess error in joining the quoted portion of *Kontrick.*

At the end of the day, the indication requirement in § 2253(c)(3) is " 'imposed by the legislature and not by the judicial process.' " *Torres*, 487 U.S., at 318, 108 S.Ct. 2405 (quoting *Schiavone v. Fortune*, 477 U.S. 21, 31, 106 S.Ct. 2379, 91 L.Ed.2d 18 (1986)). Whether or not its enforcement leads to a harsh result, wastes time in this particular case, or (though the Court does not give this as a reason) prevents us from reaching a circuit conflict we are dying to resolve, we are obliged to enforce it. I respectfully dissent.

U.S.,2012.
Gonzalez v. Thaler
132 S.Ct. 641, 181 L.Ed.2d 619, 80 BNA USLW 4045, 12 Cal. Daily Op. Serv. 360, 2012 Daily Journal D.A.R. 269, 23 Fla. L. Weekly Fed. S 23

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TAB 3

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MEMORANDUM

DATE: March 28, 2012

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Timing of petitions for rehearing

As the Committee is aware, Appellate Rule 40(a)(1) sets a presumptive deadline of 14 days for the filing of petitions for rehearing or rehearing en banc; this deadline can be altered "by order or local rule." For *civil* cases in which specified U.S. entities are parties, the Rule sets a presumptive 45-day deadline, which can be altered by order.

Douglas Letter has drawn to the Committee's attention the fact that the D.C. Circuit has by local rule lengthened the time to petition for rehearing or rehearing en banc. He has asked whether it would make sense for the Committee to consider a change to Rule 40(a)(1)'s timing prescriptions. This memo briefly describes the D.C. Circuit's local rule and selected local provisions in other circuits. If the Committee is interested in considering possible modifications to Rule 40(a)(1), I can explore these matters in greater depth.

A quick survey indicates that, at present, three circuits have adopted local rules that extend the time for seeking rehearing or rehearing en banc. D.C. Circuit Rule 35(a) provides:

> In all cases in which a party is one of those listed in FRAP 40(a)(1)(A) - (D), the time within which any party may seek panel rehearing or rehearing en banc is 45 days after entry of judgment or other form of decision. In all other cases, any petition for panel rehearing or petition for rehearing en banc must be filed within 30 days after entry of judgment or other form of decision. The time for filing a petition for panel rehearing or rehearing en banc will not be extended except for good cause shown.

The D.C. Circuit provision appears to lengthen (from 14 days to 45 days) the time to seek rehearing or rehearing en banc in connection with criminal appeals (because the federal government will be a party in such cases). And it lengthens (from 14 days to 30 days) the time to seek rehearing or rehearing en banc in connection with civil appeals in cases that do not include federal parties of the types listed in Appellate Rule 40(a)(1)(A) - (D). Eleventh Circuit Rule 35-2 provides in part: "A petition for en banc rehearing must be filed within 21 days of entry of judgment, except that a petition for en banc rehearing in a civil appeal in which the United States or an agency or officer thereof is a party must be filed within 45 days of entry of

judgment.... Counsel should not request extensions of time except for the most compelling reasons." Eleventh Circuit Rule 40-3 similarly alters the time to filed a petition for panel rehearing. Federal Circuit Rule 40(e) provides:

> Except for a civil case in which the United States or its officer or agency is a party, a petition for panel rehearing may be filed within 30 days after entry of judgment. If the United States or its officer or agency is a party, a petition for panel rehearing may be filed within 45 days after entry of judgment. The time limits set forth in this rule also apply to a motion for panel reconsideration of a dispositive panel order.

On the other hand, at least two circuits have adopted local provisions that suggest a general reluctance to extend the time to seek rehearing or rehearing en banc. Fourth Circuit Rule 40(c) provides in part:

> The Court strictly enforces the time limits for filing petitions for rehearing and petitions for rehearing en banc.... The only grounds for an extension of time to file a petition, or to accept an untimely petition, are as follows:
>
> i. the death or serious illness of counsel, or of a member of counsel's immediate family (or in the case of a party proceeding without counsel, the death or serious illness of the party or a member of the party's immediate family); or
>
> ii. an extraordinary circumstance wholly beyond the control of counsel or of a party proceeding without counsel.

Similarly, Fifth Circuit Rule 35.4 states: "Any petition for rehearing en banc must be received in the clerk's office within the time specified in FED. R. APP. P. 40. Counsel should not request extensions of time except for the most compelling reasons."

This brief survey suggests that some circuits consider it useful to extend the deadlines for rehearing petitions beyond the default time limits specified in Appellate Rule 40(a)(1), but it also might be taken to suggest that some other circuits might not welcome such a change if the change were implemented in the national Rule.

TAB 4A

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MEMORANDUM

DATE: March 28, 2012

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 08-AP-G

The Appellate Rules proposals published for comment in summer 2011 included proposed changes to Form 4 (concerning applications to proceed in forma pauperis ("i.f.p.")) that make some technical changes and remove the current Form's requirement of detailed information concerning the i.f.p. applicant's expenditures for legal and other services in connection with the case.

Part I of this memo sets out the proposal as published. Part II summarizes the sole comment received on this proposal – namely, the suggestion by the National Association of Criminal Defense Lawyers ("NACDL") that when Question 4 specifies that the requirement of an institutional-account statement is limited to prisoners "seeking to appeal a judgment in a civil action or proceeding," the form should further specify that for this purpose neither a habeas proceeding nor a proceeding under 28 U.S.C. § 2255 counts as a civil proceeding.[1] Part III evaluates NACDL's proposal and suggests that this proposal is worth adding to the Committee's study agenda as a new item.

I. The proposal as published

Here is the proposal as published for comment:

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

* * * * *

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

[1] The letter from Peter Goldberger on behalf of NACDL is included among the enclosures to the memo (elsewhere in these agenda materials) concerning Item No. 10-AP-B (statement of the case).

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

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

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

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

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

4. *How much cash do you and your spouse have? $_____*
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse

			has
_____	_____	$_____	$_____
_____	_____	$_____	$_____
_____	_____	$_____	$_____

If you are a prisoner seeking to appeal a judgment in a civil action or proceeding, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

* * * * *

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

~~If yes, how much? $_____~~
~~If yes, state the attorney's name, address, and telephone number:~~
~~_____~~
~~_____~~
~~_____~~

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

~~☐ Yes ☐ No~~
~~If yes, how much? $_____~~
~~If yes, state the person's name, address, and telephone number:~~
~~_____~~
~~_____~~
~~_____~~

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

☐ Yes ☐ No
If yes, how much? $_____

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

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

_____
Your daytime phone number: (____) _____

Your age: _____ Your years of schooling: _____

Last four digits of your social-security number: _____

II. NACDL's comment on the Form 4 proposal

Only one comment was submitted on the Form 4 proposal. Peter Goldberger writes on behalf of the National Association of Criminal Defense Lawyers (NACDL) with the following comment:

> The committee proposes to clarify that the requirement that a prisoner attach a statement of the balance in his or her institutional account applies only when the prisoner[] seeks to appeal "a judgment in a civil action or proceeding." NACDL suggests that this wording be clarified to reflect more accurately the coverage of the Prison Litigation Reform Act, by adding "(not including a decision in a habeas corpus proceeding or a proceeding under 28 U.S.C. § 2255)." Such proceedings, while generally treated as "civil" for purposes of appeal, are not governed by the PLRA. *See, e.g.*, *Santana v. United States*, 98 F.3d 752 (3d Cir. 1996) (Becker, J.).

NACDL's comment concerns one of the technical amendments that the Committee had included in the version of Form 4 that was published for comment. As the Committee will recall, these technical amendments arose from our discovery that the version of Form 4 in the December 1, 2009, House pamphlet (and prior such pamphlets) was not identical to the version of Form 4 transmitted by the Chief Justice to Congress on April 24, 1998. The House pamphlets had reproduced the version of Form 4 that was approved by the Judicial Conference in fall 1997 for submission to the Supreme Court (the "Committee Version") – rather than the version transmitted by the Supreme Court to Congress in spring 1998 (the "Transmitted Version"). Believing the Committee Version to be preferable to the Transmitted Version, the Committee included among the changes published for comment in summer 2011 the alterations necessary to eliminate the discrepancies between the official Form 4 and the Committee Version.

One of those changes concerned Form 4's Question 4. Question 4 in the Committee Version directs the submission of certified institutional-account statement(s) by any applicant who is "a prisoner seeking to appeal a judgment in a civil action or proceeding." Question 4 in the Transmitted Version omits the limiting phrase "seeking to appeal a judgment in a civil action or proceeding." The basis for the limiting phrase presumably is 28 U.S.C. § 1915(a)(2), which provides that "[a] prisoner seeking to bring a civil action or appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor, in addition to filing the affidavit filed under paragraph (1), shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at

which the prisoner is or was confined."[2]

III. Recommendation

I recommend that the Committee approve the changes to Form 4 as published, and that it add NACDL's suggestion to its study agenda as a new item. After further consideration, the Committee may well decide that NACDL's suggestion is worth implementing, but the topic is a bit more complex than it at first appears, and it seems useful to consult the Criminal Rules Committee and other stakeholders before proceeding.

As I discuss in this Part, the challenge arises because, in drafting the in forma pauperis provisions in the Prison Litigation Reform Act ("PLRA"), Congress used the term "civil action or proceeding" without defining what it meant.[3] NACDL is correct that the caselaw has reached

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[2] If the appellant is a criminal defendant who was determined to be financially unable to employ counsel, Appellate Rule 24(a)(3) permits that party to proceed on appeal i.f.p. "without further authorization" unless the district court (stating its reasons in writing) certifies the appeal as not taken in good faith or finds that the party is not otherwise entitled to proceed i.f.p.

[3] As NACDL notes, habeas and Section 2255 proceedings are treated as civil for purposes of determining the time to appeal. *See* Rule 11(b) of the Rules Governing § 2255 Proceedings ("Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules."); Bowles v. Russell, 551 U.S. 205, 208-09 (2007) (applying Appellate Rule 4(a) and 28 U.S.C. § 2107 to an appeal by a habeas petitioner). The 1979 Committee Note to Rule 11 of the Section 2255 Rules states:

> Prior to the promulgation of the Rules Governing Section 2255 Proceedings, the courts consistently held that the time for appeal in a section 2255 case is as provided in Fed.R.App.P. 4(a), that is, 60 days when the government is a party, rather than as provided in appellate rule 4(b), which says that the time is 10 days in criminal cases. This result has often been explained on the ground that rule 4(a) has to do with civil cases and that "proceedings under section 2255 are civil in nature." E.g., *Rothman v. United States*, 508 F.2d 648 (3d Cir.1975). Because the new section 2255 rules are based upon the premise "that a motion under § 2255 is a further step in the movant's criminal case rather than a separate civil action," see Advisory Committee Note to Rule 1, the question has arisen whether the new rules have the effect of shortening the time for appeal to that provided in appellate rule 4(b). A sentence has been added to Rule 11 in order to make it clear that this is not the case.
>
> Even though section 2255 proceedings are a further step in the criminal case, the added sentence correctly states current law. In *United States v. Hayman*, 342 U.S. 205 (1952), the Supreme Court noted that such appeals "are governed by

a general consensus that the term does not include habeas proceedings.[4] Caselaw from all twelve of the relevant circuits[5] now agrees that state prisoners' habeas petitions under 28 U.S.C. § 2254 fall outside the terms of the PLRA's i.f.p. provisions.[6] I have found caselaw from seven circuits

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> the civil rules applicable to appeals from final judgments in habeas corpus actions." In support, the Court cited *Mercado v. United States*, 183 F.2d 486 (1st Cir.1950), a case rejecting the argument that because § 2255 proceedings are criminal in nature the time for appeal is only 10 days. The *Mercado* court concluded that the situation was governed by that part of 28 U.S.C. § 2255 which reads: "An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus." Thus, because appellate rule 4(a) is applicable in habeas cases, it likewise governs in § 2255 cases even though they are criminal in nature.

Habeas proceedings are not characterized as "civil" for all purposes. *See, e.g.*, Harris v. Nelson, 394 U.S. 286, 293-94 (1969) ("It is, of course, true that habeas corpus proceedings are characterized as 'civil.' .... But the label is gross and inexact.... Essentially, the proceeding is unique."). *Compare* Browder v. Director, Dept. of Corrections, 434 U.S. 257, 269 (1978) ("It is well settled that habeas corpus is a civil proceeding."); 28 U.S.C. § 1914(a) ("The clerk of each district court shall require the parties instituting any civil action, suit or proceeding in such court, whether by original process, removal or otherwise, to pay a filing fee of $350, except that on application for a writ of habeas corpus the filing fee shall be $5.").

[4] NACDL presents its suggestion as one that will bring Form 4 more closely into line with existing caselaw, rather than as a suggestion that Form 4 be amended to depart from the approach taken in existing caselaw. This makes sense to me. As discussed in this memo, the caselaw interprets statutory law (the PLRA). I doubt that the Committee would wish to take an approach in Form 4 that purported to supersede the PLRA's requirements. It is an interesting question whether the Rules Enabling Act's supersession clause – which refers to supersession via rules and does not mention forms, see 28 U.S.C. § 2072(b) – would authorize supersession by means of the combination of Appellate Rule 24 and Form 4.

[5] For obvious reasons, the Federal Circuit's caselaw does not address questions concerning habeas or Section 2255 proceedings.

[6] *See* Martin v. Bissonette, 118 F.3d 871, 874 (1st Cir. 1997) (holding on an appeal from the dismissal of a Section 2254 petition that "the PLRA does not apply to habeas petitions prosecuted in federal courts by state prisoners"); Reyes v. Keane, 90 F.3d 676, 678 (2d Cir. 1996) (holding in the context of an appeal from the dismissal of a state prisoner's habeas petition"that Congress did not intend the PLRA to apply to petitions for a writ of habeas corpus"), *overruled on other grounds by* Lindh v. Murphy, 521 U.S. 320, 336-37 (1997); Santana v. United States, 98 F.3d 752, 756 (3d Cir. 1996) (directing court clerks with circuit not to apply PLRA's in forma pauperis provisions to Section 2254 or Section 2255 proceedings); Smith v. Angelone, 111 F.3d 1126, 1131 (4th Cir. 1997) (holding on appeal from the denial of a

reaching the same conclusion about federal prisoners' petitions under 28 U.S.C. § 2255.[7] And there are holdings in five circuits – and dicta in two more – that take the same approach to habeas petitions under 28 U.S.C. § 2241.[8] (A further complication arises when a mandamus

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Section 2254 petition that "the in forma pauperis filing fee provisions of the PLRA do not apply in habeas corpus actions"); Carson v. Johnson, 112 F.3d 818, 820-21 (5th Cir. 1997) (concluding that "the new PLRA requirements do not apply to habeas petitions under § 2254," but characterizing the suit at hand as a Section 1983 action rather than a habeas action); Kincade v. Sparkman, 117 F.3d 949, 951 (6th Cir. 1997) ("[T]he fee requirements of the Prison Litigation Reform Act do not apply to cases or appeals brought under § 2254 and § 2255."); Martin v. United States, 96 F.3d 853, 855-56 (7th Cir. 1996) (addressing a Section 2255 proceeding and a state-prisoner habeas proceeding); Malave v. Hedrick, 271 F.3d 1139, 1140 (8th Cir. 2001) (per curiam) (in the context of an appeal from the dismissal of a Section 2241 petition, "holding that the PLRA's filing-fee provisions are inapplicable to habeas corpus actions"); Carmona v. Minnesota, 23 Fed. Appx. 629, 630 (8th Cir. 2002) (nonprecedential opinion applying *Malave* in the context of a Section 2254 petition); Naddi v. Hill, 106 F.3d 275, 277 (9th Cir. 1997) (Section 2254 proceeding); United States v. Simmonds, 111 F.3d 737, 741 (10th Cir. 1997) (holding that neither Section 2254 proceedings nor Section 2255 proceedings are "'civil actions' for purposes of 28 U.S.C. § 1915"), overruled on other grounds by United States v. Hurst, 322 F.3d 1256, 1261 n.4 (10th Cir. 2003); Anderson v. Singletary, 111 F.3d 801, 806 (11th Cir. 1997) (holding that "the filing fee provisions of section 804(a) of the PLRA do not apply in 28 U.S.C. § 2254 or 28 U.S.C. § 2255 proceedings"); United States v. Levi, 111 F.3d 955, 956 (D.C. Cir. 1997) (per curiam) (holding that the PLRA does not apply to Section 2254 or Section 2255 proceedings).

[7] *See* Santana, 98 F.3d at 756; United States v. Cole, 101 F.3d 1076, 1077 (5th Cir. 1996) (holding that the PLRA "is inapplicable to § 2255 petitions"); Kincade, 117 F.3d at 951; Martin, 96 F.3d at 855-56; Simmonds, 111 F.3d at 741; Anderson, 111 F.3d at 806; Levi, 111 F.3d at 956; United States v. Ortiz, 136 F.3d 161, 169 (D.C. Cir. 1998) ("[T]he in forma pauperis filing fee provisions of the PLRA do not apply to proceedings under § 2255.").

[8] *See* Davis v. Fechtel, 150 F.3d 486, 487 (5th Cir. 1998) (holding in the context of a habeas action by a federal prisoner "that Congress did not intend for the term 'civil action' [in the PLRA] to include section 2241 habeas proceedings"); Malave, 271 F.3d at 1140; McIntosh v. U.S. Parole Comm'n, 115 F.3d 809, 811-12 (10th Cir. 1997) (reasoning that "a § 2241 action challenging prison disciplinary proceedings, such as the deprivation of good-time credits, is not challenging prison *conditions*, it is challenging an action affecting the fact or duration of the petitioner's custody" and holding that "§ 2241 habeas corpus proceedings, and appeals of those proceedings, are not 'civil actions' for purposes of §§ 1915(a)(2) and (b)."); Blair-Bey v. Quick, 151 F.3d 1036, 1037, 1041 (D.C. Cir. 1998) (holding that the PLRA did not apply to petitioner's Section 2241 action challenging "the procedures by which he was denied parole").

The Seventh Circuit had previously held to the contrary. *See* Newlin v. Helman, 123 F.3d 429, 438 (7th Cir. 1997); Thurman v. Gramley, 97 F.3d 185, 187 (7th Cir. 1996) (dictum). However, in 2000 it reversed course and joined other circuits in holding that "the PLRA does not

petition – arising out of an underlying proceeding under Sections 2241, 2254, or 2255 – is filed in the court of appeals. A number of circuits have concluded that the PLRA's applicability to a mandamus petition depends on whether the underlying district-court proceeding falls within the PLRA's scope.[9])

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apply to any requests for collateral relief under 28 U.S.C. §§ 2241, 2254, or 2255." Walker v. O'Brien, 216 F.3d 626, 629 (7th Cir. 2000). The *Walker* court reasoned that a distinction "between habeas corpus petitions that relate to the original criminal prosecution and those that do not, for purposes of the PLRA, is not consistent with the Supreme Court's decisions in this area, is in tension with the distinct statutory systems Congress has created for habeas corpus actions and other civil actions, and is confusing for the district courts to administer." *Id.* at 634.

See also Harris v. Garner, 216 F.3d 970, 979 n.7 (11th Cir. 2000) (en banc) (discussing figures concerning cases subject to the PLRA and noting that "[t]he statistic we cite does not include 28 U.S.C. §§ 2241, 2254, and 2255 filings, because they are not covered by the PLRA."); Carmona v. U.S. Bureau of Prisons, 243 F.3d 629, 634 (2d Cir. 2001) (resting decision concerning exhaustion requirement in a Section 2241 proceeding on caselaw rather than the PLRA, observing that "[a] number of other circuits ... have ruled the Litigation Reform Act inapplicable to habeas actions brought by federal prisoners under § 2241," and stating that "[d]oubtless the same rule should obtain in § 2241 cases as in § 2254 petitions").

[9] *See* In re Stone, 118 F.3d 1032, 1034 (5th Cir. 1997) ("In a mandamus proceeding ... the nature of the underlying action will determine the applicability of the PLRA."); Martin, 96 F.3d at 854 ("When as is normally the case in the federal courts mandamus is being sought against the judge presiding in the petitioner's case, it is realistically a form of interlocutory appeal, and whether an interlocutory appeal is within the scope of the new Act should turn on whether the litigation in which it is being filed is within that scope."); In re Grant, 635 F.3d 1227, 1232 (D.C. Cir. 2011) ("[P]risoners filing petitions for mandamus in civil cases must comply with the filing-fee requirements of the PLRA.").

The Tenth Circuit initially took a different view, holding the PLRA applicable to a mandamus petition that asked the court of appeals to require prompt resolution of the petitioner's habeas petition. *See* Green v. Nottingham, 90 F.3d 415, 416, 418 (10th Cir. 1996). Some two years later, however, the Tenth Circuit disavowed *Green*'s holding without citing it by name: "[T]his circuit will no longer require mandatory fees under the PLRA for filing petitions for writs of mandamus seeking to compel district courts to hear and decide actions brought solely under 28 U.S.C. §§ 2241, 2254 and 2255. To the limited extent that any of our earlier cases could be interpreted to the contrary, they are overruled." In re Phillips, 133 F.3d 770, 771 (10th Cir. 1998).

See also In re Nagy, 89 F.3d 115, 117 (2d Cir. 1996) ("Nagy filed the pending motion for i.f.p. status in aid of a petition for a writ of mandamus directed to a judge conducting a criminal trial. Such a petition is not analogous to the lawsuits to which the PLRA applies. We will therefore not apply our PLRA procedure to Nagy's motion."); Madden v. Myers, 102 F.3d 74,

The analysis supporting these decisions seems persuasive to me. Courts have reasoned that interpreting the PLRA's i.f.p. provisions to include habeas petitioners would run counter to the tradition of access to courts for such petitioners.[10] Courts have noted that the PLRA was directed principally at perceived abuses of suits concerning prison conditions,[11] and that the same Congress that enacted the PLRA separately addressed questions concerning the appropriate scope of habeas and Section 2255 relief in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA").[12] And courts have observed that the

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77-78 (3d Cir. 1996) (expressing agreement "with the courts of appeals that have held that where the underlying litigation is criminal, or otherwise of the type that Congress did not intend to curtail, the petition for mandamus need not comply with the PLRA," but also stating that "*bona fide* mandamus petitions, regardless of the nature of the underlying actions, cannot be subject to the PLRA"); In re Crittenden, 143 F.3d 919, 920 (5th Cir. 1998) (holding that "the 'three strikes rule' of 28 U.S.C. § 1915(g) prevents Crittenden from filing a petition for a writ of mandamus in this Court without first paying the applicable filing fees when his petition arises from an underlying civil rights action"); In re Tyler, 110 F.3d 528, 529 (8th Cir. 1997) (holding that "a mandamus petition arising from an ongoing civil rights lawsuit falls within the scope of the PLRA" but leaving undecided "whether the PLRA applies to mandamus petitions when the underlying litigation is a civil habeas corpus proceeding"); In re Smith, 114 F.3d 1247, 1250 (D.C. Cir. 1997) (holding that because petition for writ of prohibition "includes compensatory and punitive damage claims ... that are civil in nature, and was filed after the effective date of the PLRA while he was still in prison, the fee requirements of the PLRA apply").

[10] *See* Carson, 112 F.3d at 820; Reyes, 90 F.3d at 678 ("Congress has endeavored to make the filing of a habeas corpus petition easier than the filing of a typical civil action by setting the district court filing fee at $5, compared to the $120 applicable to civil complaints. See 28 U.S.C. § 1914. It is not likely that Congress would have wished the elaborate procedures of the PLRA to apply to a habeas corpus petition just to assure partial, monthly payments of a $5 filing fee."); Martin, 96 F.3d at 855-56 ("[A]pplication of the Prison Litigation Reform Act to habeas corpus would block access to any prisoner who had filed three groundless civil suits and was unable to pay the full appellate filing fee (compared to the $5 fee for an application for habeas corpus). This result would be contrary to a long tradition of ready access of prisoners to federal habeas corpus.").

[11] *See* Reyes, 90 F.3d at 678 ("[T]he PLRA was aimed primarily at prisoners' suits challenging prison conditions, many of which are routinely dismissed as frivolous.... There is nothing in the text of the PLRA or its legislative history to indicate that Congress expected its filing fee payment requirements to apply to habeas corpus petitions.").

[12] *See* Carson, 112 F.3d at 820; Reyes, 90 F.3d at 678 ("Congress gave specific attention to perceived abuses in the filing of habeas corpus petitions by enacting Title I of the AEDPA. That title imposes several new restrictions on habeas corpus petitions, but makes no change in filings fees or in a prisoner's obligation for payment of existing fees."); United States v. Cole, 101 F.3d 1076, 1077 (5th Cir. 1996); Naddi, 106 F.3d at 277; Santana v. United States, 98 F.3d

PLRA and AEDPA adopted different methods for dealing with frequent filers.[13] In sum, though the Supreme Court has not spoken to the issue and though not all circuits have ruled on all permutations of the issue, I think that NACDL's statement – that the PLRA's i.f.p. provisions do not apply to habeas or Section 2255 proceedings – is clearly accurate as to Section 2254 proceedings and likely accurate as to Section 2255 and Section 2241 proceedings.

There are, however, a few caveats. If a prisoner erroneously styles as a habeas petition something that actually presents a challenge to prison conditions[14] – or if a prisoner includes a prison-conditions challenge in a petition that also presents a claim that does fall within the core of habeas[15] – the court is likely to conclude that the PLRA's i.f.p. provisions apply. And to the extent (currently unclear) that a habeas proceeding could be employed to assert some challenges to prison conditions, it seems possible that the PLRA's i.f.p. provisions would apply to such a proceeding.[16]

752, 755 (3d Cir. 1996) ("If Congress had wanted to reform the *in forma pauperis* status of habeas petitioners, it might have done so in the AEDPA; yet nothing in the AEDPA changes the filing fees attached to habeas petitions or a prisoner's obligation to pay those filing fees.")

[13] *See* Walker v. O'Brien, 216 F.3d 626, 637 (7th Cir. 2000) ("AEDPA handles the problem of repeat filers through the requirement that inmates seeking to file second or successive petitions for a writ of habeas corpus must obtain the permission of the court of appeals, in 28 U.S.C. § 2244. The PLRA, in contrast, handles the problem of repetitive filers through the 'three strikes' rule .... See 28 U.S.C. § 1915(g).").

[14] *See* Walker, 216 F.3d at 634 n.4 ("We emphasize that the action must be a proper habeas corpus action. Our ruling is not intended in any way to suggest that the district courts should not look beyond the label the petitioner attaches to his pleading to ensure that the proper procedural regime is followed.").

[15] *Cf.* Jennings v. Natrona County Detention Center Medical Facility, 175 F.3d 775, 779 & n.2 (10th Cir. 1999) (holding that dismissal of prior habeas action did not count as a strike under 28 U.S.C. § 1915(g), but noting that the court was "not dealing here with a habeas petition containing both habeas corpus and civil rights claims, which, when dismissed under § 1915(e) as frivolous, may count as a prior occasion .... Nor are we dealing with a habeas petition more appropriately construed as a § 1983 action and thus countable as a strike.").

[16] The D.C. Circuit has reasoned as follows:

> It is possible that habeas corpus might be available to challenge prison conditions in at least some situations. The Court expressly left this possibility open in Preiser v. Rodriguez, see 411 U.S. 475, 499 ... (1973); see also Brown v. Plaut, 131 F.3d 163, 168 (D.C. Cir.1997), cert. denied, 524 U.S. 939 ... (1998); Abdul-Hakeem v. Koehler, 910 F.2d 66, 69-70 (2d Cir.1990); but cf. Gomez v. United States, 899 F.2d 1124, 1125-26 (11th Cir.1990). Such claims, if they are permissibly brought

If this description of the caselaw is accurate, that suggests the following thoughts about the wording of Form 4's Question 4. It seems to me that the wording of the published proposal is preferable to Form 4's current wording, because adding a limitation to "civil action[s] or proceeding[s]" alerts readers that no institutional-account statement is needed for i.f.p. applications in criminal proceedings. The current wording of Form 4 could mislead appellants in criminal cases into thinking that they must submit the institutional-account statement; that is to say, the current wording is over-inclusive. The question then becomes whether it would be better to adopt the published wording or to attempt to specify further, in the Form, that the account-statement requirement does not apply to habeas or Section 2255 proceedings. The published wording could be read as over-inclusive; it could lead some habeas or Section 2255 petitioners to believe that they must include the institutional-account statement when they actually do not. Adding the further specification about habeas and Section 2255 proceedings would avoid that problem.

However, the next question is whether, at the margins, the addition of the habeas / Section 2255 specification might mislead some prisoners into thinking that they need not submit an institutional-account statement when they actually must do so. This problem could arise to the extent that the prisoner erroneously styles his or her complaint as a habeas petition when it actually should be styled as a *Bivens* or Section 1983 claim about prison conditions.[17] It is possible that this sort of wrong guess by a prisoner would be less likely to occur at the stage of an appeal, because by that point the district court would likely have recharacterized the claims appropriately, thus putting the prisoner on notice that the action is not properly styled as a habeas petition. But it should be noted that the choices that the Committee makes with respect to Form 4 may affect practice in the district courts as well as practice in the Supreme Court.[18] The

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> in habeas corpus, would have to be subject to the PLRA's filing fee rules, as they are precisely the sort of actions that the PLRA sought to address. See In re Smith, 114 F.3d at 1250 (D.C. Cir.1997) ("[I]t would defeat the purpose of the PLRA if a prisoner could evade its requirements simply by dressing up an ordinary civil action as a petition for mandamus or prohibition or by joining it with a petition for habeas corpus.").

Blair-Bey, 151 F.3d at 1042.

[17] As noted above, the possibility appears to remain that in some instances habeas may provide an avenue to challenge some prison conditions. If a challenge to prison conditions could be properly styled as a habeas petition in a given case, the courts might well apply the PLRA's i.f.p. provisions to such a habeas petition.

[18] As the Committee knows, changes to Form 4 directly affect practice in the Supreme Court because Supreme Court Rule 39 requires an i.f.p. applicant to "file a motion for leave to [proceed i.f.p.] together with the party's notarized affidavit or declaration (in compliance with 28 U. S. C. § 1746) in the form prescribed by the Federal Rules of Appellate Procedure, Form 4." I have not looked to see whether there is caselaw that addresses the applicability of the PLRA's

Administrative Office has created forms for use in connection with requests to proceed i.f.p. in the district courts. Form AO 240 is a short form that dispenses with much of the detail sought by Appellate Form 4. Form AO 239 is a longer form that is more similar to Appellate Form 4. AO 239 and AO 240 both require prisoners to include the institutional-account statement; because AO 239 and AO 240 are styled for use in civil actions (they include a space at the top for a civil action number), their approach is consistent with that taken by the published amendments to Appellate Form 4. But if Appellate Form 4 were amended to further specify the institutional-account-statement requirement's inapplicability to habeas and Section 2255 proceedings, that could raise the question whether AO 239 and AO 240 should be similarly amended.

In comparing the merits of an over-inclusive approach – i.e., an approach in which the applicable forms purport to require an institutional-account statement in all "civil actions" – with the merits of a more specific approach – i.e., an approach in which the applicable forms explicitly exempt habeas and Section 2255 proceedings from the institutional-account-statement requirement – it seems useful to ask what the consequences would be if a prisoner misunderstood the instructions on the form. If the prisoner erroneously understands the form to require an institutional-account statement when it does not, then that inconveniences the prisoner (and perhaps the institution in which the prisoner is held). If the prisoner erroneously understands the form not to require an institutional-account statement, then the prisoner will presumably be required to provide such a statement before being permitted to proceed. I would hope that a court faced with the latter scenario would regard the prisoner's initial filing as timely despite the absence of a statutorily-required institutional-account statement.[19] But I have not researched this question in depth, and I would want to do so before reaching a determination concerning the possible costs of a prisoner's mischaracterization of his or her proceeding.[20]

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i.f.p. provisions to petitions for certiorari seeking Supreme Court review. Even if these PLRA provisions were construed to extend to Supreme Court proceedings in civil actions, I would think that the reasoning that justifies exempting appeals to the courts of appeals in habeas and Section 2255 proceedings would also justify exempting petitions for certiorari seeking Supreme Court review in connection with such proceedings. Nonetheless, the link between court of appeals and Supreme Court i.f.p. practice provides another reason to add this suggestion to the Committee's agenda as a new item rather than adopting the suggestion as part of the current round of amendments.

[19] *See, e.g.*, Garrett v. Clarke, 147 F.3d 745, 746 (8th Cir. 1998) ("The Prison Litigation Reform Act does not say that a prison account statement must be supplied when the complaint is filed. Instead, the prisoner should be allowed to file the complaint, and then supply a prison account statement within a reasonable time.... Because Garrett presented his complaint to the District Court clerk for filing before the statute of limitations ran, we conclude his action is timely.").

[20] I am aware of caselaw taking the common-sense position that failure to supply a filing fee is a nonjurisdictional defect, but I would wish to check whether the courts have adhered to that view since the Supreme Court's decision in *Bowles v. Russell*. I would hope so. *See*

IV. Conclusion

For the reasons stated in Part III, I suggest that the Committee approve the changes to Form 4 as published, and that it add NACDL's suggestion to the study agenda as a new item.

Appellate Rule 3(a)(2) ("An 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."); Appellate Rule 3(e) ("Upon filing a notice of appeal, the appellant must pay the district clerk all required fees.").

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MEMORANDUM

DATE: March 28, 2012

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 08-AP-M

Among the proposals published for comment in August 2011 were amendments to Appellate Rules 13, 14, and 24. The proposed amendments to Rules 13 and 14 revise those rules to address permissive interlocutory appeals from the United States Tax Court under 26 U.S.C. § 7482(a)(2). The Committee developed these proposals in consultation with the Tax Court and with the Tax Division of the Department of Justice. The proposed amendment to Rule 24 grows out of a suggestion by the Tax Court that Rule 24(b)'s reference to the Tax Court be revised to remove a possible source of confusion concerning the Tax Court's legal status. No comments were submitted on these proposals. I recommend that they be approved as published.

I enclose copies of the proposed amendments.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

TITLE III. ~~REVIEW OF A DECISION OF~~ APPEALS FROM THE UNITED STATES TAX COURT

Rule 13. ~~Review of a Decision of~~ Appeals from the Tax Court

(a) ~~How Obtained; Time for Filing Notice of Appeal~~ Appeal as of Right.

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

~~(1) Review of a decision of~~ (A) An appeal as of right from the United States Tax Court is commenced by filing a notice of appeal with the Tax Court clerk within 90 days after the entry of the Tax Court's decision. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d). If one party files a timely notice of appeal, any other party may file a notice of appeal within 120 days after the Tax Court's decision is entered.

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

~~(2)~~ (B) If, under Tax Court rules, a party makes a timely motion to vacate or revise the Tax Court's decision, the time to file a notice of appeal runs from the entry of the order disposing of the motion or from the entry of a new decision, whichever is later.

~~**(b)**~~ **(2) Notice of Appeal; How Filed.** The notice of appeal may be filed either at the Tax Court clerk's office in the District of Columbia or by mail addressed to the clerk. If sent by mail the notice is considered filed on the postmark date, subject to § 7502 of the Internal Revenue Code, as amended, and the applicable regulations.

~~**(c)**~~ **(3) Contents of the Notice of Appeal; Service; Effect of Filing and Service.** Rule 3 prescribes the contents of a notice of appeal, the manner of service, and the effect of its filing and service. Form 2 in the Appendix of Forms is a suggested form of a notice of appeal.

~~**(d)**~~ **(4) The Record on Appeal; Forwarding; Filing.**

~~(1)~~ (A) Except as otherwise provided under

Tax Court rules for the transcript of proceedings, the ~~An~~ appeal ~~from the Tax Court~~ is governed by the parts of Rules 10, 11, and 12 regarding the record on appeal from a district court, the time and manner of forwarding and filing, and the docketing in the court of appeals. ~~References in those rules and in Rule 3 to the district court and district clerk are to be read as referring to the Tax Court and its clerk.~~

~~(2)~~ (B) If an appeal ~~from a Tax Court decision~~ is taken to more than one court of appeals, the original record must be sent to the court named in the first notice of appeal filed. In an appeal to any other court of appeals, the appellant must apply to that other court to make provision for the record.

(b) Appeal by Permission. An appeal by permission is governed by Rule 5.

Committee Note

Rules 13 and 14 are amended to address the treatment of permissive interlocutory appeals from the Tax Court under 26 U.S.C. § 7482(a)(2). Rules 13 and 14 do not currently address such appeals; instead, those Rules address only appeals as of right from the Tax Court. The existing Rule 13 – governing appeals as of right – is revised and becomes Rule 13(a). New subdivision (b) provides that

Rule 5 governs appeals by permission. The definition of district court and district clerk in current subdivision (d)(1) is deleted; definitions are now addressed in Rule 14. The caption of Title III is amended to reflect the broadened application of this Title.

Rule 14. Applicability of Other Rules to ~~the Review of a~~ Appeals from the Tax Court ~~Decision~~

All provisions of these rules, except Rules ~~4-9~~ 4, 6-9, 15-20, and 22-23, apply to ~~the review of a~~ appeals from the Tax Court ~~decision~~. References in any applicable rule (other than Rule 24(a)) to the district court and district clerk are to be read as referring to the Tax Court and its clerk.

Committee Note

Rule 13 currently addresses appeals as of right from the Tax Court, and Rule 14 currently addresses the applicability of the Appellate Rules to such appeals. Rule 13 is amended to add a new subdivision (b) treating permissive interlocutory appeals from the Tax Court under 26 U.S.C. § 7482(a)(2). Rule 14 is amended to address the applicability of the Appellate Rules to both appeals as of right and appeals by permission. Because the latter are governed by Rule 5, that rule is deleted from Rule 14's list of inapplicable provisions. Rule 14 is amended to define the terms "district court" and "district clerk" in applicable rules (excluding Rule 24(a)) to include the Tax Court and its clerk. Rule 24(a) is excluded from this definition because motions to appeal from the Tax Court in forma pauperis are governed by Rule 24(b), not Rule 24(a).

Rule 24. Proceeding in Forma Pauperis

(a) Leave to Proceed in Forma Pauperis.

(1) **Motion in the District Court.** Except as stated in Rule 24(a)(3), a party to a district-court action who

desires to appeal in forma pauperis must file a motion in the district court. The party must attach an affidavit that:

(A) shows in the detail prescribed by Form 4 of the Appendix of Forms 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.

(2) **Action on the Motion.** If the district court grants the motion, the party may proceed on appeal without prepaying or giving security for fees and costs, unless a statute provides otherwise. If the district court denies the motion, it must state its reasons in writing.

(3) **Prior Approval.** A party who was permitted to proceed in forma pauperis in the district-court action, or who was determined to be financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization, unless:

(A) the district court--before or after the notice of appeal is filed--certifies that the appeal is not taken in good faith or finds that the party is not

otherwise entitled to proceed in forma pauperis and states in writing its reasons for the certification or finding; or

(B) a statute provides otherwise.

(4) **Notice of District Court's Denial.** The district clerk must immediately notify the parties and the court of appeals when the district court does any of the following:

(A) denies a motion to proceed on appeal in forma pauperis;

(B) certifies that the appeal is not taken in good faith; or

(C) finds that the party is not otherwise entitled to proceed in forma pauperis.

(5) **Motion in the Court of Appeals.** A party may file a motion to proceed on appeal in forma pauperis in the court of appeals within 30 days after service of the notice prescribed in Rule 24(a)(4). The motion must include a copy of the affidavit filed in the district court and the district court's statement of reasons for its action. If no affidavit was filed in the district court, the party must include the affidavit prescribed by Rule

24(a)(1).

(b) Leave to Proceed in Forma Pauperis on Appeal from the United States Tax Court or on Appeal or Review of an Administrative-Agency Proceeding. ~~When an appeal or review of a proceeding before an administrative agency, board, commission, or officer (including for the purpose of this rule the United States Tax Court) proceeds directly in a court of appeals, a~~ A party may file in the court of appeals a motion for leave to proceed on appeal in forma pauperis with an affidavit prescribed by Rule 24(a)(1):

(1) in an appeal from the United States Tax Court; and

(2) when an appeal or review of a proceeding before an administrative agency, board, commission, or officer proceeds directly in the court of appeals.

(c) Leave to Use Original Record. A party allowed to proceed on appeal in forma pauperis may request that the appeal be heard on the original record without reproducing any part.

Committee Note

Rule 24(b) currently refers to review of proceedings "before an administrative agency, board, commission, or officer (including for the purpose of this rule the United States Tax Court)." Experience suggests that Rule 24(b) contributes to confusion by fostering the

impression that the Tax Court is an executive branch agency rather than a court. (As a general example of that confusion, appellate courts have returned Tax Court records to the Internal Revenue Service, believing the Tax Court to be part of that agency.) To remove this possible source of confusion, the quoted parenthetical is deleted from subdivision (b) and appeals from the Tax Court are separately listed in subdivision (b)'s heading and in new subdivision (b)(1).

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MEMORANDUM

DATE: March 28, 2012

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 10-AP-B

The proposals published for comment in summer 2011 included proposed amendments to Rules 28 and 28.1. These proposals would amend Rule 28(a)'s list of components of the appellant's brief by consolidating the statements of the case and of the facts. The proposals would also make conforming changes to Rule 28(b) (appellee's brief) and Rule 28.1(c) (briefs in cross-appeals). Four of the six comments submitted on these proposals support the proposals' goal of consolidating the statements of the case and of the facts.[1] Among the four sets of supportive comments, two sets – from the National Association of Criminal Defense Lawyers ("NACDL") and the Council of Appellate Lawyers of the Appellate Judges Conference of the American Bar Association's Judicial Division (the "Council") – suggest drafting changes. In light of the comments, I recommend that the Committee consider whether to specify – either in the Rule text or in the Committee Note – further detail concerning the contents and organization of the statement of the case.

Part I of this memo sets out the proposals as published. Part II summarizes the comments. Part III considers the comments in further detail, and recommends (in Part III.C) that the Committee consider providing lawyers with more specific guidance – in the Committee Note if not in the text of the Rule – concerning the contents of the statement of the case. Part IV suggests that the Committee add to its agenda as a new item the Council's suggestion that Rule 28(e) be amended to require record citations (for statements of facts or procedural history) throughout the brief rather than only in the statement of facts. Part V concludes.

I. Text of Rules and Committee Notes as published

Here are the proposals as published for comment in summer 2011:

Rule 28. Briefs

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

[1] The comments are enclosed.

the order indicated:

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

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

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

(4) a jurisdictional statement, including:

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

(B) the basis for the court of appeals' jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

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

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

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

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

~~(7)~~ ~~a statement of~~ setting out the facts relevant to the issues submitted for review and identifying the rulings presented for review, with appropriate references to the record (see Rule 28(e));

~~(8)~~ (7) a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings;

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

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

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

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

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

(b) Appellee's Brief. The appellee's brief must conform to the requirements of Rule 28(a)(1)-~~(9)~~ (8) and ~~(11)~~ (10), except that none of the following need appear unless the appellee is dissatisfied with the appellant's statement:

(1) the jurisdictional statement;

(2) the statement of the issues;

(3) the statement of the case;

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

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

* * * * *

Committee Note

Subdivision (a). Rule 28(a) is amended to remove the requirement of separate statements of the case and of the facts. Currently Rule 28(a)(6) provides that the statement of the

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

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

Rule 28.1. Cross-Appeals

* * * * *

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

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

(2) **Appellee's Principal and Response Brief.** The appellee must file a principal brief in the cross-appeal and must, in the same brief, respond to the principal brief in the appeal. That appellee's brief must comply with Rule 28(a), except that the brief need not include a statement of the case ~~or a statement of the facts~~ unless the appellee is dissatisfied with the appellant's statement.

(3) **Appellant's Response and Reply Brief.** The appellant must file a brief that responds to the principal brief in the cross-appeal and may, in the same brief, reply to the response in the appeal. That brief must comply with Rule 28(a)(2)-~~(9)~~ (8) and ~~(11)~~ (10), except that none of the following need appear unless the appellant is dissatisfied with the appellee's statement in the cross-appeal:

(A) the jurisdictional statement;

(B) the statement of the issues;

(C) the statement of the case;

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

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

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

* * * * *

Committee Note

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

II. Summary of public comments

Judge Jon O. Newman. In an email to Judge Sutton, Judge Newman argues that there is no reason to amend Rule 28. He notes that the Second Circuit's Clerk sought the views of her colleagues in other circuits and learned that they had not noticed any confusion on the part of lawyers concerning the statement of the case. Judge Newman states that the statements of the case and of the facts should remain separate because "[j]udges should not have to comb through one consolidated statement that sets forth all the facts in great detail, often several pages, to find the key procedural step – what ruling (or rulings) the lower court made." He urges that if the statements of the case and of the facts are to be consolidated, the rule should "at least allow any circuit to maintain the current separation by a local rule."

11-AP-001: M. Elizabeth Egbers. M. Elizabeth Egbers, of Becker Gallagher Legal Publishing, Inc., in Cincinnati, Ohio, writes in opposition to the proposed amendments. She states that the amendments are unneeded, and she predicts that they will inconvenience lawyers, engender confusion, and require changes to local court rules and checklists.

11-AP-002: Jack Schisler. Jack Schisler, the Fayetteville Chief of the Arkansas Federal Defender Organization, writes to support the proposed amendments, stating that they will

"streamline the process."

11-AP-003: The National Association of Criminal Defense Lawyers. Peter Goldberger writes on behalf of the National Association of Criminal Defense Lawyers ("NACDL") to express general support for the proposed amendments and to suggest two revisions to them.

One such proposed revision concerns the use of the word "relevant." NACDL argues that the term "relevant" in proposed Rule 28(a)(6) might lead lawyers to think that the statement of the case must contain "all the facts pertinent [to] an argument." NACDL suggests revising the Committee Note "to make clear that a brief overview of the facts may be sufficient in the Statement, where additional necessary details are set forth in the Argument portion of the brief, showing how the issues raised and argument ... arise[] out of the factual history of the case."

NACDL's other suggestion concerns the proposal's elimination of the words "briefly indicating the nature of the case, the course of proceedings, and the disposition below." NACDL is concerned that the elimination of this language might be taken to imply "that these basic 'facts' are not appropriate for inclusion in an appellate brief." NACDL's comments suggest that it would prefer that this language not be deleted from the Rule text; failing that, NACDL argues that "at least the Note should be amended" to forestall such an implication. NACDL proposes the following language: "a concise statement setting forth the nature of the case, the essential procedural history (including reference to the rulings presented for review), and the key facts giving rise to the claims or charges as well as those relevant to the issues submitted for review …."

11-AP-004: The ABA Council of Appellate Lawyers. Steven Finell writes on behalf of the Council of Appellate Lawyers of the Appellate Judges Conference of the American Bar Association's Judicial Division. The Council supports the goals of the proposed amendments, noting that combining the statements of the case and of the facts will reduce confusion and redundancy, and observing that this consolidation is "favored by a substantial majority of experienced appellate lawyers who responded to our survey." However, the Council believes that the amendments as drafted will mislead attorneys, and it submits a different proposed formulation.

The Council warns against the deletion of current Rule 28(a)(6)'s reference to "the nature of the case." The Council observes that it is useful for the brief to state the nature of the case (e.g., a medical malpractice action), and fears that deleting this wording would "at least arguably" ban lawyers from describing the nature of the case (because "the preamble of Rule 28(a) states that a 'brief must contain' the contents prescribed by the numbered subdivisions 'in the order indicated'").

The Council also warns against deleting the reference to "the course of proceedings." The Council argues that a well-drafted rule would not "banish *all* procedural history" but rather would "make clear that procedural history should be limited to that which is necessary to inform

the court of the posture of the case and give context to the issues presented for review."

The Council objects on style grounds to the phrase "a concise statement of the case setting out the facts relevant to the issues submitted for review" because "setting out the facts" is a verb construction that contrasts with noun constructions elsewhere in Rule 28(a).

The Council views the phrase "identifying the rulings presented for review" as undesirable because "identifying" could mean providing page cites, docket numbers, or titles and dates of rulings, "*none* of which is what the rule intends."

The Council proposes "amending Rule 28(e) to require a pinpoint citation to the appendix or record to support each statement of fact and procedural history anywhere in every brief," rather than "only in the statement of facts."

Finally, the Council suggests "amending Rule 28 to caution parties against repeating the same material in more than one of the sections of the brief that precede the summary of argument."

11-AP-005: DRI. Henry M. Sneath writes on behalf of DRI–The Voice of the Defense Bar. DRI supports the proposed amendments because they will "allow[] the brief to present the factual and procedural history chronologically and eliminate[] any overlap or repetition between the two sections."

III. Recommendation concerning the current proposal

Judge Newman, NACDL, and the Council have submitted thoughtful comments and specific drafting suggestions. Although – as Part III.B explains – I disagree with some of their concerns, I do think that their comments weigh in favor of providing lawyers with more guidance concerning the contents and organization of the statement of the case. I am not convinced that this additional guidance must be placed in the Rule text; placing more detail in the Rule text would lengthen the rule and might diminish its flexibility. Nor am I convinced that it would be advisable for the Rule text to invite local rulemaking on the subject. But I do think that it would be useful to provide the additional guidance in the Committee Note.

To frame the discussion, I set forth in Part III.A the published language of proposed Rule 28(a)(6) and the alternative language suggested by NACDL and by the Council. Part III.B considers Judge Newman's, NACDL's, and the Council's critiques in greater detail. Part III.C sketches three ways of addressing those critiques: by revising the Committee Note (as shown in Part III.C.1); by revising both text and Note (as shown in Part III.C.2); or by simply reversing the order of current Rules 28(a)(6) and (7) (as discussed in Part III.C.3).

A. Comparing the published language with that proposed by NACDL and that proposed by the Council of Appellate Lawyers

Before turning to a detailed discussion of the comments, it may be useful to set out for comparison the published language in clean form and the language proposed by NACDL and by the Council.[2]

Here is the text of proposed Rule 28(a)(6) as published:

> (6) a concise statement of the case setting out the facts relevant to the issues submitted for review and identifying the rulings presented for review, with appropriate references to the record (see Rule 28(e));

Here is a sketch of the proposal as it would look if NACDL's proposed language were to be incorporated in the Rule text:

> (6) a concise statement setting forth the nature of the case, the essential procedural history (including reference to the rulings presented for review), and the key facts giving rise to the claims or charges as well as those relevant to the issues submitted for review, with appropriate references to the record (see Rule 28(e));

And here is the Council's proposed alternative:

> (6) a statement of the case, which must contain:
>
> (A) a brief statement of the general nature of the case;
>
> (B) a concise statement of facts relevant to the issues submitted for review;
>
> (C) a concise statement, without discussion or argument, of those aspects of the case's procedural history that are necessary to understand the posture of the appeal or are relevant to the issues submitted for review; and
>
> (D) a concise statement, without discussion or argument, of the rulings presented for review.

B. Evaluating the concerns voiced by the commentators

The detailed comments by Judge Newman, by the Council, and by NACDL provide helpful guidance as the Committee considers whether to revise the proposed Rule text and Notes.

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[2] Judge Newman did not propose specific language.

In Parts III.B.1 and III.B.2, I suggest that these comments indicate a possible need for greater detail in the description of the contents of the statement of the case. Parts III.B.3 through III.B.7 discuss other suggestions that, although thoughtful, do not seem to me to be ultimately persuasive.

1. A separate heading for the procedural history

Judge Newman points out that judges find it useful to be able to quickly locate (by means of a separate heading) the relevant procedural history, and in particular the rulings presented for review. He indicates that, for this reason, he would prefer to retain the current version of the Rule. That is one way to serve the goal of highlighting the rulings presented for review, but it is not the only way.

It is true that under the current Rule the portion of the brief that identifies the rulings presented for review is separated from the statement of facts, which avoids the possibility that a long statement of facts would make it difficult to locate the discussion of the relevant rulings. However, others have pointed out that the current rule is less than ideal because inexperienced lawyers may include unnecessary detail in their discussion of the "course of proceedings"; and if this occurs, it too could make it difficult to quickly locate the discussion of the relevant procedural history.

If the Committee proceeds to consolidate the statements of the case and of the facts, one way to address Judge Newman's concern would be to include guidance for lawyers concerning the usefulness of including a separate subheading to identify the discussion of the rulings presented for review. Mentioning subheadings in the text of the Rule would be the most effective way to highlight the idea, but that would lengthen the Rule; it could decrease drafting flexibility; and it might suggest misleadingly that the omission of such a directive in other portions of the Rule means that subheadings are not permitted elsewhere in briefs. For these reasons, I suggest that the idea of subheadings be discussed in the Committee Note. I illustrate this approach in Part III.C.1 below.

It is also worth considering Judge Newman's suggestion that the amendment "allow any circuit to maintain the current separation by a local rule." If the Committee proceeds with the amendment as published (or a similar amendment) without specifying in the Rule text that circuits can opt out of the consolidation of the statements of the case and the facts, then it seems likely that the new Rule would preempt local circuit rules requiring separate statements of the case and the facts. *See* Appellate Rule 47 ("A local rule must be consistent with—but not duplicative of—Acts of Congress and rules adopted under 28 U.S.C. § 2072 ...."). But it seems likely that a circuit could – consistent with the amended Rule – adopt a local rule that requires a *subheading* separately identifying the rulings presented for review. Judges who strongly prefer such subheadings and who are concerned that guidance in the Committee Note will not be widely heeded may find that a local rule effectively addresses that concern. I do not think that it would be necessary for Rule 28 to explicitly invite local rulemaking on this topic, because I do not think that a local rule requiring subheadings would necessarily conflict with the proposed

amended rule. And I would be reluctant to explicitly invite such local rulemaking, in the light of the Committee's longstanding interest in decreasing, rather than increasing, the number of circuit-specific briefing requirements.

A quite different way to address Judge Newman's concern would be to abandon the idea of consolidating the statements of the case and of the facts, and instead simply to reverse the order of what are now Rules 28(a)(6) and 28(a)(7). I discuss this possibility in Part III.C.3.

2. The "nature of the case" and the "course of proceedings"

Assuming that the Committee does proceed with the proposal to consolidate the statements of the case and of the facts, both NACDL and the Council suggest that the reference to the "nature of the case" should be retained[3] and that the reference to the "course of proceedings" should be revised rather than deleted outright.

My sense of the Committee's prior discussions is that a number of participants agree with NACDL and the Council that it is useful for the statement of the case to disclose the nature of the case (e.g., that the appeal is from summary judgment for the defendant in a Title VII retaliation case). By contrast, as the Committee has discussed, proponents of deleting the reference to "course of proceedings" argue that this phrase encourages lawyers to include irrelevant detail in their description of the proceedings below. NACDL and the Council each propose language that attempts to forestall this objection. NACDL suggests the following: "the essential procedural history (including reference to the rulings presented for review)." The Council proposes the following: "a concise statement, without discussion or argument, of those aspects of the case's procedural history that are necessary to understand the posture of the appeal or are relevant to the issues submitted for review." Either of these formulations seems preferable to "the course of proceedings."

The main question, in my view, is whether it is worthwhile specifying in the text of the Rule that the statement of the case should include the nature of the case and the necessary procedural history, or whether it is better to keep the Rule text brief and to make clear in the Note that the statement of the case can include both these items.

As published, the text of the proposed Rule does not refer explicitly to the inclusion of procedural history in the statement of the case, other than to require that the statement "identify[] the rulings presented for review." However, the Committee Note makes clear the expectation that the statement of the case will include procedural history; it observes that the amended Rule "permits but does not require the lawyer to present the factual and procedural history chronologically." If a lawyer is familiar with current Rule 28(a)(6) and (a)(7) and wonders whether the deletion of "course of proceedings" is meant to foreclose mention of procedural history, recourse to the Note would answer that question.

---

[3] The Council's proposed Rule text would refer to the "general nature of the case."

The Council points out that many lawyers will not consult the Note: "Not all lawyers read Committee Notes with the same care as they read the rules; some do not read the notes at all, and some are not aware that they exist. Indeed, some of the lawyers who are most in need of explanation may be among the least likely to read Committee Notes." This is a good point. On the other hand, I wonder whether lawyers who are unlikely to read the Committee Notes would be likely to (as the Council predicts) "compare [the new Rule] to the current version of the rule, and possibly prior versions, to divine the amendment's intent." A lawyer who is sufficiently knowledgeable to realize that the amended version constitutes a change and to compare the amended version with prior versions is more likely than the average lawyer to also consult the Committee Note. And a reader who is unaware that the prior version of the Rule referred to the "course of proceedings" should not necessarily conclude from the proposed Rule text that procedural history should be omitted from the statement of the case. Admittedly, the proposed Rule text directs that the statement of the case be "concise," but where procedural history is relevant to the issues presented for review, the proposed Rule should not be read to foreclose its inclusion. A different question is whether the proposed Rule would *prompt* an inexperienced lawyer to include relevant procedural history in the statement of the case – that is to say, even if the proposed Rule would not be read to bar the inclusion of that history, would it inform less experienced practitioners that the pertinent aspects of such history should be included?

Similar questions arise with respect to the "nature of the case," except that the Committee Note, as published, would not answer the question whether the statement of the case should include this item. Neither the Note nor the text, as published, says anything specific about the "nature of the case." Common sense would support the view that a "statement of the case" can include a statement of the case's nature, but inexperienced lawyers might not realize this.

In sum, it seems like a good idea to mention in the Committee Note the usefulness of including in the statement of the case discussions of the nature of the case and of the pertinent procedural history. Inclusion of such detail in the Rule text as well as the Note would flag the point for less-experienced lawyers who do not consult Committee Notes. But placing this level of detail in the Rule text would lengthen the Rule, and could decrease lawyers' drafting flexibility. I illustrate these alternatives – discussion in the Note versus discussion in the Rule text – in Parts III.C.1 and III.C.2.

3. Reference to the "facts"

As published, the proposal requires that the statement of the case "set[] out the facts relevant to the issues submitted for review." Both NACDL and the Council have proposed alternative language relating to the "facts."

NACDL's proposed language[4] would refer to "the key facts giving rise to the claims or

[4] It is not clear whether NACDL is proposing this language for Rule text or for the Committee Note.

charges as well as those relevant to the issues submitted for review." I do not think that it would be desirable to *require* the statement of the case to include "the key facts giving rise to the claims or charges." Some appeals might present purely procedural issues that are distinct from the factual details giving rise to the claims.

The Council voices a style objection to the proposed Rule text's reference to "a concise statement of the case setting out the facts relevant to the issues submitted for review."[5] The Council observes that the published language "is a verb construction that describes what the statement of facts *does*, rather than a noun construction that defines what it *is*." And the Council argues that this formulation contrasts with noun constructions elsewhere in Rule 28(a) ("'a table,' 'a statement,' 'the basis,' 'an assertion,' 'a summary,' 'the argument'"). I disagree with this objection. The proposed Rule text reflects the Committee's decision to combine the current statements of the case and of the facts into one "statement of the case." Using the Council's terminology, the proposed Rule 28(a)(6) *does* contain a "noun construction" – namely, "statement of the case." And like other parts of Rule 28(a), proposed Rule 28(a)(6) also contains a "verb construction" that modifies the "noun construction." Here are other examples, taken from the existing rule:

- Rule 28(a)(4): "a jurisdictional statement, ***including***: (A) the basis for the district court's or agency's subject-matter jurisdiction, with citations to applicable statutory provisions and ***stating*** relevant facts establishing jurisdiction; (B) the basis for the court of appeals' jurisdiction, with citations to applicable statutory provisions and ***stating*** relevant facts establishing jurisdiction; (C) the filing dates ***establishing*** the timeliness of the appeal or petition for review; and (D) an assertion that the appeal is from a final order or judgment that disposes of all parties' claims, or information ***establishing*** the court of appeals' jurisdiction on some other basis"

- Rule 28(a)(6): "a statement of the case briefly ***indicating*** the nature of the case, the course of proceedings, and the disposition below"

- Rule 28(a)(10): "a short conclusion ***stating*** the precise relief sought"

4. The word "identifying"

The published proposal would require "a concise statement of the case ... identifying the rulings presented for review, with appropriate references to the record (see Rule 28(e))." The Council suggests saying, instead, "a statement of the case, which must contain: ... (D) a concise statement, without discussion or argument, of the rulings presented for review." The Council is concerned that the published language would be confusing, especially for less-experienced

[5] I should note that the proposed amendment, as published, reflects Professor Kimble's helpful style guidance.

lawyers:

> "identifying" is vague and will lead to unnecessary confusion, especially for those with less appellate experience—that is, those most in need of clear guidance. The proposed language could mean any of the following, *none* of which is what the rule intends: (a) citation to the pages in the appendix or record where the rulings appear; (b) the district court's docket numbers for the rulings; or (c) the titles and dates of the documents that contain the rulings.

I am not convinced that lawyers will misread "identifying" in this way. If one takes "identifying" to mean providing page or docket citations, then proposed Rule 28(a)(6)'s concluding phrase ("with appropriate references to the record") would be surplusage as to the rulings presented for review. I suppose that it is possible that an inexperienced lawyer might understand "identifying the rulings" to mean "providing the titles and dates of the documents that contain the rulings," though that does not seem the likeliest reading of the phrase. But a lawyer who reads "identifying the rulings" in that way might also discern the same meaning in "a concise statement, without discussion or argument, of the rulings." In essence, the two formulations seem very similar to me, except that the published version uses the term "identify[]" and the Council's proposal uses the term "statement." If "stating" is thought to be a better word than "identifying," the amendment could be modified to require "a concise statement of the case ... ***stating*** the rulings presented for review [etc.]." Although "statement ... stating" might seem a bit awkward, roughly the same pattern already appears in Rule 28(a)(4).[6]

5. The word "relevant"

As noted above, NACDL has expressed concern that the use of the term "relevant" to modify "facts" will cause lawyers to think that they must include all pertinent factual details in the statement of the case. But if this is true, one would expect this problem to have surfaced under current Rule 28(a)(7), which require the brief to include "a statement of facts relevant to the issues submitted for review ...." In the absence of evidence that the current language is causing confusion, it seems unnecessary to revise the Committee Note (as NACDL suggests) to point out that further factual detail may be supplied in the argument section. This seems particularly true in the light of the addition (in proposed Rule 28(a)(6)) of the word "concise" before "statement of the case."

---

[6] Rule 28(a)(4) reads in part: "a jurisdictional ***statement***, including: (A) the basis for the district court's or agency's subject-matter jurisdiction, with citations to applicable statutory provisions and ***stating*** relevant facts establishing jurisdiction; (B) the basis for the court of appeals' jurisdiction, with citations to applicable statutory provisions and ***stating*** relevant facts establishing jurisdiction; ...."

6. Warning against repetition

As noted above, the Council suggests "amending Rule 28 to caution parties against repeating the same material in more than one of the sections of the brief that precede the summary of argument." The Council does not suggest where to locate this admonition or how to word it. Moreover, it seems likely to me that the consolidation of the statements of the case and of the facts would eliminate the most likely cause of such redundancy. The Council's suggestion would warn against redundancy in the items currently required by Rules 28(a)(1) through (7) (and to be required by subdivisions (a)(1) through (a)(6) in the amended Rule). Of these, it is hard to imagine redundancies among the corporate disclosure statement (subdivision (a)(1)), the table of contents (subdivision (a)(2)), and the table of authorities (subdivision (a)(3)). That leaves the jurisdictional statement (subdivision (a)(4)), the statement of the issues (subdivision (a)(5)), and the statement of the case (new subdivision (a)(6)). It is possible that less-experienced drafters would repeat the same material in more than one of these three sections. But it is unclear that such redundancy is as big a problem as the redundancies toward which the current amendment is targeted – namely, those that currently exist between the statements of the case and of the facts.

7. Selectively forbidding "discussion or argument"

As seen in Part III.A, the Council's proposed Rule text would provide that the statements of procedural history and rulings presented for review must omit "discussion or argument," but would place no such limit on the statements of the nature of the case or of the facts. It seems to me that this change would go beyond the scope of the current proposal and that its merit is unclear. The statements of procedural history and rulings presented for review should, of course, be neutral. But it is not clear to me that it is necessary to so state in the text of the Rule. And if such language were placed in the Rule text as to those two statements, this could raise a question concerning other portions of the brief that are not explicitly limited in this manner. In particular, readers might wonder whether the omission of such a limit concerning the statement of the facts means that an argumentative treatment of the facts is appropriate. *See, e.g.*, Seventh Circuit Rule 28(c) ("The statement of the facts required by Fed. R. App. P. 28(a)(7) shall be a fair summary without argument or comment."); Eighth Circuit IOP III.I.4 ("The statement of facts should be complete, concise, and nonargumentative."); Eleventh Circuit Rule 28-1(i)(ii) ("A proper statement of facts reflects a high standard of professionalism. It must state the facts accurately, those favorable and those unfavorable to the party. Inferences drawn from facts must be identified as such.").

C. Three alternatives for the Committee's review

If the Committee agrees with my evaluation of the comments by Judge Newman, NACDL, and the Council, then it would make sense to consider revising the Rule text and/or the Note to provide more detail concerning the contents of the statement of the case and to emphasize the usefulness of subheadings. For the reasons stated in Parts III.B.1 and III.B.2, I think that placing that detail in the Committee Note makes more sense than adding it to the Rule

text.[7] But I sketch both approaches here as a basis for the Committee's discussion. Part III.C.3 illustrates a third possibility: simply switching the order of Rules 28(a)(6) and 28(a)(7).

1. Augmenting the Committee Note concerning Rule 28(a)

I recommend revising the Committee Note to Rule 28(a)(6) to specify in more detail the contents of the statement of the case. If the Committee were to adopt this approach, the Rule text would remain as published, but the Committee Note to Rule 28(a) could be revised as follows:

Committee Note

Subdivision (a). Rule 28(a) is amended to remove the requirement of separate statements of the case and of the facts. Currently Rule 28(a)(6) provides that the statement of the case must "indicat[e] the nature of the case, the course of proceedings, and the disposition below," and it precedes Rule 28(a)(7)'s requirement that the brief include "a statement of facts." Experience has shown that these requirements have generated confusion and redundancy. Rule 28(a) is amended to consolidate subdivisions (a)(6) and (a)(7) into a new subdivision (a)(6) that provides for one "statement," much like Supreme Court Rule 24.1(g) (which requires "[a] concise statement of the case, setting out the facts material to the consideration of the questions presented, with appropriate references to the joint appendix...."). This permits but does not require the lawyer to present the factual and procedural history chronologically. Conforming changes are made by renumbering Rules 28(a)(8) through (11) as Rules 28(a)(7) through (10).

The statement of the case should describe the nature of the case, which ordinarily would include – though not necessarily in this order – (1) the facts relevant to the issues submitted for review; (2) those aspects of the case's procedural history that are necessary to understand the posture of the appeal or are relevant to the issues submitted for review; and (3) the rulings presented for review. The statement should be concise. It may be useful to include subheadings within the statement of the case, particularly for the purpose of separating the description of the facts and the rulings presented for review.

Subdivision (b). Rule 28(b) is amended to accord with the amendment to

[7] Addressing the concerns in the Note rather than in the Rule text carries the advantage that the text of the Rule (as amended) would be roughly similar to the Supreme Court's comparable rule. *See* Supreme Court Rule 24(g) (petitioner's brief shall contain "[a] concise statement of the case, setting out the facts material to the consideration of the questions presented, with appropriate references to the joint appendix, *e.g.*, App. 12, or to the record, *e.g.*, Record 12").

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

2. Revising the text of the proposal

If the Committee is inclined to provide more specificity in the text of Rule 28(a), it could alter the proposed language of Rule 28(a)(6) as follows:[8]

(6) a concise statement of the case ~~setting out the facts relevant to the issues submitted for review and identifying the rulings presented for review, with~~ , which must provide appropriate references to the record (see Rule 28(e)), and which must include (in a logical order)[9] statements of:

(A) the general nature of the case;

(B) the facts relevant to the issues submitted for review;

(C) those aspects of the case's procedural history that are necessary to understand the posture of the appeal or are relevant to the issues submitted for review; and

(D) the rulings presented for review;

The Committee Note could then be augmented as shown in Part III.C.1. In addition, this change to the text of Rule 28(a) would require a conforming alteration to the Committee Note to Rule 28.1(c), as illustrated here:

Committee Note

Subdivision (c). Subdivision (c) is amended to accord with the amendments to Rule 28(a). Rule 28(a) is amended to consolidate subdivisions (a)(6) and (a)(7) into a new subdivision (a)(6) that provides for one "statement of the case ~~setting out the facts relevant to the issues submitted for review and~~

[8] The blacklining in this sketch indicates the difference between this sketch and the language as published.

[9] This parenthetical is included in order to ensure that brief writers have drafting flexibility. Due to the introductory language in Rule 28(a) stating that the listed items must appear "in the order indicated," the language proposed by the Council would appear to diminish such flexibility.

~~identifying the rulings presented for review~~. . . ." Rule 28.1(c) is amended to refer to that consolidated "statement of the case," and references to subdivisions of Rule 28(a) are revised to reflect the re-numbering of those subdivisions.

3. Switching the order of Rules 28(a)(6) and 28(a)(7)

The Committee has previously discussed the possibility of switching the order of existing Rules 28(a)(6) and 28(a)(7). That would address the concerns of those who would prefer to address events in chronological order (with pre-litigation facts discussed prior to litigation proceedings). It would avoid deleting from the Rule text that NACDL and the Council believe should be retained, and it would address Judge Newman's concern about the importance of separate headings for the statements of facts and of the case. But it would not provide lawyers with as much drafting flexibility as the published proposal.

IV. The Council's suggestion concerning Rule 28(e)

As noted above, the Council proposes "amending Rule 28(e) to require a pinpoint citation to the appendix or record to support each statement of fact and procedural history anywhere in every brief," rather than "only in the statement of facts." The Council explains:

> Like all prior versions, the current version of Rule 28 and the proposed amendment require record citations only in the statement of facts. While experienced appellate counsel should know better, this leads some lawyers to believe that record references are unnecessary elsewhere in the brief. Statements in briefs that lack citations to the appendix or record waste the time of court personnel, especially law clerks.

As an example taken from among existing local rules, the Council quotes Eleventh Circuit Rule 28-1(i): "In the statement of the case, *as in all other sections of the brief*, every assertion regarding matter in the record shall be supported by a reference to the volume number (if available), document number, and page number of the original record where the matter relied upon is to be found." (Emphasis added.)

This is an interesting suggestion, but I am not entirely persuaded by its premise – namely, by the Council's assertion that Rule 28 "require[s] record citations only in the statement of facts." Rule 28(a)(9)(A) requires that the argument section contain "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellate relies." It is true that there are other portions of the brief for which record citations may be helpful. *See, e.g.*, Third Circuit Local Appellate Rule 28.1(a)(1) (requiring "in the statement of the issues presented for review required by FRAP 28(a)(5), a designation by reference to specific pages of the appendix or place in the proceedings at which each issue on appeal was raised, objected to, and ruled upon"). But in drafting the current proposals the Committee did not specifically consider the question of adding requirements for record citations in sections of the brief other than the statement of the case. If this suggestion holds interest for

the Committee, I suggest that it be added to the study agenda as a new item.

V. Conclusion

All but two of the comments submitted on the proposals to amend Rules 28 and 28.1 support the Committee's goal of consolidating the statements of the case and of the facts. In the light of the comments, I think it would be useful to augment the Committee Note to Rule 28(a) in order to provide guidance on the appropriate contents of the statement of the case.

Encls.

TAB 5A

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Excerpt from December 31, 2011, email from Judge Newman to Judge Sutton:

Finally a chance to offer comment on the proposed amendment to FRAP 28. Having chaired the Appellate Rules Committee some time ago, I became persuaded that rule changes should not be made unless there was an important reason to do so. There is no important reason to change Rule 28 to combine the statement of the case with the statement of the facts. There is no clamor for this change. Our Clerk canvassed her counterparts in the other circuits, who reported no lawyer confusion. I believe the separate statement of the case serves a useful purpose and should be retained. If some judges do not like the separation, they can always skip over the second heading and consider both statements together. Procedural aspects of the case are separate from the facts and should not be blended together. Judges should not have to comb through one consolidated statement that sets forth all the facts in great detail, often several pages, to find the key procedural step--what ruling (or rulings) the lower court made. Your proposal says that it provides flexibility to lawyers as to presenting the case and facts not in chronological order if they wish. That option still abolishes the current requirement of a separate statement of the case.

If the Committee is determined to combine the statement of the case and the statement of facts, I urge you to at least allow any circuit to maintain the current separation by a local rule.

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TAB 5B

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Proposed Rule 28 amendment
Beth Egbers
to:
Rules_Comments
02/09/2012 01:48 PM
Hide Details
From: "Beth Egbers" <beth@beckergallagher.com>

To: <Rules_Comments@ao.uscourts.gov>

11-AP-001

History: This message has been forwarded.

Please don't change Rule 28(6) and (7) to combine the Statements of the Case and Facts. The subsections are perfectly clear. How is there a need for any change? Changing them will mean attorneys who have been following the rules for years will have to amend their brief layouts. It will generate confusion and cause some of the circuit courts to have to change their already voluminous local rules and checklists.

Beth Egbers
Cincinnati, OH

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TAB 5C

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Proposed Amendments to Fed Rules - comments
Jack Schisler to: Rules Comments 02/13/2012 06:54 PM

Dear Mr. McCabe:

These are my comments on proposed amendments to the federal rules pertinent to my area of practice:

FRAP 28 & 28.1: These changes are welcome. They serve to streamline the process, and to avoid the redundancy in current appellate practice.

FRCP 11: I believe it is a good practice to include *the Padilla* information. This admonition is being made in the Western District of Arkansas currently, and is also part of written plea agreements when applicable. I see no harm in admonishing any defendant with immigration issues of the possibility that a criminal conviction could impact the defendant's immigration status.

Thank you for taking the time to consider these comments.

Jack Schisler

Jack Schisler, Fayetteville Chief
Arkansas Federal Defender Organization
3739 N. Steele Blvd. Suite 280, Fayetteville, AR 72703
tel 479.442.2306 fax 479.443.1904

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TAB 5D

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11-AP-003

February 14, 2012
via e-mail

Peter G. McCabe, Secretary
Standing Committee on Rules of Prac. and Proc.
Judicial Conference of the United States
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Bldg.
One Columbus Circle, N.E., suite 4-170
Washington, DC 20002

COMMENTS OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
Concerning Proposed Amendments to the Federal Rules of Appellate Procedure
Published for Comment in August 2011

Dear Mr. McCabe:

The National Association of Criminal Defense Lawyers is pleased to submit our comments with respect to the proposed changes in the Federal Rules of Appellate Procedure. NACDL's comments on the proposed amendments to the Evidence and Criminal Rules are being submitted separately. Our organization has more than 12,000 members; in addition, NACDL's 94 state and local affiliates, in all 50 states, comprise a combined membership of about 35,000 private and public defenders. NACDL, which celebrated its 50th Anniversary in 2008, is the preeminent organization in the United States representing the views, rights and interests of the defense bar and its clients.

FRAP 28. The proposed amendment to Rules 28(a)(6) and (b)(4) would eliminate the prior, artificial distinction between the "statement of the case" and the "statement of facts." (Conforming amendments to Rule 28.1 are also proposed.) As amended, Rule 28 would require only the appellant's brief contain, "a concise statement of the case setting out the facts relevant to the issues submitted for review and identifying the rulings presented for review …." NACDL agrees that the prior requirement to separate these two "statements" has sometimes proven confusing and

unhelpful to either counsel or the court. The "facts" underlying an issue that arose in the courtroom are often indistinguishable from the details of the procedural history of the case. The new requirement that the now-consolidated Statement of the Case include a specific reference to any ruling of the lower court which the appellant seeks to have reviewed is also bound to be helpful.

At the same time, we note that the wording of the new rule could lead to new forms of confusion. Practitioners may think, from the use of the term "relevant," that all the facts pertinent an argument must be in this new Statement. We assume this would not be a correct reading of the words, "setting out the facts relevant to the issues submitted for review," particularly since the statement is required to be "concise." Accordingly, NACDL suggests that the Advisory Committee Note concerning this change be expanded somewhat to make clear that a brief overview of the facts may be sufficient in the Statement, where additional necessary details are set forth in the Argument portion of the brief, showing how the issues raised and argument for reversal (or affirmance, in the case of the appellee's brief) arises out of the factual history of the case.

Conversely, we assume that the Committee does not mean to suggest that a brief statement of "the nature of the case, the course of proceedings, and the disposition below" is *not* expected to be found in every appellant's brief, despite the deletion of those words. As presently worded, the committee's proposal, as we read it, could suggest that these basic "facts" are not appropriate for inclusion in an appellate brief. If those words are not restored to the Rule, then at least the Note should be amended to make the expectation clear, since their pointed elimination is potentially misleading. We suggest language such as the following: "a concise statement setting forth the nature of the case, the essential procedural history (including reference to the rulings presented for review), and the key facts giving rise to the claims or charges as well as those relevant to the issues submitted for review …."

Form 4 - IFP. The committee proposes to clarify that the requirement that a prisoner attach a statement of the balance in his or her institutional account applies only when the prisoners seeks to appeal "a judgment in a civil action or proceeding." NACDL suggests that this wording be clarified to reflect more accurately the coverage of the Prison Litigation Reform Act, by adding "(not including a decision in a habeas corpus proceeding or a proceeding under 28 U.S.C. § 2255)." Such proceedings, while generally treated as "civil" for purposes of appeal, are not governed by the PLRA. See, *e.g.*, *Santana v. United States*, 98 F.3d 752 (3d Cir. 1996) (Becker, J.).

The National Association of Criminal Defense Lawyers is grateful for the opportunity to submit its views on these proposals. We look forward to continuing to work with the Committee in the years to come.

Very truly yours,
s/Peter Goldberger

Alexander Bunin
Houston, Texas
Cheryl Stein
Washington, D.C.
William J. Genego
Santa Monica, CA
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National Association of Criminal Defense Lawyers
Committee on Rules of Procedure

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TAB 5E

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COUNCIL OF APPELLATE LAWYERS

ABA Judicial Division
APPELLATE JUDGES CONFERENCE
AMERICAN BAR ASSOCIATION

COMMENTS ON PROPOSED AMENDMENTS TO FED. R. APP. P. 28 & 28.1:
MERGING STATEMENTS OF THE CASE AND FACTS
(Advisory Committee on Appellate Rules Agenda Item No. 10-AP-B)

The Council of Appellate Lawyers supports the proposal to amend FED. R. APP. P. 28(a) (Appellant's Brief) by consolidating subdivisions (a)(6) and (a)(7) to require a single, combined statement of the case and facts, with conforming amendments of Rules 28(b) (Appellee's Brief) and 28.1(c) (Cross Appeals: Briefs), for the reasons summarized in the proposed Committee Note on the amendment of Rule 28(a).[1] As the Honorable Jeffrey S. Sutton observed when he initiated the study that led to these proposed amendments, the separation of the statement of the case from the statement of facts in the 1998 amendment of Rule 28(a) has confused appellate lawyers, and has unintentionally encouraged redundancy in briefs and unnecessary procedural details in descriptions of "the course of proceedings." This redundancy and excessive detail compound the potential for redundancy in other sections of the brief, especially the jurisdictional statement. All agree that redundancy and irrelevant matter in briefs disserves the courts, the parties, and the public.

The Council of Appellate Lawyers' broad survey of experienced appellate lawyers (reproduced in the appendix to these comments), our own experience and analysis, and published literature support Judge Sutton's diagnosis of the problems and the proposed solution. Recombining the statements of the case and facts, and giving lawyers flexibility in choosing the order of the elements that comprise the combined statement, should solve the unintended difficulties that followed the 1998 amendments.

However, we are concerned that the specific language of the proposed

[1] Appellate Rules Advisory Committee, Proposed Amendments to the Federal Rules of Appellate Procedure 4–5 (May 2, 2011; rev. June 2, 2011), *at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Publication%20Aug%202011/AP_May_2011.pdf [hereinafter Proposed Amendments].

amendment of Rule 28(a) lends itself to misinterpretation. In our opinion, experience with widespread confusion and misinterpretation of the 1998 amendments indicates the need for greater specificity in this amendment's language to achieve the objectives summarized in the proposed Committee Note.

RECOMMENDATIONS

Before the 1998 amendments, FED. R. APP. P. 28(a)(3) required a single statement of the case with the content that the current subdivision (a)(6) prescribes, followed by a statement of facts as described in the current subdivision (a)(7).[2] Modest as the 1998 change was, dividing the pre-amendment statement in two led some lawyers to increase the procedural details in descriptions of "the course of proceedings" beyond what was pertinent to deciding the appeal. Further, separation of the statements coupled with requiring description of "the course of proceedings" to precede the statement of facts—which reverses the actual chronological sequence—led to repetition of some procedural details in the chronological statement of facts.

The consensus solution is to combine the contents of subdivisions (a)(6) and (a)(7) to create a statement of the case that includes the facts—which in substance would recreate the pre-1998 Rule 28(a)(3)—but *not* prescribe the order of the elements. That would permit, at counsel's option, "a statement of the case briefly indicating the nature of the case," followed by a chronological "statement of facts relevant to the issues submitted for review," followed by a concise chronological description of "the course of proceedings" to the extent relevant to the issues submitted for review, with a brief and purely factual summary of "the disposition below"—or, alternatively, "the

[2] As now in force, FED. R. APP. P. 28(a)(6)–(7) provides:

> (a) APPELLANT'S BRIEF. The appellant's brief must contain, under appropriate headings and in the order indicated: ….
>
> (6) a statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below;
>
> (7) a statement of facts relevant to the issues submitted for review with appropriate references to the record (see Rule 28(e)); ….

rulings presented for review"[3]—as part of the chronological "course of proceedings."

According to the Committee Note, the proposed amendment of Rule 28(a) implements the consensus solution described in the preceding paragraph:

> Rule 28(a) is amended to consolidate subdivisions (a)(6) and (a)(7) into a new subdivision (a)(6) that provides for one "statement." This permits but does not require the lawyer to present the factual and procedural history chronologically.[4]

The Council of Appellate Lawyers supports amending Rule 28(a) as described in the Committee Note. In our opinion, it is the best solution to problems that are frequent in appellate practice under the current rule. It is also the solution favored by a substantial majority of experienced appellate lawyers who responded to our survey (see the appendix to these comments).

Unfortunately, the proposed amendment does not conform to the amendment's description in the Committee Note. The proposed amendment's language differs materially from a consolidation of subdivisions (a)(6) and (a)(7).

- The proposed amendment would eliminate current subdivision (a)(6)'s brief indication of "the nature of the case." In the many discussions and commentaries on Rule 28(a) that we have read, we do not recall any that recommended eliminating this very useful introduction to the case that sets the stage for the rest of the brief. We believe it helps the court to know at the outset that the case is, for example, an action for patent infringement, or a medical malpractice case arising under diversity jurisdiction, or a civil antitrust action for price fixing. Since the preamble of Rule 28(a) states that a "brief must contain" the contents prescribed by the numbered subdivisions "in the order indicated," any contents not prescribed are, at least arguably, forbidden.
- The proposed amendment would eliminate entirely current

[3] Proposed Amendments at 2.

[4] Proposed Amendments at 5.

subdivision (a)(6)'s "course of proceedings." While we recognize the problem caused by inclusion of *irrelevant* procedural details, the solution is not to banish *all* procedural history. The solution is to make clear that procedural history should be limited to that which is necessary to inform the court of the posture of the case and give context to the issues presented for review. Some issues on appeal, and some appeals, may be based entirely on the procedural course in the lower court.

- Current subdivision (a)(7) prescribes "a statement of facts relevant to the issues submitted for review." The proposed amendment would change "a statement of facts" to "setting out the facts." While this does not alter meaning, the change is inconsistent with the carefully crafted styling of the rest of Rule 28(a), which consistently uses nouns to define a brief's elements (e.g., "a table," "a statement," "the basis," "an assertion," "a summary," "the argument").[5] The proposed language is a verb construction that describes what the statement of facts *does*, rather than a noun construction that defines what it *is*.
- The proposed amendment would replace current subdivision (a)(6)'s "the disposition below" with "identifying the rulings presented for review." In our opinion, "identifying" is vague and will lead to unnecessary confusion, especially for those with less appellate experience—that is, those most in need of clear guidance. The proposed language could mean any of the following, *none* of which is what the rule intends: (a) citation to the pages in the appendix or record where the rulings appear; (b) the district court's docket numbers for the rulings; or (c) the titles and dates of the documents that contain the rulings. On the other hand, the proposed "rulings presented for review" is more accurate than, and therefore preferable to, the current

[5] The restyling of the Federal Rules of Appellate Procedure effective December 1, 1998, was the first product of the Judicial Conference's multi-year project that restyled all the federal rules of practice and procedure. Based on innovative principles developed by Bryan Garner, the restyling project modernized the rules' language, eliminated jargon, shortened sentences, improved clarity, and brought consistency to the federal rules, among other benefits. *See generally* BRYAN A. GARNER, GUIDELINES FOR DRAFTING AND EDITING COURT RULES (1996).

"disposition below." For example, "the rulings presented for review" might include evidentiary rulings, jury instructions, and interlocutory orders that *resulted* in the disposition below.

Considering the specific problems to be solved and to reduce the likelihood of confusion, such as that which followed from the 1998 amendment, we propose the following reformulation of Rule 28(a)(6) to implement the solution described in the proposed Committee Note: [6]

(6) a statement of the case, which must contain:

(A) a brief statement of the general nature of the case;

(B) a concise statement of facts relevant to the issues submitted for review;

(C) a concise statement, without discussion or argument, of those aspects of the case's procedural history that are necessary to understand the posture of the appeal or are relevant to the issues submitted for review; and

(D) a concise statement, without discussion or argument, of the rulings presented for review.

We also propose amending Rule 28(e) to require a pinpoint citation to the appendix or record to support each statement of fact and procedural history anywhere in every brief.[7] Like all prior versions, the current version of Rule 28 and the proposed amendment require record citations only in the statement of facts. While experienced appellate counsel

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[6] The structure of this proposed amendment is modeled on current Rule 28(a)(8).

[7] *See* 11TH CIR. R. 28-1(i) (emphasis added): "In the statement of the case, *as in all other sections of the brief*, every assertion regarding matter in the record shall be supported by a reference to the volume number (if available), document number, and page number of the original record where the matter relied upon is to be found."

should know better, this leads some lawyers to believe that record references are unnecessary elsewhere in the brief. Statements in briefs that lack citations to the appendix or record waste the time of court personnel, especially law clerks.

Finally, to reduce redundancy, we recommend amending Rule 28 to caution parties against repeating the same material in more than one of the sections of the brief that precede the summary of argument.

HISTORICAL CONTEXT

As originally adopted effective July 1, 1968, FED. R. APP. P. 28(a) provided as follows:

> BRIEF OF THE APPELLANT. The brief of the appellant shall contain under appropriate headings and in the order here indicated:
>
> (1) A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where they are cited.
>
> (2) A statement of the issues presented for review.
>
> (3) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. There shall follow a statement of the facts relevant to the issues presented for review, with appropriate references to the record (see subdivision (e)).
>
> (4) An argument. The argument may be preceded by a summary. The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on.
>
> (5) A short conclusion stating the precise relief sought. [8]

Rule 28(a) remained unchanged for 28 years. Subsequent history has been one of accretion, often to nationalize additional contents prescribed by some circuit rules.

- The first amendment, in 1991, added the jurisdictional statement.
- A 1993 amendment required the argument to include a statement of the standard of review for each issue on appeal. The Committee Note explains that this addition was based on favorable

[8] According to the Committee Note, FED. R. APP. P. 28 was modeled on SUP. CT. R. 40, which corresponds to current SUP. CT. R. 24.

experience in five circuits that had imposed this requirement by local rule.

- Amendments to subdivisions (a) and (b) in 1994 added the requirement that main briefs include a summary of the argument, to precede the argument itself. Again, this addition was based on rules in several circuits. Before this amendment, including a summary of the argument was optional.
- Finally, the amendments effective December 1, 1998, the year of restyling, made four additions to subdivision (a): the corporate disclosure statement, subdivision (1); separating the table of contents, subdivision (2), and table of authorities, subdivision (3), which many lawyers did before the amendment; the certificate of compliance with the length limitation, where required, subdivision (11); and, most pertinent here, separating the statement of the case, subdivision (6), and statement of facts, subdivision (7).

ANALYSIS OF THE PROBLEM

So far as we recall, the original 1968 formulation of the combined statement of the case and facts in FED. R. APP. P. 28(a)(3) was unproblematic throughout the 30 years it was in force. The 1998 amendment to that formulation was remarkably modest: all it did was add a separate heading for the statement of facts. The amendment did not change the contents that the original rule required or their prescribed order. Logically, the amended version should have been as unproblematic as the original. But experience under the amendment defies that logic.

One can only speculate why. Perhaps some lawyers believed that the amendment's isolation of the statement of the case signaled a greater emphasis on, and therefore devoting more pages to, the contents described in subdivision (a)(6). Perhaps this led some lawyers, especially those with limited training and experience in appellate practice, to puzzle over the undefined "nature of the case" and to suppose that that stating "the course of proceedings" required listing each pleading, motion, discovery demand, and stipulation extending time. When they moved to the separate statement of facts, they felt obliged to repeat some of the same procedural facts as part of the

factual chronology. Combining this with other elements of the brief—the relatively new jurisdictional statement, the newly required summary of argument, and the argument itself—some procedural facts might be stated five times, instead of twice or thrice. This multi-redundancy, even if confined to a minority of briefs, disserves the courts.

Many knowledgeable observers are dissatisfied with the current formulation. The Council of Appellate Lawyers shares the concerns that led the Appellate Rules Advisory Committee to re-examine Rule 28(a)(6) and (7). Indeed, on invitation by the Advisory Committee's Chair in 2002, the Council proposed recombining the statements of case and facts based on concerns similar to those that led to the current proposed amendment.[9] The Advisory Committee took up our recommendation in 2003 and again in 2004. On those occasions, several members expressed their dissatisfaction and observed widespread confusion among practitioners about what the statement of the case should include. However, the Advisory Committee reached no consensus to amend the rule and dropped the item from its working agenda.[10]

Several circuits have adopted local rules that elaborate or conflict with FED. R. APP. P. 28(a)(6)–(7).[11] According to two experts in federal appellate practice, one of whom is a member of the Advisory Committee, "The language of Rule 28 is somewhat murky on the relationship between the Statement of the Case and the Statement of the Facts, which is a separate, required section."[12]

In 2010, at Judge Sutton's suggestion, the Advisory Committee on Appellate Rules launched a study (Agenda Item No. 10-AP-B) of

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[9] Letter from Robert A. Vort to Honorable Samuel A. Alito, Jr., 5 (September 17, 2002) (considered as Item No. 02-12 on the Advisory Committee's agenda).

[10] Catherine T. Struve, Memorandum on Item No. 10-AP-B, 2–6 (March 13, 2010).

[11] Catherine T. Struve, Memorandum on Item No. 10-AP-B, 13–15 (March 11, 2011), reproduced in the agenda materials for the Advisory Committee's April 2011 meeting at 185–99, in Tab V-A-2 (Item No. 10-AP-B).

[12] Douglas N. Letter & Mark B. Stern, *Substantive Statements and Summary of Argument*, *in* A PRACTITIONER'S GUIDE TO APPELLATE ADVOCACY 225, 226 (Anne Marie Lofaso et al. eds., 2010).

whether to repeal or amend the current requirement that the appellant's brief include "a statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below," FED. R. APP. P. 28(a)(6), followed by a statement of the facts relevant to the issues on appeal, FED. R. APP. P. 28(a)(7), under separate headings.[13] As was the case in 2003 and 2004, some members of the Advisory Committee have expressed concern that subdivision (6) confuses some lawyers and has unintentionally encouraged redundancy in briefs.

In considering this issue, we spoke informally with many experienced appellate lawyers and some appellate judges. We also invited comments from the Council of Appellate Lawyers' membership. All the written comments we received are included in the appendix to this report. Many of those comments reflect widespread confusion about what to include in the statement of the case or how to differentiate it from the statement of facts—either by the commentators themselves (including a teacher of appellate practice) or observed by the commentators in other lawyers.[14] Likewise, many of the comments observe that the separate statements of the case, facts, and jurisdiction lead to repetition and excessive procedural history beyond what will aid the court in deciding the appeal. Close reading of the comments reveals that appellate specialists who profess to understand the current rule do not all understand it the same way.

Even comments that oppose amending the rule do not do so on the ground that practice under the current rule is satisfactory. Rather, they propose other solutions to the acknowledged problems, including better education of appellate advocates, restricting appellate practice to certified specialists, and local circuit rules that override FED. R. APP. P. 28(a)(6)–(7). One comment despairs, "I don't know that changing the

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[13] "The appellant's brief must contain, under appropriate headings and in the order indicated," the items listed in FED. R. APP. P. 28(a). The appellee's brief must contain the same elements in the same order, except for the "short conclusion stating the precise relief sought," FED. R. APP. P. 28(a)(10), and with appellee having the option to omit several of the elements, including the statements of the case and the facts, "unless the appellee is dissatisfied with the appellant's statement …." FED. R. APP. P. 28(b).

[14] *Accord* Letter & Stern, *supra* p. 8 note 12, quoted *supra* p. 8.

rule will necessarily solve the problem of attorneys including irrelevant information."

Similarly, two recent writings in the same publication differ on how to frame the statement of the case. One, after stressing the importance of a powerful statement of facts in chronological order, teaches the following approach under the subheading "Adhere to a chronological structure even if you have to include a separate Statement of the Case":

> In many appellate courts, you are required to have a separate "Statement of the Case" that must precede the "Statement of Facts." If so, my recommendation is not to abandon a chronological structure. Rather, you can draft a pointed one- or two-paragraph statement that relays the critical procedural events of the case but does not attempt to address them in detail. Leave the detail for the procedural history section of your Statement of Facts….[15]

The other advocates a different treatment:

> From this [the language of FED. R. APP. P. 28(a)(6)–(7)], one might (wrongly) infer that the Statement of the Case should contain relevant procedural history and the Statement of Facts should contain only a discussion of record evidence. That impression is heightened by reference to the Advisory Committee's statement that the rule provides for two statements, "one procedural, called the statement of the case; and one factual, called the statement of facts."
>
> In practice, however, it is probably more accurate to view the Statement of the Case as providing a brief introduction to and summary of the Statement of Facts. The Statement of Facts will then not only set out the relevant evidence but also will present a full account of prior proceedings. In that sense, the Statement of the Case bears approximately the same relation to the Statement of Facts as the Summary of Argument to the Argument.[16]

Both of these writings counsel lawyers to ignore the explicit distinction between subdivisions (6) and (7), a distinction that is reinforced in the authoritative Advisory Committee Note that accompanied the 1998 amendment.

Widespread dissatisfaction with the current rule among appellate

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[15] Lawrence D. Rosenberg, *The Appellate Brief*, *in* A PRACTITIONER'S GUIDE TO APPELLATE ADVOCACY, *supra* p. 8 note 12, at 181, 199.

[16] Letter & Stern, *supra* p. 8 note 12, at 227 (footnote omitted).

specialists, lingering confusion about what the statement of the case should contain, and the counterproductive practices by a minority of practitioners are pivotal factors that warrant amendment of the rule.

ANALYSIS OF POSSIBLE SOLUTIONS

Because FED. R. APP. P. 28(a) has a long history, an amendment cannot be written on a clean slate. Practitioners will not look merely at the rule as amended. They will compare it to the current version of the rule, and possibly prior versions, to divine the amendment's intent. In view of the unanticipated misunderstanding of the 1998 amendments, the amended rule should provide an extra measure of clarity.

Our proposed reformulation of Rule 28(a)(6), *supra* pp. 2–6, increases specificity by adding subdivisions devoted to each element of the combined statement. We also recommend more explanation in the text of the amended rule. We believe this is important to avoid misunderstanding and to educate lawyers who are not appellate specialists. Not all lawyers read Committee Notes with the same care as they read the rules; some do not read the notes at all, and some are not aware that they exist. Indeed, some of the lawyers who are most in need of explanation may be among the least likely to read Committee Notes.

Some commentators suggest reversing the prescribed order of the separate statements of case and facts, to correspond to the usual chronological order: (1) plaintiff patents invention (fact); (2) plaintiff sues for infringement (case). In many appeals, perhaps most, this sequence would be optimal. However, in appeals that primarily concern procedure in the lower court, it may be preferable to begin with the pertinent procedural facts upon which the appeal turns. This may be true, for example, where a district court enters final judgment on a motion for summary judgment and the losing party's main argument is that the trial court erred in granting summary judgment without first allowing reasonable discovery. Therefore, we favor allowing counsel flexibility to order the elements as counsel believes most appropriate for the particular appeal.

Another possible solution, suggested in one or two comments we received, is to eliminate altogether "the course of proceedings." In our opinion, this is an overreaction to the present problems; a larger number of the comments we received share our opinion. Some

procedural history is necessary to inform the court of the posture of the appeal and give context to the issues presented for review. And, as explained above, aspects of the procedural history will be dispositive of some appeals. Therefore, that is one of our disagreements with the proposed amendment that was published for comment.

CONCLUSION

We respectfully offer these comments for consideration by the Advisory Committee on Appellate Rules, and recommend adoption of the amendments proposed *supra* pp. 2–6.

February 2012

Respectfully submitted,

Steven Finell
Chair, Rules Committee
StevFinell@aol.com

About the Council

The Council of Appellate Lawyers is a part of the Appellate Judges Conference of the American Bar Association's Judicial Division. It is the only nationwide Bench-Bar organization devoted to appellate practice. The views expressed here are solely those of the Council, and have not been endorsed by the Appellate Judges Conference, the Judicial Division, or the American Bar Association.

APPENDIX

COMMENTS BY MEMBERS OF THE COUNCIL OF APPELLATE LAWYERS

QUESTION

-----Original Message-----
From: for the Council of Appellate Lawyers, part of the Appellate Judges Conference/JD [mailto:AJCCAL@MAIL.ABANET.ORG] on Behalf of Steven Finell
Sent: Tuesday, January 25, 2011 10:03 PM
To: AJCCAL@MAIL.ABANET.ORG

Subject: Requests for Comments on Fed. R. App. P. 28(a)(6) - Statement of the Case

Judge Jeffrey S. Sutton, Chair of the Appellate Rules Advisory Committee, has asked the Council of Appellate Lawyers to comment on a proposal to repeal or amend Fed. R. App. P. 28(a)(6), which requires the appellant's brief to include a "statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below." This requirement was added in 1998. Before that, rule 28 required a statement of the case that included both the procedural history and the relevant facts.

Judge Sutton is concerned that some lawyers unnecessarily repeat some of the same material in the statement of the case, the jurisdictional statement, and the statement of facts. He is also concerned that some lawyers include unnecessary procedural details that have no bearing on the appeal.

If you have any comments on this proposal, please email them to me. Thank you.

Steven Finell
Chair, Council of Appellate Lawyers Rules Committee

RESPONSES

When I read your email, the first thought that came to mind is a law school legal writing class. The majority of what is taught is to teach students how to write but the methods and requirements are generally forgotten by the student the first time a partner gives the summer associate an assignment. At that point all that matters is the style the

boss prefers. However, one part of the law school legal writing experience that carries over to the real world is the repetitive and structured nature of the writing. I did a quick search and found the quote below my text. I would personally suggest removing the requirement, however, like the partner referenced in the quote a busy judge may find the section a necessary evil for his/her quick initial review of a brief. That being said, I would turn the question back to Judge Sutton and ask if he and his colleagues find it a useful exercise.

"I tried everything I could think of in an effort to persuade them to accept the theory behind the CRAC format but they just wouldn't buy it. Regardless of the philosophical rationalization proffered in support of the CRAC format, it was met with shaking heads and looks of disdain. And then, way in the back, a young woman raised her hand in obvious annoyance. 'I was an English major,' she said. 'I know how to write. Why should I write like that when it seems so stilted and repetitive?' she asked. And that's when, with nothing left in my arsenal, I blurted out the only answer I could think of: 'Because your boss is billing the client $400 an hour and your client won't pay him to spend 20 minutes poring over your memo just to find out what your conclusion is.' " (http://west.thomson.com/pdf/perspec/Spring%202003/Spr033.pdf)

I agree with. Judge Sutton

I agree with the proposal. At the very least, it will cut unnecessary verbiage from a brief.

I'd support an amendment. As the rules are written, it's hard to avoid duplication over those three sections. I've only been practicing since 2002, but the 1998 version of the rule makes a lot of sense to me. One statement of the case setting out the factual background, the procedural posture, and the basis for appellate jurisdiction ought to do the trick, and it would be a whole lot easier to write.

Steven, I appreciate Judge Sutton's concern. I have taught Appellate Advocacy at … and both in teaching and in my own practice, I have found the same, often necessary repetition in the jurisdictional statement, statement of the case, and statement of facts.

The jurisdictional statement seems to me to stand on its own, but the statements of case and facts overlap in almost all cases, although more in procedurally driven appeals than otherwise. For a teacher, differentiating the two types of statements is difficult. I would suggest keeping the jurisdictional statement requirement but substituting a combined statement of case/facts.

I'm sure that's true, but I don't know that changing the rule will necessarily solve the problem of attorneys including irrelevant information. That may be a problem with the attorneys, not the rule.

When properly used, the rule serves a very useful function. It allows judges to know whether this is a commercial dispute, personal-injury action, or civil-rights claim. It allows the judges to know whether it is an appeal from a jury or bench trial, and whether judgment was entered on a verdict or notwithstanding a verdict. It also allows the judges to learn the name of the trial judgment, and the size of any judgment.

Judge Sutton's complaint seems to be that a lot of lawyers don't know how to write a good brief, in that they include unnecessary information or repeat things needlessly. That can't be legislated against. A better solution would be to adopt something akin to the British barrister system and require special certification before one can appear in an appellate court.

I'm against a change to the rule.

I think the statement of the case can serve a valuable purpose, so I would not want to see it eliminated. I know how I use that statement – as an overview of the case that gives me a context for what I am about to read. If that was the legislative intent behind the rule, perhaps the

rule needs to be rewritten, not removed:

> (6) a one-paragraph summary of the relevant facts of the case and issues on appeal, suitable for inclusion in the court's website description of the docket;

What do you think?

Personally, I have used the brief statement of the case in lieu of an introduction, and have never had more than one page. As for course of proceedings, I have written things like "Plaintiff filed her Complaint in early 2007, and following extended discovery Defendant filed a Motion for Summary Judgment which was granted by the District Court on December 17, 2010."

I think whether you have this rule or not, there are folks who will (as I did in the first few appellate briefs I did back when I started) include each and every pleading and date. The distinction for me came with experience. Perhaps if the rule were amended to state "the course of relevant proceedings" it might send the message to less experienced appellate practitioners that they should leave out those things that are not relevant to the appeal.

I agree with the proposal. My experience has been the same as Judge Sutton's with duplication between the statement of facts and statement of the case, and unnecessarily detailed discussions of the immaterial procedural history.

My preference would be elimination of the requirement to include a statement of the case in the briefs. I agree that the statement of the case is duplicative of other parts of the brief.

But I do see some purpose in having the appellant provide "the nature of the case, the course of the proceedings, and the disposition below" earlier in the appeal -- particularly in cases with inexperienced appellate counsel or pro se appellants. Such information could be provided in a "docketing statement," such as that used by the Texas appellate courts under Texas Rule of Appellate Procedure 32. Having a

"docketing statement" in the early stages of an appeal would expedite the identification of jurisdictional or procedural problems and would provide additional information for judges in their self-recusal decisions.

Steve, thanks for your email about modifying FRAP 28(a)(6). Judge Sutton's concerns are well-taken. My firm has long disliked the way Rule 28(a)(6) interacts with other components of Rule 28(a), so we've submitted a letter addressing our particular concerns. (A PDF copy is attached.) Our points are separate from the concerns Judge Sutton identified, but please feel free to weigh in on them as you see fit when preparing CAL's response.

NOTE: The attached PDF was the letter from Peder K. Batalden to Peter G. McCabe dated January 27, 2011

FYI from a legal writing professor:

I looked at several other similar rules and thought this might be a good starting point. I believe the items I've incorporated are important to the Court's complaints and for the sake of brevity, but that it could be better written.

Proposal to Amend Fed. R. App. P. 28 (a)(6)

"The Statement of the Case shall contain a brief summary of the state of the case, to include: (1) a description of the form (nature) of the action, (2) a brief procedural history and (3) a brief synopsis of any prior determination(s) issued by any court or governmental agency. Matters provided in the Statement of the Case should not be repeated; matters that have no bearing on the appeal should not be included, and; the Statement of the Case should not contain any argument. "

Whether the "form of the action" or the "nature of the action" is used, is a matter of choice.

I believe the jurisdictional statement and the statement of facts should be separately discussed under separate headings.

I appreciate this opportunity to comment.

I am opposed to eliminating this from FRAP 28 because I think it can be handled by local rule. For example, the D.C. Circuit's local rules say that a statement of the case is not required. This gives counsel a choice, and many counsel omit the section from D.C. Circuit briefs. A local rule can also advise counsel to avoid repeating information that has already been presented in the jurisdictional statement, such as procedural information about the filing and timeliness of the notice of appeal.

There are times when a statement of the case is warranted. For example, when an appeal arises from earlier protracted proceedings--such as a previous appeal and remand--it is helpful to give the court the procedural history of the case--and to give it up front rather than waiting until the end of the statement of facts to end with a factual statement of litigation history. (Lately I've had a number of appeals that have previously been on appeal.) If a case has gone to the Supreme Court and has been sent back to the circuit court, the statement of the case is the place to give that information at the outset.

Another example is when there are multiple claims and parties, but not all of those claims or parties are involved in the appeal. This occurs not only in the context of a Rule 54(b) certification, but also when the case below has been processed through multiple stages--e.g., a previously unappeased 12(b)(6) ruling knocking out some claims or parties, followed by summary judgment ruling on some other issues, followed by trial. It's helpful to clarify separately and at the outset--in the statement of the case--what the case was when it began, what it is now, and why (in terms of claims and parties).

I also like that the statement of the case is an opportunity for counsel to present a thematic statement of what the case is about, an opportunity that doesn't exist in other pre-argument sections. (Of course, many lawyers alternatively insert an introduction before the jurisdictional statement.)

Steven - in my experience, the Statement of the Case seldom contains anything that is not already in the Statement of Facts.

In the Kansas state courts, the appellant is required to indicate the "Nature of the Case." Despite the fact that the judges have repeatedly urged that this not be used for argument, it often is. I think the problem (if you want to call it that) is even more pronounced in the federal appellate courts where rule 28(a)(6) requires more than just the "nature" of the case. I recently received an appellant's brief in which the Statement of the Case extended 7 pages and was probably 80% argument. Under the circumstances, I could not say I was satisfied with the appellant's statement and had to do my own in the appellee's brief.

I think that if the Statement of the Case requirement were eliminated, the Court would receive all the information that is needed about the nature of the case and the proceedings below from the Jurisdictional Statement and the Factual Statement.

As an aside, it seems to me that the Jurisdictional Statement is also superfluous in most instances. The docketing statement usually provides all that is needed in this regard. I also find it cumbersome to have to provide a Summary of the Argument, before the argument itself. Of course, the judges are in a better position to determine what information they really need in the briefs.

Thank you for providing the opportunity for input.

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Fw: Federal Rule of Appellate Procedure 28
Bernida Evans to: Bernida Evans 02/16/2012 03:51 PM

----- Forwarded by Peter McCabe/DCA/AO/USCOURTS on 02/16/2012 03:45 PM -----

From: "Henry M. Sneath" <hsneath@DRI.org>
To: <peter_mccabe@ao.uscourts.gov>
Date: 02/16/2012 03:35 PM
Subject: Federal Rule of Appellate Procedure 28
Sent by: "Nancy Gundlach" <ngundlach@DRI.org>

Dear Mr. McCabe:

DRI–The Voice of the Defense Bar, is an international organization that includes more than 22,000 attorneys involved in the defense of civil litigation. DRI is the world's largest defense attorney and in-house counsel organization. DRI has a very active amicus curiae program and a very successful Appellate Advocacy substantive law committee and has a keen interest in the Federal Rules of Appellate Procedure.

One of the five most important goals of DRI is to strive to improve the civil justice system. On behalf of DRI, I am pleased to offer comment to the proposed amendment to Federal Rule of Appellate Procedure 28.

DRI supports the removal of the requirement of separate statements of the case and of the facts. DRI agrees that one statement allows the brief to present the factual and procedural history chronologically and eliminates any overlap or repetition between the two sections.

Thank you for considering our comments.

Very truly yours,

Henry M. Sneath, President

Henry M. Sneath | DRI PRESIDENT
P: 312.795.1101 | F: 312.795.0747 | E: hsneath@dri.org
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TAB 6A

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MEMORANDUM

DATE: March 28, 2012

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve

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

This memo presents proposed changes to Appellate Rule 6 (concerning appeals in bankruptcy matters). The Committee discussed this proposal at its fall 2011 meeting, but decided to consider further the wording of the proposal. The Standing Commitee's January 2012 meeting provided an opportunity for further discussion both of the Appellate Rule 6 proposal and the Bankruptcy Rules Committee's project to revise Part VIII of the Bankruptcy Rules (dealing with appeals to the district court or bankruptcy appellate panel (BAP) in bankruptcy matters). The Standing Committee's discussion resulted in the creation of a subcommittee that will consider the use (in each set of national Rules) of terminology relating to electronic service and filing. This winter, Andrea Kuperman generously provided that subcommittee with very helpful research concerning terms, in each set of Rules, that describe modes of sharing paper or electronic documents. Meanwhile, the Bankruptcy Rules Committee is set to consider the full set of Part VIII proposals at its spring 2012 meeting.[1] This memo summarizes these matters, with a view to laying the groundwork for the Appellate Rules Committee's discussion of the Appellate Rule 6 proposals. If the Committee can reach consensus on the proposed Rule 6 amendments at the spring 2012 meeting, the proposal could then be presented to the Standing Committee in June 2012 for approval for publication in tandem with the Bankruptcy Part VIII draft.

Part I of this memo summarizes the Appellate Rule 6 proposals as presented to the Committee at its fall 2011 meeting, and reviews the highlights of the discussions at and after that meeting. Part II describes the creation of the new subcommittee that will review Rules terminology that may relate to electronic service and filing, and presents the results of Andrea Kuperman's research concerning relevant terms in the existing Rules. Part III suggests two alternative ways to revise the Appellate Rule 6 proposal.

These materials are lengthy, so perhaps it is useful to note that Part I of this memo recapitulates matters with which Committee members will be familiar (from the discussion at the fall 2011 meeting and from my November 28, 2011 follow-up memo). Readers familiar with those matters could skim or even skip Part I and focus on the later portions of the memo (commencing with Part II on page 21).

[1] I enclose the Part VIII proposals.

In addition to reviewing the Appellate Rule 6 proposal – which will be presented as an action item for the Committee at the spring meeting – Committee members may wish to review the current draft of the Part VIII proposal in case they have comments on it. The Committee has, of course, seen prior versions of the Part VIII draft.

I. The Appellate Rule 6 proposal as presented to the Committee in fall 2011

At its fall 2011 meeting, the Committee had before it proposed amendments to Rule 6's title and to existing Rule 6(b) as well as the proposed addition of a new Rule 6(c). The Committee focused most of its discussion on the choice of terminology, in Rules 6(b) and 6(c), concerning the treatment of the record on appeal (and the implications, for that terminology, of the shift to electronic filing). In Part I.A, I set forth the proposed amendments as they were presented in the fall 2011 agenda materials. Part I.B summarizes the aspects of those proposals that did not raise any controversy at the fall 2011 meeting. Part I.C turns to the Committee's discussion of the choice of terminology concerning the treatment of the record.

A. Proposed amendments as set forth in the fall 2011 materials

Here is the prior version of the proposed amendments, as set forth in the fall 2011 materials:

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

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

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

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

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

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

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

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

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

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

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

(ii) ~~Appellate review of~~ If a party intends to challenge the order disposing of the motion – or the alteration or amendment of a judgment, order, or decree upon the motion – then ~~requires~~ the party, in compliance with Rules 3(c) and 6(b)(1)(B), ~~to amend a previously filed notice of appeal. A party intending to challenge an altered or amended judgment, order, or decree~~ must file a notice of

appeal or amended notice of appeal. The notice or amended notice must be filed within the time prescribed by Rule 4 – excluding Rules 4(a)(4) and 4(b) – measured from the entry of the order disposing of the motion.

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

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

(i) Within 14 days after filing the notice of appeal, the appellant must file with the clerk possessing the record assembled in accordance with Bankruptcy Rule ~~8006~~ 8009 – and serve on the appellee – a statement of the issues to be presented on appeal and a designation of the record to be certified and sent to the circuit clerk.

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

(iii) The record on appeal consists of:

• the redesignated record as provided above;

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

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

(C) ~~Forwarding~~ Transmitting the r~~R~~ecord.

(i) When the record is complete, the district clerk or bankruptcy appellate panel clerk must number the documents constituting the record and ~~send~~ promptly

transmit ~~them promptly to the circuit clerk together with a list of the documents correspondingly numbered and reasonably identified~~ to the circuit clerk either the record or notice of how to access it electronically. ~~Unless directed to do so by a party or the circuit clerk~~ If the record is transmitted in paper form, the clerk will not send ~~to the court of appeals~~ documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals, unless directed to do so by a party or the circuit clerk. If ~~the exhibits are~~ unusually bulky or heavy exhibits are to be sent in paper form, a party must arrange with the clerks in advance for their transportation and receipt.

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

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

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

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

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

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

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

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

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

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

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

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

filing date.

(E) **Filing a Representation Statement**. Unless the court of appeals designates another time, within 14 days after entry of the order granting permission to appeal, the attorney who sought permission to appeal must file a statement with the circuit clerk naming the parties that the attorney represents on appeal.

Committee Note

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

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

Subdivision (b)(2)(A)(ii) is amended to address problems that stemmed from the adoption — during the 1998 restyling project — of language referring to challenges to "an altered or amended judgment, order, or decree." Current Rule 6(b)(2)(A)(ii) states that "[a] party intending to challenge an altered or amended judgment, order, or decree must file a notice of appeal or amended notice of appeal …." Before the 1998 restyling, the comparable subdivision of Rule 6 instead read "[a] party intending to challenge an alteration or amendment of the judgment, order, or decree shall file an amended notice of appeal …." The 1998 restyling made a similar change in Rule 4(a)(4). One court has explained that the 1998 amendment introduced ambiguity into that Rule: "The new formulation could be read to expand the obligation to file an amended notice to circumstances where the ruling on the post-trial motion alters the prior judgment in an insignificant manner or in a manner favorable to the appellant, even though the appeal is not directed against the alteration of the judgment." *Sorensen v. City of New York*, 413 F.3d 292, 296 n.2 (2d Cir. 2005). Though the *Sorensen* court was writing of Rule 4(a)(4), a similar concern arises with respect to Rule 6(b)(2)(A)(ii). Rule 4(a)(4) was amended in 2009 to remove the ambiguity identified by the *Sorensen* court. The current amendment follows suit by removing Rule 6(b)(2)(A)(ii)'s reference to challenging "an altered or amended judgment, order, or decree," and referring instead to challenging "the alteration or amendment of a judgment, order, or decree."

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

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

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

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

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

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

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

B. Uncontroversial aspects of the Rule 6 proposals

This section describes the aspects of the Rule 6 proposal that seemed at the fall 2011 meeting to be uncontroversial. Part I.B.1 describes proposed new Rule 6(c) (concerning permissive direct appeals). Part I.B.2 describes proposed revisions to Rule 6(b) (concerning appeals from the district court or BAP).

1. Proposed new Appellate Rule 6(c)

The Appellate Rules do not currently address in explicit terms the topic of permissive direct appeals from a bankruptcy court to a court of appeals under 28 U.S.C. § 158(d)(2). At the time that Section 158(d)(2) came into being as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), the Appellate Rules Committee decided that no immediate action was necessary with respect to the Appellate Rules, because BAPCPA put in place interim procedures for administering the new direct appeals mechanism. Some of those interim procedures were subsequently displaced by the 2008 addition of subdivision (f) in Bankruptcy Rule 8001. It seems worthwhile to specify in more detail the way in which the Appellate Rules apply to direct appeals under Section 158(d)(2), and the Bankruptcy Rules

Committee's Part VIII project provides an opportune context in which to obtain input and guidance on proposed new Appellate Rule 6(c), which would address the topic. This section highlights selected features of proposed Rule 6(c).

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

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

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

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

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

- Appellate Rules 8(a) and 8(c) are excluded for reasons that are discussed in Part I.B.1.d below.

- Appellate Rule 12 is excluded. Rule 12(a) appears inapposite because, in the case of permissive appeals, docketing is accounted for in Appellate Rule 5(d)(3).[2] Rule 12(c) is supplanted, in this context, by proposed Rule 6(c)(2)(D). Rule 12(b) – which requires the filing of a representation statement – might be useful to apply in the context of direct appeals under Section 158(d)(2), but Rule 12(b) is awkwardly worded for use in such a context. The requirement of a representation statement is set out in proposed Rule 6(c)(2)(E).

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

b. Dealing with the record on appeal

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

Apart from the question of terminology (discussed below), this aspect of proposed Rule 6(c) did not seem to raise concerns at the fall 2011 meeting.

c. Dealing with tolling motions

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

d. Dealing with stays pending direct appeals

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

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

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

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

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

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

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

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

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

Rule 8(b), by contrast, probably should not be excluded. Rule 8(b) is compatible with Bankruptcy Rule 9025,[3] and Rule 8(b) is relevant beyond the context of stays and injunctions pending appeal; Rule 8(b) also applies to sureties on bonds for costs on appeal under Rule 7. Accordingly, proposed Rule 6(c) does not exclude Rule 8(b) from application to direct appeals.[4]

At the fall 2011 meeting, the Appellate Rules Committee briefly discussed the treatment of stays pending appeal. No members voiced disagreement with the proposal to apply proposed

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

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

Bankruptcy Rule 8007 to that topic. It was suggested that Appellate Rule 6(c)(2)(C) should also include a reference to Appellate Rule 8(b), in order to make clear that Bankruptcy Rule 8007's operation does not exclude that of Appellate Rule 8(b). Further discussion after the meeting, however, suggested that it may be preferable to address this issue in the Committee Note, for two reasons. First, proposed Rule 6(c)(2) commences as follows: "In addition [to the rules made applicable by Rule 6(c)(1)], the following rules apply." Given that introductory sentence, a reference to Rule 8(b) (which is one of the rules made applicable by Rule 6(c)(1)) might seem redundant. Second, when Rule 6(c)(1) renders Rule 8(b) applicable, it does so subject to the proviso that "as used in any applicable rule, 'district court' or 'district clerk' includes – to the extent appropriate – a bankruptcy court or bankruptcy appellate panel or its clerk." This proviso permits us to avoid determining whether a bankruptcy judge would have statutory and constitutional authority to finally determine a claim for enforcement of a surety's liability.

The revised proposals shown in Part III of this memo address these concerns by means of a modest change to the Rule text and an addition to the Committee Note. The text of proposed Rule 6(c)(2)(C) says "Bankruptcy Rule 8007 **applies to** stays pending appeal" rather than "Bankruptcy Rule 8007 **governs** stays pending appeal." And the Committee Note states explicitly that Appellate Rule 8(b) applies to sureties on bonds provided in connection with stays pending appeal.

There remains one further issue concerning these interlocking provisions. The fall 2011 draft of the Part VIII Rules provided, in proposed Rule 8007(c), that "[t]he appellate court may condition relief under this rule on the filing of a bond or other appropriate security with the bankruptcy court." By contrast, the current draft of proposed Rule 8007(c) refers to "[t]he district court or BAP" (not "[t]he appellate court"). It seems advisable to amend either the Rule 8007 draft or the Rule 6 draft to make clear that the court of appeals likewise has power to condition relief on the filing of appropriate security. This could be done by amending Rule 8007(c) to refer to "[t]he district court, BAP, or court of appeals," or by amending Rule 6(c)(2)(C) to state that Rule 8007(c)'s reference to the "district court or BAP" should be read to include the court of appeals. As stated in the enclosed memorandum from the Subcommittee on Privacy, Public Access, and Appeals to the Bankruptcy Rules Committee, Professor Gibson has recommended to the Bankruptcy Rules Committee that it make revise Rule 8007(c) to refer to the court of appeals. Assuming that the Bankruptcy Rules Committee adopts this recommendation, no change will be needed in the draft of Rule 6(c)(2)(C).

e. Dealing with indicative rulings

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

Rule 8008 is modeled on Civil Rule 62.1 and Appellate Rule 12.1. When appeals are pending in the district court or BAP, Rule 8008 governs the indicative-ruling procedure in both the bankruptcy court and the appellate court. When an appeal is pending in the court of appeals under § 158(d)(2), Rule 8008 specifies only the bankruptcy court's options and the notice that must be provided to the clerk of the court of appeals.[5] Thus in the latter context it operates in a similar fashion to Civil Rule 62.1. The procedures applicable to the court of appeals are then specified by Appellate Rule 12.1, which would be made applicable in the case of a direct bankruptcy appeal by proposed Rule 6(c)(1).

f. Dealing with documents under seal

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

2. Proposed revisions to Appellate Rule 6(b)

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

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

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

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

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

exclusions. It turns out that only one such change appears necessary.[7]

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

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

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

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

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

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

The proposed amendments to Appellate Rule 6(b)(2)(A) would parallel the 2009 amendment to Appellate Rule 4(a)(4). These changes have received support, in principle, from the Bankruptcy Rules Committee's Subcommittee on Privacy, Public Access, and Appeals.

Rule 6(b)(2)(A)(ii) contains an ambiguity similar to the ambiguity in former Rule 4(a)(4)

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

that was pointed out in *Sorensen v. City of New York*, 413 F.3d 292 (2d Cir. 2005). A 2009 amendment to Rule 4(a)(4) removed the ambiguity in that rule by altering Rule 4(a)(4)(B)(ii) as follows: "A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a ~~judgment altered or amended~~ judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal — in compliance with Rule 3(c) — within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion."

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

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

One other issue remains with respect to Rule 6(b)(2): It is necessary to decide how the Rule should treat the re-starting of appeal time after disposition of rehearing motions. At present, this question is addressed by both Bankruptcy Rule 8015 and Appellate Rule 6(b)(2)(A), and the two rules are inconsistent in their approach. Current Bankruptcy Rule 8015 provides that "[u]nless the district court or the bankruptcy appellate panel by local rule or by court order otherwise provides, a motion for rehearing may be filed within 14 days after entry of the judgment of the district court or the bankruptcy appellate panel. If a timely motion for rehearing is filed, the time for appeal to the court of appeals for all parties shall run from the entry of the order denying rehearing or the entry of subsequent judgment." Appellate Rule 6(b)(2)(A)(i) currently provides in part that "[i]f a timely motion for rehearing under Bankruptcy Rule 8015 is filed, the time to appeal for all parties runs from the entry of the order disposing of the motion." Thus, oddly, both of these rules purport to set the point from which the re-started appeal time runs, and the two rules specify what may (in some cases) turn out to be two different points in time. That is to say, in cases where the order granting rehearing is entered on Day X and the resulting amended judgment is entered on Day X + 20, Appellate Rule 6(b)(2)(A) currently tells us that the appeal time runs from Day X, yet Bankruptcy Rule 8015 tells us that the appeal time runs from Day X + 20.

This inconsistency would be eliminated by the proposed amendments to Part VIII. Proposed Rule 8022 governs motions for rehearing in bankruptcy appeals filed in the district court and BAP, thus replacing current Rule 8015. Following the example of Civil Rules 50, 52

and 59, proposed Rule 8022 does not address the question of when the appeal time re-starts after disposition of a tolling motion. Instead, it leaves the issue to be addressed by Appellate Rule 6(b)(2)(A)(i). For the present, no change is proposed in Appellate Rule 6(b)(2)(A)(i)'s approach to the re-starting issue; but it may be useful to seek input on this question during the comment period.

It should also be noted that because the Part VIII project will re-number Bankruptcy Rule 8015, Appellate Rule 6(b)(2)(A)(i) should be revised to refer to Bankruptcy Rule 8022.[8]

C. The controversial part: dealing with electronic filing and transmission

As members will readily recall, the challenge in drafting the Rule 6 amendments arose when dealing with the treatment of the record.[9] In particular, the cause of the difficulty is that courts use different methods for treating the record on appeal. It may be provided to the court of appeals in paper form, or as one or more electronic documents, or via links to a server that holds electronic versions of the documents. The bankruptcy courts having taken the lead in the shift to electronic handling of documents, the Part VIII Rules assume electronic treatment as a default principle.[10] The question is how to address this topic in Appellate Rule 6, given that the record in a bankruptcy appeal will be received from a lower court accustomed to electronic handling, but that the record will be received *by* a court of appeals that may not yet be fully accustomed to electronic handling.

The existing Appellate Rules were drafted on the assumption that filings would be in

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[8] The fall 2011 agenda materials referred to Rule 8023, because that was the number of the relevant provision in the fall 2011 Part VIII draft. The numbering has shifted; hence the current reference to Rule 8022.

[9] One aspect of the fall 2011 draft's treatment of the shift to electronic methods for handling the record seemed less controversial. Proposed Rule 6(c)(2)(D) addressed the event that traditionally has been known as filing the record. If the record is transmitted in the form of electronic links to electronic docket entries, then it might seem odd to speak of the circuit clerk "filing" the record. Thus, Rule 6(c)(2)(D) referred instead to the clerk noting the record's receipt on the docket. Because other parts of the Appellate Rules use the date of filing of the record for purposes of computing certain deadlines, proposed Rule 6(c)(2)(D) defined the receipt date as the filing date. These aspects of Rule 6(c) did not attract comment at the fall 2011 meeting and they appear in similar form in the sketches set forth in Part III below.

[10] The relevant portions of the draft Part VIII Rules have changed since fall 2011. Thus, the details of the discussion from the fall 2011 agenda materials are now obsolete. In the current Part VIII draft, proposed Rule 8001(c) states: "METHOD OF TRANSMISSION. A document must be sent electronically under these Part VIII rules, unless the document is being sent by or to an individual who is not represented by counsel or the governing rules of the court expressly permit or require mailing or other means of delivery."

paper form. By contrast, proposed Rule 6(c), as sketched in the fall 2011 materials, was designed to take electronic filing and transmission as a given, while also accommodating the use of a paper record. In proposed Rules 6(b)(2)(C), 6(b)(2)(D), and 6(c)(2)(D), the fall 2011 draft used the term "transmit" (instead of "forward" or "send"), in an attempt to accord with the then-current draft of the proposed Part VIII amendments and to acknowledge the likelihood of electronic transmission.

It soon became clear, however, that this word choice was not favored. Professor Kimble demurred to it on grounds of style. And at the fall 2011 meeting, Committee members raised persuasive concerns about the use of "transmit" in this context. The fall 2011 draft used the term "transmit" to denote both transmission of a paper record and transmission of an electronic record; it used the term "send" to denote transmission of a paper record. One participant noted that "send" could be read to encompass electronic transmission,[11] and thus that the way in which the draft used "send" was confusing. Members expressed a desire to know how the Civil Rules and the other Appellate Rules treat the topic of electronic filing and transmission, and also asked whether the proposed Part VIII rules will define "transmit." Members also doubted whether the term "transmit" would encompass all possible modes of providing the record to the court of appeals. As Richard Taranto noted, a record could be sent in paper form, or could be transmitted as an electronic document, or could be made available in the form of a set of links to portions of the electronic record. Richard suggested that the terms "transmit" and "send" do not seem to encompass instances where the court below sends a list or index as opposed to the documents themselves; he proposed that better terms might be "furnish" or "provide."

Based on the discussion at the meeting, deliberations after the meeting focused on the possibilities of using "furnish"[12] or "provide"[13] in place of "send" or "transmit." Richard Taranto

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[11] Similarly, in later comments on the draft Rule 6, Professor Kimble noted that he is "not sure why 'send' doesn't work for electronic doc[uments] – we 'send' an email."

[12] "Furnish" currently appears in Rules 3(a)(1) ("At the time of filing, the appellant must furnish the clerk with enough copies of the notice [of appeal] to enable the clerk to comply with Rule 3(d).") and 13(a)(1) (similar provision with respect to appeals from the Tax Court). *See also* Rule 25(e) ("When these rules require the filing or furnishing of a number of copies, a court may require a different number by local rule or by order in a particular case."); Rule 47(b) ("No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local circuit rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.").

[13] Leaving aside instances where "provide" is used in a different sense (e.g., 'Rule X provides that ...'), the term "provide" currently appears in Rule 7 ("In 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.") and Rule 21(a)(1) ("The party must also provide a copy [of the petition for an extraordinary writ] to the trial-court judge."). *See also* Rule 13(d)(2) (addressing scenarios in which Tax Court record goes to the first of multiple

pointed out that, in addition to the choice of terminology, the Committee should also decide whether to state explicitly that there is a range of actions that would meet the requirement of "furnishing" or "providing": sending paper originals; sending paper copies; sending electronic copies; or "giving the circuit clerk direct electronic access to documents (necessarily electronic) in the district court's possession, without giving the electronic documents themselves (until, of course, the circuit clerk, or a judge/clerk to whom the circuit clerk has provided access, calls up a particular document, which typically places a copy in random access memory on the computer of the person calling up the document)."

As to the choice of terminology, Richard pointed out benefits of choosing "furnish": To some readers, it may seem a broad term, and also one that sounds likely to be a term of art. Its use could be further clarified if a definition is added that specifies actions that constitute furnishing. On the other hand, Amy Barrett suggested that "provide" would be a better choice:

> "Furnish" strikes me as an awkward word in this context. "Supply with" – the sense in which we use it here – isn't its first meaning: It's the fourth definition in the OED and the second in the more homely Webster's online. As Richard says, it carries with it a whiff of being a term of art, but that doesn't seem like an advantage to me.... [T]erms of art typically have narrower, more specialized meanings rather than broader ones – and breadth is what we're going for here. I think it's much more straightforward to use "provide."

As to the question of whether to add a definition of "furnish" or "provide" in the text of the Rule, some email exchanges after the fall meeting helpfully set forth arguments for and against such an addition. Drawing upon emails from Richard and Amy, I summarize those discussions here. As will be seen, our post-meeting email exchanges gave rise to three possible courses of action: Leave the term unexplained in the Rule text; add a definition; or add a provision that invites local rulemaking.

Richard offered reasons to include such a definition and a proposal for how to implement it. As he pointed out, the terminology and approach contemplated for the amended Rule 6 will depart from the default practice to which courts and litigants are accustomed under the existing Appellate Rules.[14] It may be helpful to flag this departure by stating explicitly in the rule the range of acts that will meet the requirement in revised Rule 6. As he explained:

> I raise for your consideration the suggestion of adding a sentence after the first

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circuits to which appeals are taken, and stating that "[i]n an appeal to any other court of appeals, the appellant must apply to that other court to make provision for the record").

[14] Richard noted: "Rule 11 pretty strongly tells a reader that the record as a whole must be physically moved into the court of appeals' clerk's office, something contrasted with keeping it in the originating court."

sentence of Rule 6(b)(2)(C)(i), which, in Cathie's proposed revision, says: "When the record is complete, the district clerk or bankruptcy appellate panel clerk must number the documents constituting the record and promptly [furnish] [provide] them to the circuit clerk." The added sentence could be a version of this:

> "For this purpose, a document may be furnished to the circuit clerk either by transferring it (or a copy of it) in paper or electronic form or by supplying the circuit clerk means of direct electronic access to it."

The aim of such a sentence is to be explicit about the coverage of options (a) through (d). It is written in a document-specific way, so that some documents could be transmitted in full while others made accessible through a link supplied to the circuit clerk (who can be counted on to provide circuit judges and law clerks the same access the circuit clerk has been provided). It's not all-or-nothing, one way or the other. It uses the phrase "means of direct electronic access" to capture the link-to-the-electronic-file-in-district-court method. It explicitly gives the district clerk or bankruptcy appellate panel clerk the option to transfer a copy, not the original. (If that is objectionable, one could omit the words, "or a copy of it," but I'm not sure what the objection is.)

It is evident that there could be different wordings. For example, if there is a disfavoring of parentheses in Rules, "or a copy of it" probably works without the parentheses. If, without parentheses, inclusion of "or a copy of it" in the single "by transferring" phrase makes that phrase too unwieldy, the copy-transfer option could be separated: " ... by transferring it in paper or electronic form, by transferring a copy of it in paper or electronic form, or by supplying the circuit clerk means of direct electronic access to it." Perhaps, too, the word "direct" in front of "access" is unnecessary -- though I currently like its conveying of the need for the kind of electronic access that is the equivalent of having a CD in your disk drive, or on a hard driver or server, with no intermediary. I've also thought about attaching a version of this sentence directly to the current first sentence of 6(b)(2)(C)(i), simply connecting, "by transferring ...." That feels less readable to me, but I am here chiefly suggesting the concept and just making one attempt to capture it in words.

Amy, however, questioned whether adopting such a definition would be advisable:

> I like the idea of more clarity, but have a few concerns. First, does being so specific work against us in an area where technology changes so fast? Perhaps there is a benefit in using a broad word like “provide” capacious enough to include means of electronic transmission that we can’t currently envision (but which might be available in a few years) and leaving it at that. Second, and relatedly, are there technological pitfalls to being so specific? For example, could

> the word "direct" get us into trouble? I have no idea how the various technologies work, but I could imagine "direct" not accurately capturing the way connections are made between user and data. Third, I gather that the circuits vary pretty widely on whether they accept electronic filings and when they do, how. Does providing that "a document may be [furnished or provided] to the circuit clerk [in the enumerated ways]" assume that all three options are available in every circuit? The kind of specificity the proposed insertion would add might best be handled by local rule given the current variety of approaches.

Amy's comments on the possibility of local rulemaking underscored that it may be useful to learn more about the current technological arrangements in each circuit:

> I agree that it could be a rare place where encouraging rulemaking is okay. I wonder, though, whether it's even necessary to invite it. Don't circuits already have local rules governing how filings can be made (electronically, in paper form, or some mix between the two)? Would those local rules easily cover this situation? If not, would courts of appeals be likely to amend their local rules to address the situation even without an express invitation from us? I don't know enough about the existing local rules to make a judgment, but thought I would flag the issue. I should also say that my lack of knowledge about how the current technology works, how it might change, and how all the circuits currently handle the issue prevents me from having a strong opinion on Richard's proposal to define the ways that a document can be "furnished" or "provided" to the circuit clerk. It may well be that my concerns aren't well-founded and that including a definition in the rule itself would be fine.

As noted above, our post-meeting email exchanges focused on whether to add the definition in the text of amended Rule 6(b)(2)(C), concerning appeals from the district court or BAP. However, a similar (though not identical) question arises with respect to proposed Rule 6(c)(2)(B), which provides that proposed Bankruptcy Rule 8010 governs the provision of the record to the circuit clerk in connection with a direct appeal. One distinction between Rule 6(b) (covering non-direct appeals) and Rule 6(c) (covering direct appeals) is that Rule 6(c), as currently drafted, incorporates Rule 8010 by reference, whereas Rule 6(b) (both in its current form and in the proposed amendment) spells out how the transmission of the record is to be handled.[15] Because proposed Rule 6(c) incorporates Rule 8010 by reference, it is important to consider whether Rule 8010's language will dovetail with that in Rule 6(c). I take up that matter in Part III.

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[15] In my view, this difference makes sense, because in the context of a non-direct appeal, the Part VIII rules' system for preparing the record requires modification in order to account for the re-designation of the record.

II. The Standing Committee's discussion, and some findings concerning terminology in the five sets of national Rules

Judge Sutton's December 2011 report to the Standing Committee summarized the Committee's deliberations and enclosed a sketch of the proposed Rule 6 amendments that illustrated (using brackets) the alternatives discussed in Part I.C above. During the Standing Committee's January meeting, Judge Sutton highlighted the questions concerning the appropriate terms to use for the treatment of the record.

It was suggested that an ad hoc subcommittee be convened to consider the terms used in each set of national Rules for describing the treatment of the record (or of other materials that could be handled in both paper and electronic form). Judge Gorsuch agreed to chair the subcommittee, and the Advisory Committee chairs agreed that they would each appoint a representative to the subcommittee. Participants in the Standing Committee discussion were interested in the idea of this cross-cutting committee and agreed that using consistent terminology across the different sets of rules would be desirable. Some participants noted, though, that this would be a complex project and that many Rule provisions are affected by the recent and ongoing changes in technology. Participants noted that any terms chosen must accommodate the likelihood that some litigants will continue to make paper filings.

Since the creation of the subcommittee, Andrea Kuperman agreed to compile a list of provisions in the national rules that discuss activities that would previously have involved (and may still involve) sharing paper documents – i.e., filing by a party or a court reporter, service by a party, transmission from one clerk's office to another, or transmission from the clerk's office to a litigant – and that may now or in the future involve accomplishing substantially the same result by electronic means. I enclose her findings concerning each set of Rules. Also included is a list of omitted terms, which Andrea compiled in order to memorialize the items that appeared to fall outside the scope of her search.

In considering the implications of Andrea's careful and comprehensive research, I found it helpful to consider which terms appear in which sets of rules. Here is a table showing my analysis. For the sake of simplicity, I transmuted words into the simplest present-tense verb form (e.g., "sent," "sending," or the like would be listed as "send").

Term	Appellate	Bankruptcy	Civil	Criminal	Evidence
Communicate [information] by telephone or other reliable electronic means				Y	

Term	Appellate	Bankruptcy	Civil	Criminal	Evidence
Deliver	Y	Y	Y	Y	Y
Personal delivery			Y		
Deposit	Y	Y	Y	Y	
Disclose	Y	Y	Y	Y	Y
Dispatch	Y				
Electronic access / remote electronic access		Y	Y	Y	
File	Y	Y	Y	Y	Y
File ... by electronic means / electronic filing	Y	Y	Y	Y	
File ... by mailing or dispatch	Y				
Forward	Y			Y	
Furnish	Y	Y	Y	Y	
Give	Y	Y	Y	Y	Y
Hand			Y		
Issue	Y	Y	Y	Y	Y
Issue ... electronically		Y			
Leave			Y	Y	
Mail	Y	Y	Y	Y	

Term	Appellate	Bankruptcy	Civil	Criminal	Evidence
Notice by electronic transmission		Y			
Notice / notify by mail		Y			
Notice by publication		Y	Y	Y	
Post		Y			
Post a notice on an official internet government forfeiture site			Y		
Present	Y	Y	Y	Y	
Produce		Y	Y	Y	Y
Provide	Y	Y	Y	Y	Y
Publish		Y	Y	Y	
Report		Y	Y	Y	
Return	Y	Y	Y	Y	
Return by reliable electronic means				Y	
Send	Y	Y	Y	Y	
Send by electronic mail			Y		
Serve	Y	Y	Y	Y	Y
Serve ... by sending to electronic address			Y		

Term	Appellate	Bankruptcy	Civil	Criminal	Evidence
Serve by mail	Y	Y	Y	Y	
Personal service	Y	Y	Y	Y	
Serve by ... publication		Y	Y		
Serve ... in a sealed envelope			Y		
Submit	Y	Y	Y	Y	Y
Submit by reliable electronic means				Y	
Supply	Y	Y			
Transfer	Y				
Transmit	Y	Y	Y	Y	
Transmit by reliable electronic means				Y	
Transmission facilities			Y		
Turn over		Y			

This table suggests to me a few tentative observations. First, the Rules currently employ a large and diverse set of terms to describe activities that might be affected by the shift to electronic filing. Multiple terms are used to describe potentially similar concepts within a given set of rules. Some terms recur across multiple sets of rules. Some features are distinctive to a particular set of rules. For instance, the Bankruptcy Rules' frequent use of the term "transmit" generally occurs during discussions of transmission to the United States Trustee. For another example, the Criminal Rules obviously confront a distinctive set of issues concerning communications between the government and the court (e.g., in the context of warrant applications or the like).

The current diversity of terminology across the national Rules might support two different

arguments concerning the choices to be made in connection with the current round of amendments to Appellate Rule 6. On the one hand, one might argue that it makes sense, in this round of amendments to Rule 6, to try to formulate the best current answer to the question of terminology. That is to say, in revising Rule 6, the Committee should try to adopt language that will accommodate current and future technological frameworks for the sharing of items such as the record on appeal. In the best case scenario, the comments received on the Rule 6 proposal, and the experience under Rule 6 as amended, will inform the rulemakers' consideration of further terminological choices for other Appellate Rules and for terms in other sets of Rules. In the worst case scenario, the terms chosen for Rule 6 might turn out not to fit as well as initially hoped. In that event, Rule 6 would require further revision in order to bring its language into line with future preferences concerning terminology. But in the light of the wide diversity of terms elsewhere in the Rules, the need to update a stray set of less-than-perfectly-successful word choices in Rule 6 might not seem to be a grave harm.

On the other hand, one might adduce the current diversity of terminology as a reason not to tackle the terminology question in connection with the Rule 6 project. That is to say, one might argue that for the present, the focus should be on the more pressing needs to update outdated cross-references, bring Rule 6(b)(2)(A) into line with Rule 4(a)(4) in terms of the treatment of challenges to amended judgments, and add a new Rule 6(c) to address permissive direct appeals. In this view, allowing Rule 6's terminology to remain unchanged for the moment would not markedly affect the overall picture of the Rules' consistency with current practice. Whether or not Rule 6's terminology is updated at this time, the remainder of the Appellate Rules and the other sets of national Rules will continue to use diverse terminology to describe activities that may increasingly be undertaken largely through electronic means.

These reflections underpin the suggestions that I put forward in Part III.

III. Two sketches of revised amendments to Rule 6

To provide a basis for further discussion, I sketch in this Part two alternatives for the Rule 6 proposal. Part III.A sets out a proposal that continues the approach discussed at the fall meeting; that is to say, the proposal attempts to resolve the terminological issues discussed at the fall meeting. It may well be worthwhile to attempt that resolution in the current round of Rule 6 amendments. However, it seems useful to consider a possible alternative – namely, a proposal that would implement the uncontroversial portions of the Rule 6 proposal and that would leave for another day the task of updating terminology relating to the sharing of the record. I sketch that minimalist alternative in Part III.B.

Since the time of the Standing Committee's January meeting, Professor Kimble provided a further set of style comments on the draft that was included in the Standing Committee's agenda materials. The drafts shown in Parts III.A and III.B incorporate a number of those suggestions. In Part III.C, I discuss a remaining point raised by Professor Kimble.

A. Option One – tackling the terminology question

It makes sense for the Committee to try to reach consensus on terminology – for Rule 6 – that would reflect current and possible future practices concerning the treatment of the record. Based on the helpful discussions that took place subsequent to the Committee's fall 2011 meeting, it is possible to narrow the drafting questions to the following:

> 1) Should Rule 6 use "furnish" to describe the transfer of the record on appeal to the court of appeals, or should it use "provide"?
>
> 2) Should Rule 6(b)(2)(C) include a sentence specifying actions that can meet the requirement of furnishing or provision? Or should Rule 6(b)(2)(C) include a sentence inviting local rulemaking on this issue? Or should this be addressed in the Committee Note rather than in Rule text?
>
> 3) Should Rule 6(c)(2)(B) include a sentence inviting local rulemaking on the question of methods that can meet the requirement of furnishing the record? Or should this be addressed in the Committee Note rather than in Rule text?

The first and second of these questions were thoughtfully discussed by members of the Committee subsequent to the fall 2011 meeting, and those discussions are summarized in Part I.C above. Those questions concern Rule 6(b), which is not directly affected by the treatment of the record on appeal in Rules 8009 and 8010 of the proposed Part VIII Rules. By contrast, the third question concerns the treatment of the record in the context of permissive direct appeals. Because proposed Rule 6(c) incorporates proposed Rules 8009 and 8010, it is important to consider how those three Rules would fit together.

In particular, the question is whether the default mode of transmission contemplated by the proposed Part VIII Rules will dovetail with the more flexible approach contemplated for the courts of appeals (some of which presumably will desire a paper record for the time being). Analysis of this question implicates four provisions in the proposed Part VIII Rules:[16]

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[16] Rule 8009 also touches on the topic of transmission, but somewhat more obliquely. As currently drafted, proposed Rule 8009 uses the term "transmit" to refer to the transfer of the record to the appellate court, and its Committee Note states in part: "Ordinarily, the bankruptcy clerk will not need to have paper copies of the designated items because the clerk will either transmit them electronically to the district court or BAP or otherwise make them available electronically. If the bankruptcy clerk requires a paper copy of some or all of the items designated as part of the record, the clerk may request the parties to provide the necessary copies ...."

Mention is also made of this issue in the Committee Note to Rule 8024 (duties of clerk on disposition of appeal), which states in part: "The rule is reworded to reflect that often the record will not be physically transmitted to the district court or BAP and thus there will be no documents to return to the bankruptcy clerk."

- Rule 8010(b)(1) provides that "the bankruptcy clerk must transmit to the clerk of the district court or BAP either the record or a notice of the availability of the record and the means of accessing it electronically."

- Rule 8010(b)(4) provides: "If the district court or BAP directs that paper copies of the record be furnished, the clerk of that court must notify the appellant and, if the appellant fails to provide the copies, the bankruptcy clerk must prepare the copies at the appellant's expense."

- Rule 8009(h) provides in part: "Rules 8009 and 8010 apply to appeals taken directly to the court of appeals under 28 U.S.C. § 158(d)(2). A reference in Rules 8009 and 8010 to the 'district court or BAP' includes the court of appeals when it has authorized a direct appeal under 28 U.S.C. § 158(d)(2)."

- Rule 8001(c) is titled "METHOD OF TRANSMISSION" and states: "A document must be sent electronically under these Part VIII rules, unless the document is being sent by or to an individual who is not represented by counsel or the governing rules of the court expressly permit or require mailing or other means of delivery."

As I read these provisions, they should be compatible with whatever method a court of appeals chooses to adopt for receiving the record on appeal. Rule 8001(c)'s reference to "the governing rules of the court" should be sufficiently capacious to encompass local circuit rules. Thus, a given circuit should be able to adopt a local rule that would direct the manner by which the lower court would provide the record to the court of appeals. The proposed Committee Note to Rule 6(c) recognizes this authority in the court of appeals. To be even more explicit, the Committee could mention it in the text of Rule 6(c); that alternative is illustrated in the draft by this bracketed sentence in Rule 6(c)(2)(B): "[The court of appeals may adopt a local rule on the acceptable methods for [furnishing] [providing] the record.]."

Here is a sketch of the Rule 6 proposal. The blacklining denotes changes compared with the current Rule. The yellow highlighting denotes the portions of the text that implicate the terminological choices discussed above.

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

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

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

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

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

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

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

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

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

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

(i) If a timely motion for rehearing under Bankruptcy Rule ~~8015~~ 8022 is filed, the time to appeal for all parties runs from the entry of the order disposing of the motion. A notice of appeal filed after the district court or bankruptcy appellate panel announces or enters a judgment, order, or decree – but before disposition of the motion for rehearing – becomes effective when the order disposing of the

motion for rehearing is entered.

(ii) ~~Appellate review of~~ If a party intends to challenge the order disposing of the motion – or the alteration or amendment of a judgment, order, or decree upon the motion – then ~~requires~~ the party, in compliance with Rules 3(c) and 6(b)(1)(B), ~~to amend a previously filed notice of appeal. A party intending to challenge an altered or amended judgment, order, or decree~~ must file a notice of appeal or amended notice of appeal. The notice or amended notice[17] must be filed within the time prescribed by Rule 4 – excluding Rules 4(a)(4) and 4(b) – measured from the entry of the order disposing of the motion.

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

(B) The ~~r~~Record on ~~a~~Appeal.

(i) Within 14 days after filing the notice of appeal, the appellant must file with the clerk possessing the record assembled in accordance with Bankruptcy Rule ~~8006~~ 8009 – and serve on the appellee – a statement of the issues to be presented on appeal and a designation of the record to be certified and ~~sent~~ [furnished] [provided] to the circuit clerk.

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

(iii) The record on appeal consists of:

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[17] See Part III.C. for a discussion of this language.

• the redesignated record as provided above;

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

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

(C) ~~Forwarding~~ [Furnishing] [Providing] the rRecord.

(i) When the record is complete, the district clerk or bankruptcy-appellate-panel[18] clerk must number the documents constituting the record and ~~send~~ promptly [furnish] [provide] them ~~them promptly to the circuit clerk together with a list of the documents correspondingly numbered and reasonably identified~~ to the circuit clerk. [[For this purpose,][19] a document may be [furnished] [provided] [to the circuit clerk][20] either by transferring it (or a copy of it) in paper or electronic form or by supplying the circuit clerk a means of electronic access to it.] [The court of appeals may adopt a local rule on the acceptable methods for [furnishing] [providing] those documents.] . ~~Unless directed to do so by a party or the circuit clerk~~ If the record is [furnished] [provided] in paper form, the clerk will not send

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[18] In the existing Rule 6 (as restyled in 1998), this term reads "bankruptcy appellate panel." Professor Kimble's style guidance on proposed Rule 6(b)(2)(D) counsels the use of hyphens ("bankruptcy-appellate-panel"). I defer to Professor Kimble's views on this style question, and accordingly have also made that change here.

[19] An earlier draft included the phrase "For this purpose". Professor Kimble suggests deleting both that phrase and "to the circuit clerk." It seems to me that the advisability of deleting those phrases may depend on the verb choice. If a unique verb is chosen, then deleting those limiting phrases will work. But if the selected verb is one that appears elsewhere in the Appellate Rules, then I believe it may be better to retain the limiting phrases. Both "furnish" and "provide" appear elsewhere in the Appellate Rules. See supra footnotes [12] and [13].

[20] See the preceding footnote for a discussion of Professor Kimble's suggestion to delete this phrase.

~~to the court of appeals~~ documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals, unless directed to do so by a party or the circuit clerk. If ~~the exhibits are~~ unusually bulky or heavy exhibits are to be sent in paper form, a party must arrange with the clerks in advance for their transportation and receipt.

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

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

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

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

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

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

(C) the reference to "Rules 11 and 12(c)" in Rule 5(d)(3) must be read as a reference to Rules 6(c)(2)(B) and (C).[21]

(2) Additional Rules. In addition,[22] the following rules apply:

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

(B) **[Furnishing] [Providing] the Record.** Bankruptcy Rule 8010 governs completing and [furnishing] [providing] the record. [The court of appeals may adopt a local rule on the acceptable methods for [furnishing] [providing] the record.]

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

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[21] Rule 5(d)(3) states in part that "[t]he record must be forwarded and filed in accordance with Rules 11 and 12(c)." A purist might argue that if the Committee uses a term such as "furnish" or "provide" in Rule 6 to denote the treatment of the record, this would cause dissonance with the use of the term "forward[]" in Rule 5(d)(3). It would be possible to redraft Rule 6(c)(1) to exclude Rule 5(d)(3) from applying to permissive direct appeals in bankruptcy in order to avoid such dissonance; but I incline against doing so because permitting Rule 5(d)(3) to remain applicable (as modified by Rule 6(c)(1)(C)) would cause no confusion.

[22] The prior drafts included at this point the phrase "to the rules made applicable by Rule 6(c)(1)." Professor Kimble advises deleting that phrase. This seems to me a matter of style and I have made the change.

(D) **Duties of the Circuit Clerk.** When the bankruptcy clerk has [furnished] [provided] the record, the circuit clerk must note that fact on the docket. The date noted on the docket serves as the filing date of the record for purposes of [these Rules] [Rules 28.1(f), 30(b)(1), 31(a)(1), and 44]. The circuit clerk must immediately notify all parties of the filing date.

(E) **Filing a Representation Statement**. Unless the court of appeals designates another time, within 14 days after entry of the order granting permission to appeal, the attorney who sought permission must file a statement with the circuit clerk naming the parties that the attorney represents on appeal.

Committee Note

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

Subdivision (b)(2). Subdivision (b)(2)(A)(i) is amended to refer to Bankruptcy Rule 8022 (in accordance with the renumbering of Part VIII of the Bankruptcy Rules).

Subdivision (b)(2)(A)(ii) is amended to address problems that stemmed from the adoption — during the 1998 restyling project — of language referring to challenges to "an altered or amended judgment, order, or decree." Current Rule 6(b)(2)(A)(ii) states that "[a] party intending to challenge an altered or amended judgment, order, or decree must file a notice of appeal or amended notice of appeal …." Before the 1998 restyling, the comparable subdivision of Rule 6 instead read "[a] party intending to challenge an alteration or amendment of the judgment, order, or decree shall file an amended notice of appeal …." The 1998 restyling made a similar change in Rule 4(a)(4). One court has explained that the 1998 amendment introduced ambiguity into that Rule: "The new formulation could be read to expand the obligation to file an amended notice to circumstances where the ruling on the post-trial motion alters the prior judgment in an insignificant manner or in a manner favorable to the appellant, even though the appeal is not directed against the alteration of the judgment." *Sorensen v. City of New York*, 413 F.3d 292, 296 n.2 (2d Cir. 2005). Though the *Sorensen* court was writing of Rule 4(a)(4), a similar concern arises with respect to Rule 6(b)(2)(A)(ii). Rule 4(a)(4) was amended in 2009 to remove the ambiguity identified by the *Sorensen* court. The current amendment follows suit by removing Rule 6(b)(2)(A)(ii)'s reference to challenging "an altered or amended judgment, order, or decree,"

and referring instead to challenging "the alteration or amendment of a judgment, order, or decree."

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

Due to the shift to electronic filing, in some appeals the record will no longer be transmitted in paper form. Subdivisions (b)(2)(B)(i), (b)(2)(C), and (b)(2)(D) are amended to reflect the fact that the record sometimes will be transmitted electronically. [Subdivision (b)(2)(C) [defines] [authorizes the adoption of local rules to define] acceptable modes of transmission of the record.]

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

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

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

Subdivision (c)(2). Subdivision (c)(2)(A) provides that the record on appeal is governed by Bankruptcy Rule 8009. Subdivision (c)(2)(B) provides that the transmission of the record is governed by Bankruptcy Rule 8010. Subdivision (c)(2)(C) provides that Bankruptcy Rule 8007 applies to stays pending appeal; in addition, Appellate Rule 8(b) applies to sureties on bonds provided in connection with stays pending appeal.

Subdivision (c)(2)(D), like subdivision (b)(2)(D), directs the clerk to note the date of receipt of the record on the docket and to notify the parties of that date, which shall serve as the date of filing the record for purposes of provisions in these Rules that calculate time from that filing date.

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

B. Option Two – the minimalist approach

As noted in Part II, a possible alternative approach would exclude from the current round of Rule 6 amendments the terminological choices discussed above. In that approach, the

proposed Rule 6 amendments would avoid altering language merely to better reflect the shift to electronic filing; but where the amendments did alter the language, terms would be chosen that would accommodate that shift.

With respect to Rule 6(b)'s treatment of appeals from the district court or BAP, this approach would entail no change to Rule 6(b)(2)(C) (concerning "forwarding the record"). That provision's description of numbering the documents and sending them to the circuit clerk may now be somewhat outdated, but may not yet be universally outdated. In any event, courts have been operating under Rule 6(b)(2)(C) without any suggestion that a rule amendment is necessary at the present time. However, it does seem advisable to amend Rule 6(b)(2)(D) to define the filing date of the record in a way that is both clear and also flexible enough to accommodate various methods of transmission of the record. (A similar approach is taken in Rule 6(c)(2)(D) with respect to direct appeals.)

With respect to Rule 6(c)'s treatment of permissive direct appeals from the bankruptcy court, the sketch below is similar to the sketch in Part III.A in the sense that it incorporates proposed Rules 8009 and 8010 and includes a bracketed sentence making explicit the circuits' authority to adopt local rules governing the mode of forwarding the record. But rather than using a new term such as "furnish" or "provide," the sketch below refers simply to "forwarding" the record.

As in Part III.A, blacklining denotes changes as compared to the language of the current Rule:

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

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

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

(1) Applicability of Other Rules. These rules apply to an appeal to a court of appeals under 28 U.S.C. § 158(d)(1) from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction under 28 U.S.C. §

158(a) or (b)~~. But there are 3 exceptions~~, but with these qualifications:

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

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

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

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

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

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

(i) If a timely motion for rehearing under Bankruptcy Rule ~~8015~~ 8022 is filed, the time to appeal for all parties runs from the entry of the order disposing of the motion. A notice of appeal filed after the district court or bankruptcy appellate panel announces or enters a judgment, order, or decree – but before disposition of the motion for rehearing – becomes effective when the order disposing of the motion for rehearing is entered.

(ii) ~~Appellate review of~~ If a party intends to challenge the order disposing of the motion – or the alteration or amendment of a judgment, order, or decree upon the motion – then ~~requires~~ the party, in compliance with Rules 3(c) and 6(b)(1)(B), ~~to amend a previously filed notice of appeal. A party intending to~~

~~challenge an altered or amended judgment, order, or decree~~ must file a notice of appeal or amended notice of appeal. The notice or amended notice[23] must be filed within the time prescribed by Rule 4 – excluding Rules 4(a)(4) and 4(b) – measured from the entry of the order disposing of the motion.

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

(B) The ~~r~~Record on ~~a~~Appeal.

(i) Within 14 days after filing the notice of appeal, the appellant must file with the clerk possessing the record assembled in accordance with Bankruptcy Rule ~~8006~~ 8009 – and serve on the appellee – a statement of the issues to be presented on appeal and a designation of the record to be certified and sent to the circuit clerk.

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

(iii) The record on appeal consists of:

• the redesignated record as provided above;

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

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

(C) Forwarding the ~~r~~Record.

[23] See Part III.C for a discussion of this language.

(i) When the record is complete, the district clerk or bankruptcy-appellate-panel clerk must number the documents constituting the record and send them promptly to the circuit clerk together with a list of the documents correspondingly numbered and reasonably identified. Unless directed to do so by a party or the circuit clerk, the clerk will not send to the court of appeals documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals. If the exhibits are unusually bulky or heavy, a party must arrange with the clerks in advance for their transportation and receipt.

(ii) All parties must do whatever else is necessary to enable the clerk to assemble and forward the record. The court of appeals may provide by rule or order that a certified copy of the docket entries be sent in place of the redesignated record, but any party may request at any time during the pendency of the appeal that the redesignated record be sent.

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

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

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

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

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

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

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

(2) Additional Rules. In addition, the following rules apply:

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

(B) **Forwarding the Record.** Bankruptcy Rule 8010 governs completing and forwarding the record. [The court of appeals may adopt a local rule on the acceptable methods for forwarding the record.]

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

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

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

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

Committee Note

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

Subdivision (b)(2). Subdivision (b)(2)(A)(i) is amended to refer to Bankruptcy Rule 8022 (in accordance with the renumbering of Part VIII of the Bankruptcy Rules).

Subdivision (b)(2)(A)(ii) is amended to address problems that stemmed from the adoption — during the 1998 restyling project — of language referring to challenges to "an altered or amended judgment, order, or decree." Current Rule 6(b)(2)(A)(ii) states that "[a] party intending to challenge an altered or amended judgment, order, or decree must file a notice of appeal or amended notice of appeal …." Before the 1998 restyling, the comparable subdivision of Rule 6 instead read "[a] party intending to challenge an alteration or amendment of the judgment, order, or decree shall file an amended notice of appeal …." The 1998 restyling made a similar change in Rule 4(a)(4). One court has explained that the 1998 amendment introduced ambiguity into that Rule: "The new formulation could be read to expand the obligation to file an amended notice to circumstances where the ruling on the post-trial motion alters the prior judgment in an insignificant manner or in a manner favorable to the appellant, even though the appeal is not directed against the alteration of the judgment." *Sorensen v. City of New York*, 413 F.3d 292, 296 n.2 (2d Cir. 2005). Though the *Sorensen* court was writing of Rule 4(a)(4), a similar concern arises with respect to Rule 6(b)(2)(A)(ii). Rule 4(a)(4) was amended in 2009 to remove the ambiguity identified by the *Sorensen* court. The current amendment follows suit by removing Rule 6(b)(2)(A)(ii)'s reference to challenging "an altered or amended judgment, order, or decree," and referring instead to challenging "the alteration or amendment of a judgment, order, or decree."

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

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

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

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

Subdivision (c)(2). Subdivision (c)(2)(A) provides that the record on appeal is governed by Bankruptcy Rule 8009. Subdivision (c)(2)(B) provides that forwarding the record is governed by Bankruptcy Rule 8010[, and authorizes the adoption of local rules to define permissible methods for forwarding the record]. Subdivision (c)(2)(C) provides that Bankruptcy Rule 8007 applies to stays pending appeal; in addition, Appellate Rule 8(b) applies to sureties on bonds provided in connection with stays pending appeal.

Subdivision (c)(2)(D), like subdivision (b)(2)(D), directs the clerk to note the date of receipt on the docket and to notify the parties of that date, which shall serve as the date of filing the record for purposes of provisions in these Rules that calculate time from that filing date.

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

C. A remaining issue raised by Professor Kimble

As noted above, the Rule 6 draft has been extensively improved by Professor Kimble's style guidance at several points in the Committee's work. There is one unresolved issue relating to the wording of proposed Rule 6(b)(2)(A)(ii), which concerns the requirement that a party file a new or amended notice of appeal if the party wishes to challenge the alteration or amendment of a judgment. The text proposed in the fall 2011 agenda materials read:

> If a party intends to challenge the order disposing of the motion – or the alteration or amendment of a judgment, order, or decree upon the motion – then the party, in compliance with Rules 3(c) and 6(b)(1)(B), must file a notice of appeal or amended notice of appeal. **The notice or amended notice** must be filed within the time prescribed by Rule 4 – excluding Rules 4(a)(4) and 4(b) – measured from the entry of the order disposing of the motion.

As noted in the fall 2011 agenda materials, Professor Kimble argued that the bolded text in the quote above – "The notice or amended notice" – should be replaced by "It." In the agenda materials, I suggested that the Committee consider whether the longer formulation is clearer. At the fall 2011 meeting, four participants agreed that the longer formulation is clearer. As a result of this discussion, the draft that was presented for discussion at the Standing Committee employed the longer formulation. After that meeting, Professor Kimble reiterated his objection to the longer formulation. He argues that the choice between "The notice or amended notice" and

"It" is a matter of style rather than substance.

IV. Conclusion

Based on hard work and input from the Bankruptcy Rules Committee, from Professor Kimble, and from members of the Appellate Rules Committee, discussions last fall and winter narrowed the debate over proposed Rule 6 to the questions identified in this memo. The formation of the subcommittee chaired by Judge Gorsuch, and the careful and illuminating work by Andrea Kuperman, have clarified the context for the Committee's further discussion of the decisions that remain to be made. If the Committee can resolve the questions presented in Part III of this memo, then it will be in a position to finalize a draft of the Rule 6 proposal that can be presented to the Standing Committee in June 2012 for possible publication for comment.

Encls.

TAB 6B

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON PRIVACY, PUBLIC ACCESS, AND APPEALS

RE: PART VIII RULES—PROPOSED RULES 8001 and 8010; 8013-8027; and 8007

DATE: MARCH 23, 2012

At the fall 2011 meeting, the Advisory Committee tentatively approved for publication the first half of the proposed Part VIII revised rules with two exceptions. The Subcommittee was asked to give further thought to Rules 8001 and 8010 and to report back on proposed changes at the spring 2012 meeting. The Committee asked the Subcommittee to revise the definition of "transmit" in Rule 8001 to incorporate an exception to the presumption of electronic transmission for pro se individuals. With respect to Rule 8010, the Committee requested the Subcommittee to resolve issues about the procedure for preparing and filing a transcript when a court records testimony electronically without a court reporter present.

Thereafter, a draft of Rules 8001-8012 was presented to the Standing Committee at its January 2012 meeting for preliminary review. Members of the Standing Committee discussed Rule 8001 in particular and provided some helpful feedback that the Subcommittee took into account in revising the draft of that rule. Questions were raised at the Standing Committee meeting about the use of the term "transmit," as defined in Rule 8001. Some Standing Committee members suggested that, given the importance of the emphasis on electronic transmission of documents, the presumption favoring electronic transmission should be set out in a separate provision rather than included in a definition. Whether "transmit" is the correct verb to use throughout the Part VIII rules was also debated. Additionally, some Standing Committee

members expressed concern that using "appellate court" to refer to district courts and BAPs, but not to courts of appeal, was confusing. They suggested that many users of the Part VIII rules will not consult Rule 8001 and will assume that common terms have their ordinary meaning.

Members of the Standing Committee noted that the choice of the terminology to use in reference to the sending of documents, whether electronically or in paper form, is an issue that is of relevance to all of the rules committees. In order to determine whether consistent terminology might be adopted for all the sets of rules, Judge Kravitz created an ad hoc subcommittee, to be chaired by Standing Committee member Judge Neil Gorsuch, that will include representatives from all of the rules committees. (Judge Wedoff asked Mr. Waldron to serve as this Committee's representative.) Although the subcommittee has not yet met, Andrea Kuperman and Professor Cathie Struve have compiled information on all of the terms used in the rules for the sending of documents. Suffice it to say, the list is long, and the task of arriving at uniform terminology will be challenging.

During conference calls on January 11 and February 8, 2012, the Subcommittee considered revisions to the drafts of Rules 8001 and 8010 and drafts of the second half of the Part VIII rules (Rules 8013-8027). After its careful review and revision of the drafts, **the Subcommittee voted to recommend that the Advisory Committee ask the Standing Committee to publish for comment this August the revised Part VIII rules as set forth in Appendix B to the agenda materials.** This publication schedule would mean that the new Part VIII rules would have a presumptive effective date of December 1, 2014.

This memorandum discusses the changes that the Subcommittee made to the drafts of Rules 8001 and 8010 after the fall meeting. It also highlights for each rule in the second half of the Part VIII draft significant differences from the existing Part VIII rules or from the Federal

Rules of Appellate Procedure ("FRAP"), as well as any issues that the Subcommittee thought should be called to the Committee's attention. Finally, the memorandum notes a needed correction to Rule 8007 that has been called to the reporter's attention.

Discussion of the Proposed Rules

1. *Changes to the drafts of Rules 8001 and 8010.*

Rule 8001. Scope of the Part VIII Rules; Definition of "BAP"; Method of Transmission. In response to comments at the Standing Committee meeting, the Subcommittee revised this rule to eliminate the definitions of "appellate court" and "transmit." Prior drafts of Part VIII used the term "appellate court" to mean only a district court or BAP. The proposed rules now refer to all courts by name: bankruptcy court, district court, BAP, and court of appeals. Because the term "appellate court" is no longer used, its definition in Rule 8001 was removed. Due to the repeated references to "district court or BAP," the acronym for bankruptcy appellate panel was retained, and its definition remains in this rule.

The Subcommittee changed what had been a definition of "transmit" in this rule to a provision that directly addresses the method of transmission of documents. This change responds to the concern about burying in a definition the presumption favoring filing, serving, and sending documents by electronic means. The title of this rule has also been revised to highlight the fact that it addresses the method of transmission. The presumption in favor of electronic transmission now includes an exception for pro se individuals.

The Subcommittee has retained the use of "transmit" or "transmission" throughout the proposed rules. As discussed above, the ad hoc subcommittee of the Standing Committee may eventually recommend another term or terms for use in all the sets of rules. Until that time, however, the Subcommittee favors the use of "transmit" rather than "send, "file," or another verb

because "transmit" may be applied to the several different contexts in which the Part VIII rules address the conveyance of documents and it seems more compatible than other terms with the use of electronic technology.

Rule 8010. Completion and Transmission of the Record. The Subcommittee made several changes to the draft of this rule after consulting with clerks of bankruptcy courts, the clerk of a BAP, and representatives of the Administrative Office of the U.S. Courts. They advised the Subcommittee that court reporters should be required to file documents only in a bankruptcy court and that all duties associated with preparing and filing transcripts should be carried out by reporters and transcription services, not the clerk's office.

The proposed rule now clarifies that in courts that record proceedings without a reporter present in the courtroom, the term "reporter" includes the person or service designated by the court to transcribe the recording. Unlike FRAP 11, proposed Rule 8010 does not require the reporter to file anything in an appellate court. And in a change from current bankruptcy practice, the clerk of the appellate court will no longer docket the appeal when the complete record is received. Docketing will occur upon transmission of the notice of appeal (proposed Rules 8003(d) and 8004(c)). The appellate court clerk will still provide notice to the parties of the date on which the transmission of the record was received, because under proposed Rule 8018(a) that date generally commences the briefing schedule.

2. *Highlights of proposed Rules 8013-8027.*

Rule 8013. Motions; Intervention.

- In a change from current bankruptcy practice, the proposed rule does not permit briefs to be filed in support of or in response to motions. Instead, like the practice under FRAP 27, legal arguments must be included in the motion or response.

- Proposed Rule 8013(g) permits motions for intervention in a bankruptcy appeal in a district court or BAP. The current Part VIII rules do not address intervention, and the appellate rules provide for intervention only with respect to the review of agency decisions. Someone seeking to intervene in a bankruptcy appeal must explain whether intervention was sought in the bankruptcy court and why intervention is being sought at the appellate stage.

Rule 8014. Briefs.

- The draft of subdivision (a)(6) regarding the statement of the case adopts the language of the proposed amendment of FRAP 28 that was published for comment in August 2011. In order to keep the two sets of rules parallel, the Committee will want to monitor subsequent action on the FRAP amendment to ensure that the wording of proposed Rule 8014(a)(6) remains consistent with FRAP 28(a)(6).
- In a change from existing bankruptcy practice, proposed Rule 8014(a)(7) would require appellants' and appellees' briefs to contain a summary of the argument. This requirement is consistent with FRAP 28(a)(8).
- The proposed rule departs from the requirements of FRAP 28 by not including provisions regarding references to parties and references to the record. The Subcommittee concluded that this level of detail in the bankruptcy appellate rules is unnecessary.
- Subdivision (f) adopts the provision of FRAP 28(j) regarding the submission of supplemental authorities. Unlike the FRAP provision, the proposed rule imposes a definite time limit (seven days) for any response, unless the court orders otherwise.

Rule 8015. Form and Length of Briefs; Form of Appendices and Other Papers.

- The proposed rule is modeled on FRAP 32. The title was changed to call attention to the fact that this rule governs the length of briefs.

- Unlike FRAP 32(a)(2), subdivision (a)(2) of the proposed rule does not prescribe colors for brief covers.
- Subdivision (a)(7) decreases the length of principal and reply briefs currently permitted by Rule 8010. This change imposes the same page limit on briefs filed in a district court or BAP as applies to briefs filed in a court of appeals.
- Subdivision (a)(7)(C)(ii) refers to an Official Form for the certificate of compliance with the type-volume limitation. The Committee will need to propose a form, similar to Official Appellate Form 6, for publication in 2013 so that it can take effect at the same time as the new Part VIII rules.

Rule 8016. Cross-Appeals.

- This provision is new to Part VIII. It is modeled on FRAP 28.1

Rule 8017. Brief of an Amicus Curiae.

- The current Part VIII rules do not provide for amicus briefs. The proposed rule is modeled on FRAP 29.
- Unlike FRAP 29(a), subdivision (a) of this rule permits the court to request amicus participation.

Rule 8018. Serving and Filing Briefs; Appendices.

- The proposed rule continues the existing bankruptcy practice of allowing the appellee to file its own appendix. It differs in that respect from FRAP 30, which requires the filing of a single appendix by all parties.
- The time periods for the appellant and appellee to file their initial briefs are lengthened from the existing time limits (changed from 14 to 30 days). For the appellant the period will still be shorter than the 40-day period prescribed by FRAP 31.

Rule 8019. Oral Argument.

- Subdivision (a) alters existing Rule 8012 by (1) authorizing the court to require the parties to submit a statement about the need for oral argument and (2) permitting statements to explain why oral argument is not needed (not just why it should be allowed). The proposed rule tracks FRAP 34(a)(1).
- Subdivision (f) differs from FRAP 34(e) by giving the court discretion whether to hear the appellant's argument, or postpone argument, if the appellee fails to appear for oral argument.

[Rule 8020. Weight Accorded Bankruptcy Judge's Findings of Fact and Conclusion of Law.]

- Earlier drafts contained a proposed Rule 8020 that would have carried forward the provisions of current Rule 8013. The Subcommittee proposes the deletion of that rule.
- The Subcommittee had previously determined that there is no need to instruct district courts and BAPs on the actions they may take (affirm, modify, reverse, or remand with instructions) in ruling on bankruptcy appeals.
- The Subcommittee now suggests that the remainder of the rule—prescribing the weight to be accorded the bankruptcy court's findings of fact—be deleted. It duplicates Rule 7052, which applies in adversary proceedings and is made applicable to contested matters by Rule 9014. The appellate rules do not contain a similar rule.
- The decision not to include in revised Part VIII a rule similar to existing Rule 8013 is not intended to change existing law. It merely reflects a determination that the rule is unnecessary.

- Deletion of the earlier drafts' Rule 8020 necessitates the renumbering of the remaining proposed Part VIII rules.

Rule 8020. Frivolous Appeals and Other Misconduct.

- Subdivision (a) of the proposed rule is derived from existing Rule 8020, which in turn is modeled on FRAP 38. Note: the Committee Note should probably be revised to refer to Rule 8020, as well as FRAP 38 and 46(c).
- Subdivision (b) is derived from FRAP 46(c). It expands the FRAP provision to apply to misconduct by parties as well as by attorneys.

Rule 8021. Costs.

- FRAP 39 requires both the court of appeals and the district court to be involved in the taxing of costs. The court of appeals fixes maximum rates for producing copies of documents, and the clerk of the court of appeals prepares and certifies an itemized statement of costs for insertion in the mandate. Additional costs on appeal are taxable in the district court. The proposed rule, by contrast, is intended to continue the practice under current Rule 8014 of giving the bankruptcy clerk the responsibility for taxing the costs of appeal.
- Mr. Waldron reviewed the proposed rule and sought input from the clerk of the Ninth Circuit BAP. They agreed that the proposed rule is consistent with existing practice, which seems to work well.
- Subdivision (b) adds a provision regarding the taxing of costs against the United States. This provision, which is not included in current Rule 8014, is derived from FRAP 39(b).
- There may be an ambiguity in proposed subdivision (d) that should be corrected. It now states, "Objections must be filed within 14 days after service of the bill of costs, unless

the court extends the time." While the context probably indicates that the reference is to the bankruptcy court, it may be better to say so expressly since that is the general practice in these proposed rules.

Rule 8022. Motion for Rehearing.

- Subdivision (a)(1) retains the requirement of current Rule 8015 that in all cases parties must file a motion for rehearing within 14 days after the judgment is entered. It thus deviates from FRAP 40(a)(1), which allows 45 days for filing the motion in a civil case if the United States is a party.
- The provision in existing Rule 8015 that specifies when the time for appeal to the court of appeals begins to run is not retained because the matter is addressed by FRAP 6(b)(2).

Rule 8023. Voluntary Dismissal.

- The provision of current Rule 8001(c)(1) for dismissal by the bankruptcy court prior to the docketing of the appeal has been omitted. Under the proposed rules, appeals are docketed shortly after the notice of appeal is filed—a period likely to be especially short if the notice of appeal is transmitted electronically. The Subcommittee therefore thought it unlikely that a voluntary dismissal of the appeal would be sought after the appellant filed the notice of appeal but before the appeal had been docketed. It should be noted, however, that FRAP 42 has a provision for dismissal by the district court prior to docketing, even though docketing under FRAP 12 also occurs upon receipt by the circuit clerk of the notice of appeal (and docket entries).
- FRAP 42(b) provides that the circuit clerk "may" dismiss an appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are

due. The proposed rule requires the clerk of the district court or BAP to dismiss under those circumstances. That requirement is consistent with current Rule 8001(c)(2).

Rule 8024. Duties of the Clerk on Disposition of Appeal.

- The only change to existing Rule 8016, other than stylistic ones, is the recognition that in some cases no original documents may have been transmitted to the appellate court.

Rule 8025. Stay of District Court or BAP Judgment.

- The proposed rule is derived from current Rule 8017. Only subdivision (c) is new. It provides for the stay of a bankruptcy court's order, judgment, or decree that is affirmed on appeal to the same extent as any stay of the appellate judgment.

Rule 8026. Rules by Circuit Councils and District Courts; Procedure When There Is No Controlling Law.

- The statement in existing Rule 8018(a) that "Rule 83 F.R.Civ.P. governs the procedure for rulemaking and amending rules to govern appeals" was deleted. The Subcommittee did not think that the rule should suggest that Civil Rule 83 governs rulemaking by a circuit council, and FRAP 47, which governs local rulemaking by courts of appeals, does not apply to circuit council rulemaking for BAPs.

Rule 8027. Suspension of Rules in Part VIII.

- While the list of rules that may not be suspended is much longer than the list in current Rule 8019 and in FRAP 2, the Subcommittee concluded that compliance with the listed rules should always be required.

3. *Correction of proposed Rule 8007.*

After the Subcommittee met and agreed on its recommendation to the Advisory Committee, Professor Struve called to the reporter's attention a possible omission in the draft of

Rule 8007(c). That rule, which governs stays pending appeal, was revised prior to its approval by the Committee last fall to apply to direct appeals to courts of appeals, as well as to appeals to district courts and BAPs. Most of the proposed rule reflects that change. Subdivision (c) (line 44), however, does not refer to the court of appeals. The reporter therefore suggests that subdivision (c) be revised to read: "The district court, BAP, or court of appeals may condition relief under this rule on the filing of a bond or other appropriate security with the bankruptcy court." This change is consistent with the existing proposed Committee Note.

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FEDERAL RULES OF BANKRUPTCY PROCEDURE

PART VIII. BANKRUPTCY APPEALS

Rule

Rule 8001. Scope of Part VIII Rules; Definition of "BAP"; Method of Transmission

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

(b) DEFINITION OF "BAP." "BAP" means a bankruptcy appellate panel established by the judicial council of a circuit and authorized to hear appeals from the bankruptcy court for the district in which an appeal is taken under 28 U.S.C. § 158.

(c) METHOD OF TRANSMISSION. A document must be sent electronically under these Part VIII rules, unless the document is being sent by or to an individual who is not represented by counsel or the governing rules of the court expressly permit or require mailing or other means of delivery.

COMMITTEE NOTE

These Part VIII rules apply to appeals under 28 U.S.C. § 158(a) from bankruptcy courts to district courts and BAPs. Subsequent appeals to courts of appeals are generally governed by the Federal Rules of Appellate Procedure.

Seven of the Part VIII rules do, however, relate to appeals to courts of appeals. Rule 8004(e) provides that authorization by the court of appeals of a direct appeal of a bankruptcy court's interlocutory judgment, order, or decree constitutes a grant of leave to appeal. Rule 8006 governs the procedure for certification under 28 U.S.C. § 158(d)(2) of a direct appeal from a judgment, order, or decree of a bankruptcy court to a court of appeals. Rule 8007 addresses stays pending a direct appeal to a court of

appeals. Rule 8008 authorizes a bankruptcy court to issue an indicative ruling while an appeal is pending in a court of appeals. Rules 8009 and 8010 govern the record on appeal in a direct appeal allowed under 28 U.S.C. § 158(d)(2). And Rule 8025 governs the granting of a stay of a judgment of a district court or BAP pending an appeal to the court of appeals.

These rules take account of the evolving technology in the federal courts for the electronic filing, storage, and transmission of documents. Except as applied to pro se parties, the Part VIII rules require documents to be sent electronically, unless applicable court rules or orders expressly require or permit another means of sending a particular document.

Rule 8002. Time for Filing Notice of Appeal

(a) FOURTEEN-DAY PERIOD.

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

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

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

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

(b) EFFECT OF MOTION ON TIME FOR APPEAL.

(1) If a party timely files in the bankruptcy court any of the following motions, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

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

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

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

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

(2)(A) If a party files a notice of appeal after the court announces or enters a judgment, order, or decree – but before it disposes of any motion listed in subdivision (b)(1) – the notice becomes effective when the order disposing of the last such remaining motion is entered.

(B) A party intending to challenge on appeal an order disposing of any motion listed in subdivision (b)(1), or the alteration or amendment of a judgment, order, or decree upon such a motion, must file a notice of appeal or

an amended notice of appeal. The notice of appeal or amended notice of appeal must be filed in compliance with Rule 8003 or 8004 and within the time prescribed by this rule, measured from the entry of the order disposing of the last such remaining motion.

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

(c) APPEAL BY AN INMATE CONFINED IN AN INSTITUTION.

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

(2) If an inmate files under this subdivision the first notice of appeal from a judgment, order, or decree of a

bankruptcy court to a district court or BAP, the 14-day period provided in subdivision (a)(2) for another party to file a notice of appeal runs from the date when the bankruptcy court dockets the first notice.

(d) EXTENSION OF TIME FOR APPEAL.

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

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

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

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

(D) authorizes the assumption or assignment of an executory contract or unexpired lease under § 365 of the Code;

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

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

(2) The bankruptcy court may extend the time to file a notice of appeal if:

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

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

(C) no extension of time for filing a notice of appeal may exceed 21 days after the time otherwise prescribed by this rule, or 14 days after the date the order granting the motion is entered, whichever is later.

COMMITTEE NOTE

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

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

Subdivision (b), like former Rule 8002(b) and F.R. App. P. 4(a),

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

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

Subdivision (c) mirrors the provisions of F.R. App. P. 4(c)(1) and (2), which specify timing rules for a notice of appeal filed by an inmate confined in an institution.

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

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

(a) FILING THE NOTICE OF APPEAL.

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

(2) An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the district court or BAP to act as it considers appropriate, including dismissing the appeal.

(3) The notice of appeal must:

(A) conform substantially to the appropriate Official Form;

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

(C) be accompanied by the prescribed fee.

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

(b) JOINT OR CONSOLIDATED APPEALS.

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

(2) When parties have separately filed timely notices of appeal, the district court or BAP may join or consolidate the appeals.

(c) SERVING THE NOTICE OF APPEAL.

(1) The bankruptcy clerk must serve notice of the filing of a notice of appeal by transmitting it to counsel of record for each party to the appeal – excluding the appellant – or, if a party is proceeding pro se, by transmitting it to the pro se party's service address.

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

(3) The bankruptcy clerk must give each party served notice of the date on which the notice of appeal was filed and note on the docket the names of the parties served and the date and method of the service.

(4) The bankruptcy clerk must promptly transmit

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

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

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

(2) Upon receiving the notice of appeal, the clerk of the district court or BAP must docket the appeal under the title of the bankruptcy court action with the appellant identified – adding the appellant's name if necessary.

COMMITTEE NOTE

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

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

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

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

Subdivision (c) is derived from former Rule 8004 and F.R. App. P. 3(d). Under Rule 8001(c), the former rule's requirement that service of the notice of appeal be accomplished by mailing is generally modified to require the bankruptcy clerk to serve counsel by electronic means. Service on pro se parties must be made by sending the notice to the address most recently provided to the court.

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

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

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

(b) CONTENT OF MOTION; RESPONSE.

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

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

(B) the questions themselves;

(C) the relief sought;

(D) the reasons why leave to appeal should be granted; and

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

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

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

(1) The bankruptcy clerk must promptly transmit the notice of appeal and the motion for leave to appeal, together with any statement of election under Rule 8005, to the clerk of the district court or BAP.

(2) Upon receiving the notice of appeal and motion for leave to appeal, the clerk of the district court or BAP must docket the appeal under the title of the bankruptcy court action with the movant-appellant identified – adding the movant-appellant's name if necessary.

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

(d) FAILURE TO FILE A MOTION. If an appellant does not file a motion for leave to appeal an interlocutory judgment,

order, or decree, but timely files a notice of appeal, the district court or BAP may:

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

If the court directs that a motion for leave to appeal be filed, the appellant must file the motion within 14 days after the order directing the filing is entered, unless the order provides otherwise.

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

COMMITTEE NOTE

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

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

Subdivision (b) prescribes the contents of the motion, retaining the

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

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

Subdivision (d) retains the provisions of former Rule 8003(c). It provides that if the appellant timely files a notice of appeal, but fails to file a motion for leave to appeal, the court can either direct that a motion be filed or treat the notice of appeal as the motion and either grant or deny leave.

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

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

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

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

(2) file the statement within the time prescribed by 28 U.S.C. § 158(c)(1).

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

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

(d) APPEAL BY LEAVE – TIMING OF ELECTION. If an appellant moves for leave to appeal under Rule 8004 and fails to file a separate notice of appeal concurrently with the filing of its

motion, the motion must be treated as if it were a notice of appeal for purposes of determining the timeliness of the filing of a statement of election.

COMMITTEE NOTE

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

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

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

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

Subdivision (d) provides that, in the case of an appeal by leave, if the appellant files a motion for leave to appeal but fails to file a notice of appeal, the filing and service of the motion will be treated for timing purposes under this rule as the filing and service of the notice of appeal.

Rule 8006. Certification of Direct Appeal to Court of Appeals

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

(1) the certification has been filed;

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

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

(b) FILING OF CERTIFICATION. The certification required by 28 U.S.C. § 158(d)(2)(A) must be filed with the clerk of the court in which a matter is pending. For purposes of this rule, a matter is pending in the bankruptcy court for 30 days after the effective date of the first notice of appeal from the judgment, order, or decree for which direct review in the court of appeals is sought. A matter is pending in the district court or BAP thereafter.

(c) JOINT CERTIFICATION BY ALL APPELLANTS AND APPELLEES. A joint certification by all the appellants and appellees under 28 U.S.C. § 158(d)(2)(A) must be made by

executing the appropriate Official Form and filing it with the clerk of the court in which the matter is pending. The parties may supplement the certification with a short statement of the basis for the certification, which may include the information listed in subdivision (f)(3).

(d) COURT THAT MAY MAKE CERTIFICATION.

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

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

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

(1) A certification on the court's own motion under 28 U.S.C. § 158(d)(2)(A) must be set forth in a separate document. The clerk of the certifying court must serve this document on all the parties to the appeal in the manner required for service of a notice of appeal under Rule 8003(c)(1). The certification must be accompanied by an

opinion or memorandum that contains the information required by subdivision (f)(3)(A)-(D).

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

(f) CERTIFICATION BY THE COURT ON REQUEST.

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

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

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

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

(B) the question itself;

(C) the relief sought;

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

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

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

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

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

Rule 8003(c)(1).

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

COMMITTEE NOTE

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

Subdivision (a), like the former rule, requires that an appeal be properly taken – now under Rule 8003 or 8004 – before a certification for direct review in the court of appeals takes effect. This rule requires the timely filing of a notice of appeal under Rule 8002 and accounts for the delayed effectiveness of a notice of appeal under the circumstances specified in that rule. Normally a notice of appeal is effective when it is filed in the bankruptcy court. Rule 8002, however, delays the effectiveness of a notice of appeal when (1) it is filed after the announcement of a decision or order but prior to the entry of the judgment, order, or decree; or (2) it is filed after the announcement or entry of a judgment, order, or decree but before the bankruptcy court disposes of certain post-judgment motions.

When the bankruptcy court enters an interlocutory judgment, order, or decree that is appealable under 28 U.S.C. § 158(a)(3), certification for direct review in the court of appeals may take effect before the district court or BAP grants leave to appeal. The certification is effective when the actions specified in subdivision (a) have occurred. Rule 8004(e) provides that if the court of appeals grants permission to take a direct appeal before

leave to appeal an interlocutory ruling has been granted, the authorization by the court of appeals is treated as the granting of leave to appeal.

Subdivision (b) provides that a certification must be filed in the court in which the matter is pending, as determined by this subdivision. This provision modifies the former rule. Because of the prompt docketing of appeals in the district court or BAP under Rules 8003 and 8004, a matter is deemed – for purposes of this rule only – to remain pending in the bankruptcy court for 30 days after the effective date of the notice of appeal. This provision will in appropriate cases give the bankruptcy judge, who will be familiar with the matter being appealed, an opportunity to decide whether certification for direct review is appropriate. Similarly, subdivision (d) provides that, when certification is made by the court, only the court in which the matter is then pending according to (b) may make the certification.

Section 158(d)(2) provides three different ways in which an appeal may be certified for direct review. Implementing these options, the rule provides in subdivision (c) for the joint certification by all appellants and appellees, in subdivision (e) for the bankruptcy court's, district court's, or BAP's certification on its own motion, and in subdivision (f) for the bankruptcy court's, district court's, or BAP's certification on request of a party or of a majority of appellants and a majority of appellees.

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

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

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

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

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

(B) approval of a supersedeas bond;

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

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

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

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

(1) A motion for a type of relief specified in Rule

subdivision (a)(1), or to vacate or modify an order of the bankruptcy court granting such relief, may be made in the district court or BAP or in the court of appeals in a direct appeal to that court.

(2) The motion must:

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

(B) state the bankruptcy court's ruling and any reasons given by the bankruptcy court for its ruling.

(3) The motion must also include:

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

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

(C) relevant parts of the record.

(4) The movant must give reasonable notice of the motion to all parties.

(c) FILING OF BOND OR OTHER SECURITY. The

district court or BAP may condition relief under this rule on the filing of a bond or other appropriate security with the bankruptcy court.

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

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

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

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

COMMITTEE NOTE

This rule is derived from former Rule 8005 and F.R. App. P. 8. It now applies to direct appeals in courts of appeals.

Subdivision (a), like the former rule, requires a party ordinarily to seek relief pending an appeal in the bankruptcy court. Subdivision (a)(1)

expands the list of relief enumerated in F.R. App. P. 8(a)(1) to reflect bankruptcy practice. It includes the suspension or continuation of other proceedings in the bankruptcy case, as authorized by subdivision (e). Subdivision (a)(2) clarifies that a motion for a stay pending appeal, approval of a supersedeas bond, or any other relief specified in paragraph (1) may be made in the bankruptcy court before or after the filing of a notice of appeal.

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

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

Rule 8008. Indicative Rulings

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

(1) defer consideration of the motion;

(2) deny the motion; or

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

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

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

that court when the bankruptcy court has decided the motion on remand.

COMMITTEE NOTE

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

Subdivision (b) requires the movant to notify the court in which an appeal is pending if the bankruptcy court states that it would grant the motion or that it raises a substantial issue. This provision applies to appeals pending in the district court, the BAP, or the court of appeals.

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

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

Rule 8009. Record and Issues on Appeal; Sealed Documents

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

(1) *Appellant's Duties.* Within 14 days after:

- filing a notice of appeal as prescribed by Rule 8003(a);
- entry of an order granting leave to appeal; or
- entry of an order disposing of the last remaining motion of a kind listed in Rule 8002(b)(1);

whichever is later,

the appellant must file with the bankruptcy clerk and serve on the appellee a designation of the items to be included in the record on appeal and a statement of the issues to be presented. A designation and statement served prematurely must be treated as served on the first day on which filing is timely under this paragraph.

(2) *Appellee's and Cross-Appellant's Duties.* Within 14 days after service of the appellant's designation and statement, the appellee may file and serve on the appellant a designation of additional items to be included in the record on appeal and, if the appellee has filed a cross-appeal, the appellee as cross-appellant must file and serve a statement of the issues to be presented on the cross-appeal

and a designation of additional items to be included in the record.

(3) *Cross-Appellee's Duties*. Within 14 days after service of the cross-appellant's designation and statement, a cross-appellee may file and serve on the cross-appellant a designation of additional items to be included in the record.

(4) *Record on Appeal*. Subject to subdivisions (d) and (e), the record on appeal must include the following:

- items designated by the parties as provided by paragraphs (1)-(3);
- the notice of appeal;
- the judgment, order, or decree being appealed;
- any order granting leave to appeal;
- any certification under 28 U.S.C. § 158(d)(2);
- any opinion or findings of fact and conclusions of law, issued by the court, relating to the subject of the appeal, including transcripts of all oral rulings;
- any transcript ordered as prescribed by subdivision (b); and
- any statement required by subdivision (c).

Notwithstanding the parties' designations, the district court or BAP may order the inclusion of additional items from

the record as part of the record on appeal.

(5) *Copies for the Bankruptcy Clerk.* If paper copies are needed, a party filing a designation of items to be included in the record must provide to the bankruptcy clerk a copy of any designated items that the bankruptcy clerk requests. If the party fails to provide the copy, the bankruptcy clerk must prepare the copy at the party's expense.

(b) TRANSCRIPT OF PROCEEDINGS.

(1) *Appellant's Duty*. Within the time period prescribed by subdivision (a)(1), the appellant must:

(A) order in writing from the reporter, as defined in Rule 8010(a)(1), a transcript of any parts of the proceedings not already on file that the appellant considers necessary for the appeal, and file the order with the bankruptcy clerk; or

(B) file with the bankruptcy clerk a certificate stating that the appellant is not ordering a transcript.

(2) *Cross-Appellant's Duty*. Within 14 days after the appellant files with the bankruptcy clerk a copy of the transcript order or a certificate stating that appellant is not

ordering a transcript, the appellee as cross-appellant must:

(A) order in writing from the reporter a transcript of any parts of the proceedings not ordered by appellant and not already on file that the cross-appellant considers necessary for the appeal, and file a copy of the order with the bankruptcy clerk; or

(B) file with the bankruptcy clerk a certificate stating that the cross-appellant is not ordering a transcript.

(3) *Appellee's or Cross-Appellee's Right to Order*. Within 14 days after the appellant or cross-appellant files with the bankruptcy clerk a copy of a transcript order or certificate stating that a transcript will not be ordered, the appellee or cross-appellee must order in writing from the reporter a transcript of any parts of the proceedings not already ordered or on file that the appellee or cross-appellee considers necessary for the appeal. The order must be filed with the bankruptcy clerk.

(4) *Payment*. At the time of ordering, a party must make satisfactory arrangements with the reporter for paying the cost of the transcript.

(5) *Unsupported Finding or Conclusion.* If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all testimony and copies of all exhibits relevant to that finding or conclusion.

(c) STATEMENT OF THE EVIDENCE WHEN A TRANSCRIPT IS UNAVAILABLE. Within the time period prescribed by subdivision (a)(1), the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection, if a transcript of a hearing or trial is unavailable. The statement must be served on the appellee, who may serve objections or proposed amendments within 14 days after being served. The statement and any objections or proposed amendments must then be submitted to the bankruptcy court for settlement and approval. As settled and approved, the statement must be included by the bankruptcy clerk in the record on appeal.

(d) AGREED STATEMENT AS THE RECORD ON APPEAL. Instead of the record on appeal as defined in subdivision (a), the parties may prepare, sign, and submit to the bankruptcy court a statement of the case showing how the issues

presented by the appeal arose and were decided in the bankruptcy court. The statement must set forth only those facts averred and proved or sought to be proved that are essential to the court's resolution of the issues. If the statement is accurate, it, together with any additions that the bankruptcy court may consider necessary to a full presentation of the issues on appeal, must be approved by the bankruptcy court and certified to the district court or BAP as the record on appeal. The bankruptcy clerk must then transmit it to the clerk of the district court or BAP within the time provided by Rule 8010. A copy of the agreed statement may be filed instead of the appendix required by Rule 8018(b).

(e) CORRECTION OR MODIFICATION OF THE RECORD.

(1) If any difference arises about whether the record truly discloses what occurred in the bankruptcy court, the difference must be submitted to and settled by the bankruptcy court and the record conformed accordingly. If an item has been improperly designated as part of the record on appeal, a party may move to strike the improperly designated item.

(2) If anything material to either party is omitted from or misstated in the record by error or accident, the

omission or misstatement may be corrected, and a supplemental record may be certified and transmitted:

(A) on stipulation of the parties;

(B) by the bankruptcy court before or after the record has been forwarded; or

(C) by the district court or BAP.

(3) All other questions as to the form and content of the record must be presented to the district court or BAP.

(f) SEALED DOCUMENTS. A document placed under seal by the bankruptcy court may be designated as part of the record on appeal. In designating a sealed document, a party must identify it without revealing confidential or secret information. The bankruptcy clerk must not transmit a sealed document to the clerk of the district court or BAP as part of the transmission of the record. Instead, a party seeking to present a sealed document to the district court or BAP as part of the record on appeal must file a motion with the district court or BAP to accept the document under seal. If the motion is granted, the movant must notify the bankruptcy court of the ruling, and the bankruptcy clerk must promptly transmit the sealed document to the clerk of the district court or BAP.

(g) OTHER. All parties to an appeal must take any other

action necessary to enable the bankruptcy clerk to assemble and transmit the record.

(h) DIRECT APPEALS TO COURT OF APPEALS. Rules 8009 and 8010 apply to appeals taken directly to the court of appeals under 28 U.S.C. § 158(d)(2). A reference in Rules 8009 and 8010 to the "district court or BAP" includes the court of appeals when it has authorized a direct appeal under 28 U.S.C. § 158(d)(2). In direct appeals to the court of appeals, the reference in Rule 8009(d) to Rule 8018(b) means F.R. App. P. 30.

COMMITTEE NOTE

This rule is derived from former Rule 8006 and F.R. App. P. 10 and 11(a). It retains the practice of former Rule 8006 of requiring the parties to designate items to be included in the record on appeal. In this respect the bankruptcy rule differs from the appellate rule. Among other things, F.R. App. P. 10(a) provides that the record on appeal consists of all the documents and exhibits filed in the case. This requirement would often be unworkable in a bankruptcy context because thousands of items might have been filed in the overall bankruptcy case.

Subdivision (a) provides the time period for the appellant to file a designation of items to be included in the record on appeal and a statement of the issues to be presented. It then provides for the designation of additional items by the appellee, cross-appellant, and cross-appellee, as well as for the cross-appellant's statement of the issues to be presented in its appeal. Subdivision (a)(4) prescribes the content of the record on appeal. Ordinarily, the bankruptcy clerk will not need to have paper copies of the designated items because the clerk will either transmit them electronically to the district court or BAP or otherwise make them available electronically. If the bankruptcy clerk requires a paper copy of some or all of the items designated as part of the record, the clerk may request the parties to provide the necessary copies, and the parties must comply with the request.

Subdivision (b) governs the process for ordering a complete or

partial transcript of the bankruptcy court proceedings. In situations in which a transcript is unavailable, subdivision (c) allows for the parties' preparation of a statement of the evidence or proceedings, which must be approved by the bankruptcy court.

Subdivision (d) adopts the practice of F.R. App. P. 10(d) of permitting the parties to agree on a statement of the case in place of the record on appeal. The statement must show how the issues on appeal arose and were decided in the bankruptcy court. It must be approved by the bankruptcy court in order to be certified as the record on appeal.

Subdivision (e), modeled on F.R. App. P. 10(e), provides a procedure for correcting the record on appeal if an item is improperly designated, omitted, or misstated.

Subdivision (f) is a new provision that governs the handling of any document that remains sealed by the bankruptcy court and that a party wants to include in the record on appeal. The party must request the district court or BAP to accept the document under seal, and that motion must be granted before the bankruptcy clerk may transmit the sealed document to the clerk of the district court or BAP.

Subdivision (g), in requiring the parties to cooperate with the bankruptcy clerk in assembling and transmitting the record, retains the requirement of former Rule 8006, which was adapted from F.R. App. P. 11(a).

Subdivision (h) is new. It makes the provisions of this rule and Rule 8010 applicable to appeals taken directly to a court of appeals under 28 U.S.C. § 158(d)(2). See F.R. App. P. 6(c)(2)(A) and (B).

Rule 8010. Completion and Transmission of the Record

(a) DUTIES OF REPORTER TO PREPARE AND FILE TRANSCRIPT.

(1) If courtroom proceedings are recorded without a reporter present, the person or service that the bankruptcy court designates to transcribe the recording is the reporter for purposes of this rule.

(2) The reporter must prepare and file a transcript as follows:

(A) Upon receiving an order for a transcript, the reporter must file in the bankruptcy court an acknowledgment of the request, the date it was received, and the date on which the reporter expects to have the transcript completed.

(B) Upon completing the transcript, the reporter must file it with the bankruptcy clerk, who will notify the clerk of the district court or BAP of the filing.

(C) If the transcript cannot be completed within 30 days of receipt of the order, the reporter must seek an extension of time from the bankruptcy clerk. The clerk must enter on the docket and notify the parties whether the extension is granted.

(D) If the reporter does not file the transcript within the time allowed, the bankruptcy clerk must notify the bankruptcy judge.

(b) DUTY OF BANKRUPTCY CLERK TO TRANSMIT RECORD.

(1) Subject to Rule 8009(f) and subdivision (b)(5) of this rule, when the record is complete for purposes of appeal, the bankruptcy clerk must transmit to the clerk of the district court or BAP either the record or a notice of the availability of the record and the means of accessing it electronically.

(2) If there are multiple appeals from a judgment or order, the bankruptcy clerk must transmit a single record.

(3) Upon receiving the transmission of the record or notice of the availability of the record, the clerk of the district court or BAP must enter its receipt on the docket and give prompt notice to all parties to the appeal.

(4) If the district court or BAP directs that paper copies of the record be furnished, the clerk of that court must notify the appellant and, if the appellant fails to provide the copies, the bankruptcy clerk must prepare the copies at the appellant's expense.

(5) Subject to subdivision (c), if a motion for leave to appeal has been filed with the bankruptcy clerk under Rule 8004, the bankruptcy clerk must prepare and transmit the record only after the district court or BAP grants leave to appeal.

(c) RECORD FOR PRELIMINARY MOTION IN DISTRICT COURT OR BAP. If, prior to the transmission of the record as prescribed by subdivision (b), a party moves in the district court or BAP for any of the following relief:

- leave to appeal;
- dismissal;
- a stay pending appeal;
- approval of a supersedeas bond, or additional security on a bond or undertaking on appeal;
- or any other intermediate order –

the bankruptcy clerk must transmit to the clerk of the district court or BAP any parts of the record designated by a party to the appeal for inclusion in the record for the preliminary motion, or a notice of the availability of those parts and the means of accessing them electronically.

COMMITTEE NOTE

This rule is derived from former Rule 8007 and F.R. App. P 11.

Subdivision (a) generally retains the procedure of former Rule 8007(a) regarding the reporter's duty to prepare and file a transcript if one is requested by a party. It clarifies that the person or service that transcribes the recording of a proceeding is considered the reporter under this rule if the proceeding is recorded without a reporter present in the courtroom. It also makes clear that the reporter must file with the bankruptcy court the acknowledgment of the request for a transcript and statement of the expected completion date, the completed transcript, and any request for an extension of time beyond 30 days for completion of the transcript.

Subdivision (b) requires the bankruptcy clerk to transmit the record to the clerk of the district court or BAP when the record is complete and, in the case of appeals under 28 U.S.C. §158(a)(3), leave to appeal has been granted. This transmission will be made electronically, either by sending the record itself or sending notice of how the record can be accessed electronically. The district court or BAP may, however, require that a paper copy of some or all of the record be furnished, in which case the clerk of that court will direct the appellant to provide the copies. If the appellant does not do so, the bankruptcy clerk must prepare the copies at the appellant's expense.

In a change from former Rule 8007(b), subdivision (b) of this rule no longer directs the clerk of the district court or BAP to docket the appeal upon receipt of the record from the bankruptcy clerk. Instead, under Rules 8003(d) and 8004(c), the clerk of the district court or BAP dockets the appeal upon receipt of the notice of appeal or, in the case of appeals under 28 U.S.C. § 158(a)(3), the notice of appeal and the motion for leave to appeal. Those documents are to be transmitted promptly to the district court or BAP by the bankruptcy clerk. Accordingly, by the time the clerk of the district court or BAP receives the record, the appeal will already be docketed in that court. The clerk of the district court or BAP must indicate on the docket and give notice to the parties to the appeal when the transmission of the record is received. Under Rule 8018(a), the briefing schedule is generally based on that date.

Subdivision (c) is derived from former Rule 8007(c) and F.R. App. P. 11(g) . It provides for the transmission of parts of the record designated by the parties for consideration by the district court or BAP in ruling on specified preliminary motions filed prior to the preparation and transmission of the record on appeal.

Rule 8009(h) makes this rule applicable to direct appeals to the court of appeals under 28 U.S.C. § 158(d)(2). It also provides that, for purposes of this rule and Rule 8009, "district court or BAP" includes the court of appeals when it has authorized a direct appeal under 28 U.S.C. § 158(d)(2).

Rule 8011. Filing and Service; Signature

(a) FILING.

(1*) Filing with the Clerk.* A document required or permitted to be filed in the district court or BAP must be filed with the clerk of that court.

(2) *Filing: Method and Timeliness.*

(A) *In general*. Filing may be accomplished by transmission to the clerk of the district court or BAP. Except as provided in subdivision (a)(2)(B)(ii), (B)(iii), and (C), filing is timely only if the clerk receives the document within the time fixed for filing.

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

(i) transmitted to the clerk of the district court or BAP in accordance with applicable electronic transmission procedures for the filing of documents in that court;

(ii) mailed to the clerk of the district court or BAP by first-class mail – or other

class of mail that is at least as expeditious – postage prepaid, if the court's procedures permit or require a brief or appendix to be filed by mailing; or

(iii) dispatched to a third-party commercial carrier for delivery within three days to the clerk of the district court or BAP, if the court's procedures permit or require a brief or appendix to be filed by commercial carrier.

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

(D) *Copies*. If a document is filed

electronically in the district court or BAP, no paper copy is required. If a document is filed by mail or delivery to the district court or BAP, no additional copies are required The district court or BAP may, however, require by local rule or order in a particular case the filing or furnishing of a specified number of paper copies.

(3) *Filing a Motion with a Judge*. In appeals to the BAP, if a motion requests relief that may be granted by a single judge, any judge of that court may permit the motion to be filed with the judge. The judge must note the filing date on the motion and transmit it to the BAP clerk.

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

(b) SERVICE OF DOCUMENTS REQUIRED. Copies of all documents filed by any party and not required by these Part VIII rules to be served by the clerk of the district court or BAP must, at or before the time of filing, be served on all other parties to the appeal by the party making the filing or a person acting for

that party. Service on a party represented by counsel must be made on counsel.

(c) MANNER OF SERVICE.

(1) Service must be made electronically if feasible and permitted by local procedure. If not, service may be made by any of the following methods:

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

(B) mail; or

(C) third-party commercial carrier for delivery within three days.

(2) When it is reasonable, considering such factors as the immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the document with the district court or BAP.

(3) Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by electronic means is complete on transmission, unless the party making service receives notice that the document was not transmitted successfully to the party attempted to be served.

(d) PROOF OF SERVICE.

(1) Documents presented for filing must contain either:

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

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

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) for each person served, the mail or electronic address, facsimile number, or the address of the place of delivery, as appropriate for the manner of service.

(2) The clerk of the district court or BAP may permit documents to be filed without acknowledgment or proof of service at the time of filing, but must require the acknowledgment or proof of service to be filed promptly thereafter.

(3) When a brief or appendix is filed by mailing, delivery, or electronic transmission in accordance with

subdivision (a)(2)(B), the proof of service must also state the date and manner by which the document was filed.

(e) SIGNATURE. If filed electronically, every motion, response, reply, brief, or submission authorized by these Part VIII rules must include the electronic signature of the person filing the document or, if the person is represented, the electronic signature of counsel. The electronic signature must be provided by electronic means that are consistent with any technical standards that the Judicial Conference of the United States establishes. If filed in paper form, every motion, response, reply, brief, or submission authorized by these rules must be signed by the person filing the document or, if the person is represented, by counsel.

COMMITTEE NOTE

This rule is derived from former Rule 8008 and F.R. App. P. 25. It adopts some of the additional details of the appellate rule, and it provides greater recognition of the possibility of electronic filing and service.

Subdivision (a) governs the filing of documents in the district court or BAP. Consistent with other provisions of these Part VIII rules, subdivision (a)(2) requires electronic filing of documents, including briefs and appendices, unless the district court's or BAP's procedures permit or require other methods of delivery to the court. An electronic filing is timely if it is received by the clerk of the district court or BAP within the time fixed for filing. No paper copies need to be submitted when documents are filed electronically, by mail, or by delivery unless the district court or BAP requires them.

Subdivision (a)(4) provides that the clerk of the district court or BAP may not refuse to accept a document for filing solely because its form does not comply with these rules or any local rule or practice. The district

court or BAP may, however, direct the correction of any deficiency in any document that does not conform to the requirements of these rules or applicable local rules, and may prescribe such other relief as the court deems appropriate.

Subdivisions (b) and (c) address the service of documents in the district court or BAP. Except for documents that the clerk of the district court or BAP must serve, a party that makes a filing must serve copies of the document on all other parties to the appeal. Service on represented parties must be made on counsel. The methods of service are listed in subdivision (c). Electronic service is required when feasible and authorized by the district court or BAP.

Subdivision (d) retains the former rule's provisions regarding proof of service of a document filed in the district court or BAP. In addition it provides that, when service is made electronically, a certificate of service must state the mail or electronic address or facsimile number to which service was made.

Subdivision (e) is a new provision that requires an electronic signature of counsel or an unrepresented filer for documents that are filed electronically in the district court or BAP. The method of providing an electronic signature may be specified by a local court rule that is consistent with any standards established by the Judicial Conference of the United States. Paper copies of documents filed in the district court or BAP must bear an actual signature of counsel or the filer. By requiring a signature, subdivision (e) ensures that a readily identifiable attorney or party takes responsibility for every document that is filed.

Rule 8012. Corporate Disclosure Statement

(a) WHO MUST FILE. Any nongovernmental corporate party appearing in the district court or BAP 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.

(b) TIME FOR FILING; SUPPLEMENTAL FILING. A party must file the statement prescribed by subdivision (a) with its principal brief or upon filing a motion, response, petition, or answer in the district court or BAP, 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 a statement before the table of contents. A party must supplement its statement whenever the information that must be disclosed under subdivision (a) changes.

COMMITTEE NOTE

This rule is derived from F.R. App. P. 26.1. It requires the filing of corporate disclosure statements and supplemental statements in order to assist district court and BAP judges in determining whether they have interests that should cause recusal. If filed separately from a brief, motion, response, petition, or answer, the statement must be filed and served in accordance with Rule 8011. Under Rule 8015(a)(7)(B)(iii), the corporate disclosure statement is not included in calculating applicable word-count limitations.

Rule 8013. Motions; Intervention

(a) CONTENTS OF MOTION; RESPONSE; REPLY.

(1) *Application for Relief.* A request for an order or other relief is made by filing with the clerk of the district court or BAP a motion for that order or relief, with proof of service on all other parties to the appeal.

(2) *Contents of a Motion*.

(A) *Grounds and relief sought.* A motion must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it.

(B) *Motion to expedite appeal*. A motion to expedite the consideration of an appeal must explain what circumstances justify the district court or BAP considering the appeal ahead of other matters. If the district court or BAP grants a motion to expedite, it may accelerate the transmission of the record, the deadline for filing briefs and other documents, oral argument, and resolution of the appeal. Under appropriate circumstances, a motion to expedite the consideration of an appeal may be filed as an emergency motion under subdivision (d).

(C) *Accompanying documents.*

(i) Any affidavit or other document necessary to support a motion must be served and filed with the motion.

(ii) An affidavit must contain only factual information, not legal argument.

(iii) A motion seeking substantive relief must include a copy of the bankruptcy court's judgment, order, or decree, and any accompanying opinion, as a separate exhibit.

(D) *Documents barred or not required.*

(i) A separate brief supporting or responding to a motion must not be filed.

(ii) A notice of motion is not required.

(iii) A proposed order is not required.

(3) *Response and Reply; Time to File*. Unless the district court or BAP orders otherwise,

(A) any party to the appeal may file a response to the motion within seven days after service of the motion, and

(B) the movant may file a reply to a response within seven days after service of the response.

A reply must address only matters raised in the response.

(b) DISPOSITION OF A MOTION FOR A PROCEDURAL ORDER. Notwithstanding subdivision (a)(3), the district court or BAP may rule on a motion for a procedural order, including a motion under Rule 9006(b) or (c), at any time without awaiting a response. Any party adversely affected by the court's ruling may move to reconsider, vacate, or modify the ruling within seven days after service of the procedural order.

(c) ORAL ARGUMENT. A motion will be decided without oral argument unless the district court or BAP orders otherwise.

(d) EMERGENCY MOTION.

(1) Whenever a movant requests expedited action on a motion on the ground that, to avoid irreparable harm, it needs relief in less time than would normally be required for the district court or BAP to receive and consider a response, the word "Emergency" must precede the title of the motion.

(2) The emergency motion must

(A) be accompanied by an affidavit setting forth the nature of the emergency;

(B) state whether all grounds advanced in support of it were submitted to the bankruptcy court and, if any grounds relied on were not submitted, why the motion should not be remanded for reconsideration by the bankruptcy court;

(C) include the email addresses, office addresses, and telephone numbers of moving counsel and, when known, of opposing counsel and any unrepresented parties to the appeal; and

(D) be served as prescribed by Rule 8011.

(3) Before filing an emergency motion, the movant must make every practicable effort to notify opposing counsel and any opposing unrepresented parties in time for them to respond to the motion. The affidavit or declaration accompanying the emergency motion must also state when and how opposing counsel and unrepresented parties were notified, or, if they were not notified, why it was impracticable to do so.

(e) POWER OF A SINGLE BAP JUDGE TO ENTERTAIN A MOTION.

(1) A judge of a BAP may act alone on any motion, but may not dismiss or otherwise determine an appeal, deny a motion for leave to appeal, or deny a motion for a stay pending appeal if denial would result in mootness of the appeal.

(2) The BAP may review the action of a single judge, either on its own motion or on the motion of a party.

(f) FORM OF DOCUMENTS; PAGE LIMITS; AND NUMBER OF COPIES.

(1) *Format of a Paper Document*. Rule 27(d)(1) F.R. App. P. applies in the district court or BAP to a paper version of a motion, response, or reply.

(2) *Format of an Electronically Filed Document*. A motion, response, or reply filed electronically must comply with the requirements made applicable to a paper copy under paragraph (1) regarding covers, line spacing, margins, typeface, and type styles. It must also comply with the length requirements under paragraph (3).

(3) *Page Limits*. Unless the district court or BAP permits or directs otherwise, the following page limits apply:

(A) a motion or a response to a motion must

not exceed 20 pages, exclusive of the corporate disclosure statement and accompanying documents authorized by subdivision (a)(2)(C); and

(B) a reply to a response must not exceed ten pages.

(4) *Copies*. Copies must be provided only if they are required by local rule or by an order in a particular case.

(g) INTERVENTION. Unless a statute provides otherwise, an entity seeking to intervene in an appeal pending in the district court or BAP must file a motion for leave to intervene with the clerk of the district court or BAP and serve a copy on all parties to the appeal. The motion, or other notice of intervention authorized by statute, must be filed within 30 days after the appeal is docketed. It must contain a concise statement of the movant's interest and ground for intervention, whether intervention was sought in the bankruptcy court, why intervention is being sought at this stage of the proceeding, and why participation in the appeal as an amicus curiae would not adequately protect the movant's interest.

COMMITTEE NOTE

Rule 8013 is derived from current Rule 8011 and F.R. App. P. 15(d) and 27. It adopts many of the provisions of the appellate rules that specify the form and page limits of motions and accompanying documents, while also adapting those requirements for the context of electronic filing. In addition, it prescribes the procedure for seeking to intervene in the district court or BAP.

Subdivision (a) retains much of the content of former Rule 8011(a) regarding the contents of a motion, response, and reply. It also specifies the documents that may accompany a motion. Unlike the former rule, which allowed the filing of separate briefs supporting a motion, subdivision (a) now adopts the practice of F.R. App. P. 27(a) of prohibiting the filing of briefs supporting or responding to a motion. The motion or response itself must include the party's legal arguments.

Subdivision (a)(2)(B) clarifies procedures for a motion to expedite the consideration of an appeal. This motion seeks to expedite the time for the disposition of the appeal as a whole, whereas an emergency motion – which is addressed by subdivision (d) – typically involves an urgent request for relief short of disposing of the entire appeal (for example, an emergency request for a stay pending appeal to prevent imminent mootness). In appropriate cases – such as when there is an urgent need to resolve the appeal quickly to prevent harm to a party – a motion to expedite the consideration of an appeal may be filed as an emergency motion.

Subdivision (b) retains the substance of former Rule 8011(b). It authorizes the district court or BAP to act on a motion for a procedural order without awaiting a response to the motion. It specifies that a party seeking reconsideration, vacation, or modification of the order must file a motion within seven days after service of the order.

Subdivision (c) continues the practice of former Rule 8011(c) and F.R. App. P. 27(e) of dispensing with oral argument of motions in the district court or BAP unless the court orders otherwise.

Subdivision (d), which carries forward the content of former Rule 8011(d), governs emergency motions that the district court or BAP may rule on without awaiting a response when necessary to prevent irreparable harm. A party seeking expedited action on a motion in the district court or BAP must explain the nature of the emergency, whether all grounds in support of the motion were first presented to the bankruptcy court, and, if not, why the district court or BAP should not remand for reconsideration. The moving

party must also (1) explain the steps taken to notify opposing counsel and any unrepresented parties to the appeal in advance of filing the emergency motion and (2) if they were not notified, state why it was impracticable to do so.

Subdivision (e), like former Rule 8011(e) and similar to F.R. App. P. 27(c), authorizes a single BAP judge to rule on certain motions. This authority, however, does not extend to issuing rulings that would dispose of the appeal. For that reason the rule now prohibits a single BAP judge from denying a motion for a stay pending appeal when the effect of that ruling would be to require dismissal of the appeal as moot. A ruling by a single judge is subject to review by the BAP.

Subdivision (f) incorporates by reference the formatting and appearance requirements of F.R. App. P. 27(d)(1). When paper copies of the listed documents are filed, they must comply with the requirements of the specified rules regarding reproduction, covers, binding, appearance, and format. When these documents are filed electronically, they must comply with the relevant requirements of the specified rules regarding covers and format. Subdivision (f) also specifies page limits for motions, responses, and replies, which is a matter that former Rule 8011 did not address.

Subdivision (g) clarifies the procedures for seeking to intervene in a proceeding that has been appealed. It is based on F.R. App. P. 15(d), but it also requires an explanation of why intervention is being sought at the appellate stage. The former Part VIII rules did not address intervention.

Rule 8014. Briefs

(a) APPELLANT'S BRIEF. The appellant's brief must contain under appropriate headings and in the order indicated:

(1) a corporate disclosure statement, if required by Rule 8012;

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

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

(4) a jurisdictional statement, including:

(A) the basis for the bankruptcy court's subject matter jurisdiction, with citations to applicable statutory provisions and a brief discussion of the relevant facts establishing jurisdiction;

(B) the basis for the district court's or BAP's jurisdiction, with citations to applicable statutory provisions and a brief discussion of the relevant facts establishing jurisdiction;

(C) the filing dates establishing the timeliness of the appeal; and

(D) an assertion that the appeal is from a

final judgment, order, or decree, or information establishing the district court's or BAP's jurisdiction on another basis;

(5) a statement of the issues presented and, for each issue, a concise statement of the applicable standard of appellate review;

(6) a concise statement of the case setting out the facts relevant to the issues submitted for review and identifying the rulings presented for review, with appropriate references to the record;

(7) a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings;

(8) the argument, which must contain the appellant's contentions with respect to the issues presented and the reasons supporting those contentions, with citations to the authorities and parts of the record relied upon;

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

(10) the certificate of compliance, if required by Rule 8015(a)(7) or (b).

(b) APPELLEE'S BRIEF. The appellee's brief must conform to the requirements of subdivision (a)(1)-(8) and (10), except that none of the following need appear unless the appellee is dissatisfied with the appellant's statement:

(1) the jurisdictional statement;

(2) the statement of the issues and the applicable standard of appellate review; and

(3) the statement of the case.

(c) REPLY BRIEF. The appellant may file a brief in reply to the appellee's brief. A reply brief must comply with the requirements of subdivision (a)(2)-(3).

(d) STATUTES, RULES, REGULATIONS, OR SIMILAR AUTHORITY. If determination of the issues presented requires reference to the Code or other statutes, rules, regulations, or similar authority, the relevant parts must be set out in the brief or in an addendum.

(e) BRIEFS IN A CASE INVOLVING MULTIPLE APPELLANTS OR APPELLEES. In a case involving more than one appellant or appellee, including consolidated cases, any number of appellants or appellees may join in a brief, and any party may adopt by reference a part of another's brief. Parties may also join in reply briefs.

(f) SUBMISSION OF SUPPLEMENTAL AUTHORITIES. If pertinent and significant authorities come to a party's attention after the party's brief has been filed, or after oral argument but before a decision, the party may promptly advise the clerk of the district court or BAP by a signed submission setting forth the citations. The submission, which must be served on the other parties to the appeal, must state the reasons for the supplemental citations, referring either to the pertinent page of a brief or to a point argued orally. The body of the submission must not exceed 350 words. Any response must be made within seven days after service of the submission, unless otherwise ordered by the court, and must be similarly limited.

COMMITTEE NOTE

Rule 8014 is derived from former Rule 8010(a) and (b) and F.R. App. P. 28. Adopting much of the content of Rule 28, it provides greater detail regarding appellate briefs than former Rule 8010 contained.

Subdivision (a) prescribes the content and structure of the appellant's brief. It largely follows former Rule 8010(a)(1), but, in order to ensure national uniformity, it eliminates the provision authorizing a district court or BAP to alter these requirements. Subdivision (a)(1) provides that when Rule 8012 requires an appellant to file a corporate disclosure statement, it must be placed at the beginning of the appellant's brief. Subdivision (a)(10) is also new. It implements the requirement under Rule 8015(a)(7) and (b) for the filing of a certificate of compliance with the limit on the number of words or lines allowed to be in a brief.

Subdivision (b) carries forward the provisions of former Rule 8010(a)(2).

Subdivision (c) is derived from F.R. App. P. 28(c). It explicitly authorizes an appellant to file a reply brief, which will generally complete the briefing process.

Subdivision (d) is similar to former Rule 8010(b), but it is reworded to reflect the likelihood that briefs will generally be filed electronically rather than in paper form.

Subdivision (e) mirrors F.R. App. P. 28(i). It authorizes multiple appellants or appellees to join in a single brief. It also allows parties to incorporate by reference portions of another party's brief.

Subdivision (f) adopts the procedures of F.R. App. P. 28(j) with respect to the filing of supplemental authorities with the district court or BAP after a brief has been filed or after oral argument. Unlike the appellate rule, it specifies a period of seven days for filing a response to a submission of supplemental authorities. The supplemental submission and response must comply with the signature requirements of Rule 8011(e).

Rule 8015. Form and Length of Briefs; Form of Appendices and Other Papers.

(a) PAPER COPIES OF BRIEFS. If a paper copy of a brief may or must be filed, the following provisions apply:

(1) *Reproduction*.

(A) A brief may be reproduced by any process that yields a clear black image on light paper. The paper must be opaque and unglazed. Only one side of the paper may be used.

(B) Text must be reproduced with a clarity that equals or exceeds the output of a laser printer.

(C) Photographs, illustrations, and tables may be reproduced by any method that results in a good copy of the original. A glossy finish is acceptable if the original is glossy.

(2) *Cover*. The front cover of a brief must contain:

(A) the number of the case centered at the top;

(B) the name of the court;

(C) the title of the case as prescribed by Rule 8003(d)(2) or 8004(c)(2);

(D) the nature of the proceeding and the name of the court below;

(E) the title of the brief, identifying the party or parties for whom the brief is filed; and

(F) the name, office address, telephone number, and email address of counsel representing the party for whom the brief is filed.

(3) *Binding*. The brief must be bound in any manner that is secure, does not obscure the text, and permits the brief to lie reasonably flat when open.

(4) *Paper Size, Line Spacing, and Margins*. The brief must be on 8½-by-11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there.

(5) *Typeface*. Either a proportionally spaced or monospaced face may be used.

(A) A proportionally spaced face must include serifs, but sans-serif type may be used in headings and captions. A proportionally spaced face must be 14-point or larger.

(B) A monospaced face may not contain

more than 10½ characters per inch.

(6) *Type Styles*. A brief must be set in plain, roman style, although italics or boldface may be used for emphasis. Case names must be italicized or underlined.

(7) *Length*.

(A) *Page limitation*. A principal brief must not exceed 30 pages, or a reply brief 15 pages, unless it complies with (B) and (C).

(B) *Type-volume limitation.*

(i) A principal brief is acceptable if:

- it contains no more than 14,000 words; or
- it uses a monospaced face and contains no more than 1,300 lines of text.

(ii) A reply brief is acceptable if it contains no more than half of the type volume specified in item (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 subdivision (a)(7)(B) must include a certificate signed by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either:

- the number of words in the brief; or
- the number of lines of monospaced type in the brief.

(ii) A certificate of compliance that conforms substantially to the appropriate Official Form satisfies the requirements of

item (i).

(b) ELECTRONICALLY FILED BRIEFS. A brief that is filed electronically must comply with subdivision (a), other than (a)(1), (a)(3), and the paper requirement of (a)(4).

(c) PAPER COPIES OF APPENDICES. If a paper copy of an appendix may or must be filed, it must comply with subdivision (a)(1), (2), (3), and (4), with the following exceptions:

(1) An appendix may include a legible photocopy of any document found in the record or of a printed decision.

(2) When necessary to facilitate inclusion of odd-sized documents such as technical drawings, an appendix may be a size other than 8½-by- 11 inches, and need not lie reasonably flat when opened.

(d) ELECTRONICALLY FILED APPENDICES. An appendix that is filed electronically must comply with subdivision (a)(2) and (4), other than the paper requirement of (a)(4).

(e) OTHER DOCUMENTS.

(1) Motion. Rule 8013(f) governs the form of a motion, response, or reply.

(2) Paper Copies of Other Documents. If a paper copy of any other document may or must be filed, other

than a submission under Rule 8014(f), it must comply with subdivision (a), with the following exceptions:

(A) A cover is not necessary if the caption and signature page of the paper together contain the information required by subdivision (a)(2). If a cover is used, it must be white.

(B) Subdivision (a)(7) does not apply.

(3) Other Documents that Are Electronically Filed. Any other document that is filed electronically, other than a submission under Rule 8014(f), must comply with the appearance requirements under paragraph (2).

(f) LOCAL VARIATION. A district court or BAP must accept documents that comply with the applicable requirements of this rule. By local rule or order in a particular case, a district court or BAP may accept documents that do not meet all of the requirements of this rule.

COMMITTEE NOTE

This rule is derived primarily from F.R. App. P. 32. Former Rule 8010(c) prescribed page limits for principal briefs and reply briefs. Those limits are now addressed by subdivision (a)(7) of this rule. In addition, the rule incorporates most of the detail of Appellate Rule 32 regarding the appearance and format of briefs, appendices, and other documents, along with new provisions that apply when those documents are filed electronically.

Subdivision (a) prescribes the form requirements for briefs that are

filed in paper form. It incorporates F.R. App. P. 32(a) in all respects except the following: Rule 8015(a)(2) does not include any color requirements for brief covers; (a)(2)(F) requires the cover of a brief to include counsel's email address; and cross-references to the appropriate bankruptcy rules are substituted for references to other Federal Rules of Appellate Procedure.

Subdivision (a)(7) decreases the page limits that were permitted by former Rule 8010(c) – from 50 to 30 pages for a principal brief and from 25 to 15 for a reply brief – to achieve consistency with F.R. App. P. 32(a)(7). It also permits the limits on the length of a brief to be measured by a word or line count, as an alternative to a page limit. By adopting the same limits on brief length that are imposed by the Federal Rules of Appellate Procedure, the amendment seeks to prevent a party whose case is eventually appealed to the court of appeals from having to substantially reduce the length of its brief at that appellate level.

Subdivision (b) adapts for briefs that are electronically filed subdivision (a)'s form requirements. With the use of electronic filing, the method of reproduction, method of binding, and use of paper become irrelevant. Information required on the cover, formatting requirements, and limits on brief length remain the same, however.

Subdivisions (c) and (d) prescribe the form requirements for appendices. Subdivision (c), applicable to appendices in paper form, is derived from F.R. App. P. 32(b), and subdivision (d) adapts those requirements for appendices that are electronically filed.

Subdivision (e), which is based on F.R. App. P. 32(c), addresses the form required for documents – in paper form or electronically filed – that are not otherwise covered by these rules.

Subdivision (f), like F.R. App. P. 32(e), is intended to provide assurance to lawyers and parties that compliance with the form requirements of this rule will allow a brief or other document to be accepted by any district court or BAP. A court may, however, by local rule or by order in a particular case choose to accepts briefs and documents that do not comply with all of this rule's requirements.

Under Rule 8011(e), all briefs and other submissions must be signed by the party filing the document or, if represented, by counsel. If the document is filed electronically, an electronic signature must be provided in accordance with Rule 8011(e).

Rule 8016. Cross-Appeals

(a) APPLICABILITY. This rule applies to a case in which a cross-appeal is filed. Rules 8014(a)-(c), 8015(a)(7)(A)-(B), and 8018(a) do not apply to such a case, except as otherwise provided in this rule.

(b) DESIGNATION OF APPELLANT. The party who files a notice of appeal first is the appellant for purposes of this rule and Rules 8018(b) and 8019. If notices are filed on the same day, the plaintiff, petitioner, applicant, or movant in the proceeding below is the appellant. These designations may be modified by the parties' agreement or by court order.

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

(1) *Appellant's Principal Brief*. The appellant must file a principal brief in the appeal. That brief must comply with Rule 8014(a).

(2) *Appellee's Principal and Response Brief*. The appellee must file a principal brief in the cross-appeal and must, in the same brief, respond to the principal brief in the appeal. That brief must comply with Rule 8014(a), except that the brief need not include a statement of the case unless the appellee is dissatisfied with the appellant's statement.

(3) *Appellant's Response and Reply Brief*. The appellant must file a brief that responds to the principal brief in the cross-appeal and may, in the same brief, reply to the response in the appeal. That brief must comply with Rule 8014(a)(2)-(8) and (10), except that none of the following need appear unless the appellant is dissatisfied with the appellee's statement in the cross-appeal:

(A) the jurisdictional statement;

(B) the statement of the issues and the applicable standard of appellate review; and

(C) the statement of the case.

(4) *Appellee's Reply Brief*. The appellee may file a brief in reply to the response in the cross-appeal. That brief must comply with Rule 8014(a)(2)-(3) and (10) and must be limited to the issues presented by the cross-appeal.

(d) LENGTH.

(1) *Page Limitation*. Unless it complies with paragraphs (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:

(i) it contains no more than 14,000 words; or

(ii) it uses a monospaced face and contains no more than 1,300 lines of text.

(B) The appellee's principal and response brief is acceptable if:

(i) it contains no more than 16,500 words; or

(ii) it uses a monospaced face and contains no more than 1,500 lines of text.

(C) The appellee's reply brief is acceptable if it contains no more than half of the type volume specified in subparagraph (A).

(3) *Certificate of Compliance*. A brief submitted either electronically or in paper form under paragraph (2) must comply with Rule 8015(a)(7)(C).

(e) TIME TO SERVE AND FILE A BRIEF. Briefs must be served and filed as follows:

(1) the appellant's principal brief, within 30 days after the docketing of notice of transmission of the record

or notice of availability of the record;

(2) the appellee's principal and response brief, within 30 days after service of the appellant's principal brief;

(3) the appellant's response and reply brief, within 30 days after service of the appellee's principal and response brief;

(4) the appellee's reply brief, within 14 days after service of the appellant's response and reply brief, but at least seven days before scheduled argument unless the district court or BAP, for good cause, allows a later filing.

(5) If an appellant or appellee fails to file a principal brief within the time provided by this rule, or within an extended time authorized by the district court or BAP, the appeal or cross-appeal may be dismissed. Unless the district court or BAP orders otherwise, an appellee who fails to file a responsive brief will not be heard at oral argument on the appeal, and an appellant who fails to file a responsive brief will not be heard at oral argument on the cross-appeal.

COMMITTEE NOTE

This rule is modeled on F.R. App. P. 28.1. It governs the timing,

content, length, filing, and service of briefs in bankruptcy cases in which there is a cross-appeal. The former Part VIII rules did not separately address the topic of cross-appeals.

Subdivision (b) prescribes which party is designated the appellant when there is a cross-appeal. Generally, the first to file a notice of appeal will be the appellant.

Subdivision (c) specifies the briefs that are permitted to be filed by the appellant and the appellee. Because of the dual role of the parties to the appeal and cross-appeal, each party is permitted to file a principal brief and a response to the opposing party's brief, as well as a reply brief. For the appellee, the principal brief in the cross-appeal and the response in the appeal are combined into a single brief. The appellant, on the other hand, initially files a principal brief in the appeal and later files a response to the appellee's principal brief in the cross-appeal, along with a reply brief in the appeal. The final brief that may be filed is the appellee's reply brief in the cross-appeal.

Subdivision (d), which prescribes page limits for briefs, is adopted from F.R. App. P. 28.1(e). It applies to briefs that are filed electronically, as well as those filed in paper form. Like Rule 8015(a)(7), it imposes limits measured either by number of pages or number of words or lines of text.

Subdivision (e) governs the time for filing briefs in cases in which there is a cross-appeal. It adapts the provisions of F.R. App. P. 28.1(f). It further authorizes the dismissal of an appeal or cross-appeal if the appellant or cross-appellant fails to timely file a principal brief, and it denies oral argument to a party who fails to file a responsive brief unless the district court or BAP orders otherwise.

Rule 8017. Brief of an Amicus Curiae

(a) WHEN PERMITTED. The United States or its officers or agencies 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. On its own motion, and with notice to all parties to an appeal, the district court or BAP may request a brief by an amicus curiae.

(b) MOTION FOR LEAVE TO FILE. The motion must be accompanied by the proposed brief and state:

(1) the movant's interest; and

(2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the appeal.

(c) CONTENT AND FORM. An amicus brief must comply with Rule 8015. In addition to the requirements of Rule 8015, the cover of an amicus brief must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. If an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 8012. An amicus brief need not comply with Rule 8014, but must include the following:

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

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

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

(4) unless the amicus curiae is one listed in the first sentence of subdivision (a), a statement that indicates:

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

(B) whether a party or a party's counsel contributed money that was intended to fund preparation or submission of the brief; and

(C) the name of any person other than the amicus curiae, its members, or its counsel who contributed money that was intended to fund preparation or submission of the brief;

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

(6) a certificate of compliance, if required by Rule

8015(a)(7)(C) or 8015(b).

(d) LENGTH. Except by the district court's or BAP's permission, an amicus brief must be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

(e) TIME FOR FILING. An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than seven days after the principal brief of the party being supported is filed. If an amicus curiae does not support either party, it must file its brief no later than seven days after the appellant's principal brief is filed. The district court or BAP may grant leave for later filing, specifying the time within which an opposing party may answer.

(f) REPLY BRIEF. Except by the district court's or BAP's permission, an amicus curiae may not file a reply brief.

(g) ORAL ARGUMENT. An amicus curiae may participate in oral argument only with the district court's or BAP's permission.

COMMITTEE NOTE

This rule is derived from F.R. App. P. 29. The former Part VIII rules did not address the participation by an amicus curiae in a bankruptcy appeal.

Subdivision (a) adopts the provisions of F.R. App. P. 29(a). In addition, it authorizes the district court or BAP on its own motion – with notice to the parties – to request the filing of a brief by an amicus curiae.

Subdivisions (b)-(g) adopt F.R. App. P. 29(b)-(g).

Rule 8018. Serving and Filing Briefs; Appendices

(a) TIME TO SERVE AND FILE A BRIEF. Unless the district court or BAP by local rule or by order in a particular case excuses the filing of briefs or specifies different time limits:

(1) The appellant must serve and file a brief within 30 days after the docketing of notice of transmission of the record or notice of the availability of the record.

(2) The appellee must serve and file a brief within 30 days after service of the appellant's brief.

(3) The appellant may serve and file a reply brief within 14 days after service of the appellee's brief, but a reply brief must be filed at least seven days before scheduled argument unless the district court or BAP, for good cause, allows a later filing.

(4) If an appellant fails to file a brief within the time provided by this rule, or within an extended time authorized by the district court or BAP, the appeal may be dismissed. An appellee who fails to file a brief will not be heard at oral argument unless the district court or BAP grants permission.

(5) If the district court or BAP has a mediation procedure applicable to bankruptcy appeals, the clerk of the

district court or BAP must notify the parties promptly after docketing the appeal (1) of the requirements of the mediation procedure and (2) of any effect the mediation procedure has on the time for filing briefs in the appeal.

(b) DUTY TO SERVE AND FILE APPENDIX TO BRIEF.

(1) Subject to subdivision (e) and Rule 8009(d), the appellant must serve and file with its principal brief excerpts of the record as an appendix, which must include the following:

(A) the relevant entries in the bankruptcy docket;

(B) the complaint and answer or other equivalent filings;

(C) the judgment, order, or decree from which the appeal is taken;

(D) any other orders, pleadings, jury instructions, findings, conclusions, or opinions relevant to the appeal;

(E) the notice of appeal; and

(F) any relevant transcript or portion thereof.

(2) The appellee may also serve and file with its brief an appendix that contains material required to be included by the appellant or relevant to the appeal or cross-appeal, but omitted by appellant.

(3) The appellant as cross-appellee may also serve and file with its response brief an appendix that contains material relevant to matters raised initially by the principal brief in the cross-appeal, but omitted by the cross-appellant.

(c) FORMAT OF APPENDIX. The appendix must begin with a table of contents identifying the page at which each part begins. The relevant docket entries must follow the table of contents. Other parts of the record must follow chronologically. When pages from the transcript of proceedings are placed in the appendix, the transcript page numbers must be shown in brackets immediately before the included pages. Omissions in the text of documents or of the transcript must be indicated by asterisks. Immaterial formal matters, such as captions, subscriptions, acknowledgments, and the like, must be omitted.

(d) APPENDIX EXHIBITS. Exhibits designated for inclusion in the appendix may be reproduced in a separate volume or volumes, suitably indexed.

(e) APPEAL ON THE ORIGINAL RECORD WITHOUT AN APPENDIX. The district court or BAP may, either by rule for all cases or classes of cases or by order in a particular case, dispense with the appendix and permit an appeal to proceed on the original record, with the submission of any relevant parts of the record that the district court or BAP orders the parties to file.

COMMITTEE NOTE

This rule is derived from former Rule 8009 and F. R. App. P. 30 and 31. Like former Rule 8009, it addresses the timing of serving and filing briefs and appendices, as well as the content and format of appendices. It retains the bankruptcy practice of permitting the appellee to file its own appendix, rather than requiring the appellant to include in the appendix it files matters designated by the appellee.

Rule 8016 governs the timing of serving and filing briefs when a cross-appeal is taken. This rule's provisions about appendices apply to all appeals, including cross-appeals.

Subdivision (a) retains the provision of former Rule 8009 that allows the district court or BAP to dispense with briefing or to provide different time periods than the ones specified by this rule. It increases some of the time periods for filing briefs from the periods prescribed by the former rule, while still retaining shorter time periods than some provided by F.R. App. P. 31(a). The time for filing the appellant's brief is increased from 14 to 30 days after the docketing of the notice of the transmission of the record or notice of the availability of the record. That triggering event is equivalent to docketing the appeal under former Rule 8007. Appellate Rule 31(a)(1), by contrast, provides the appellant 40 days after the record is filed to file its brief. The shorter time period for bankruptcy appeals reflects the frequent need for greater expedition in the resolution of bankruptcy appeals, while still providing the appellant a more realistic time period to prepare its brief than the former rule provided.

Subdivision (a)(2) similarly expands the time period for filing the appellee's brief from 14 to 30 days after the service of the appellant's brief. This period is the same as the period provided by F.R. App. 31(a)(1).

Subdivision (a)(3) retains the 14-day time period for filing a reply brief that the former rule prescribed, but it qualifies that period to ensure that the final brief is filed at least seven days before oral argument.

Subdivision (a)(4) is new. Based on F.R. App. P. 31(c), it provides for actions that may be taken – dismissal of the appeal or denial of participation in oral argument – if the appellant or appellee fails to file its brief.

Subdivision (a)(5) is also new. If a district court or BAP has a mediation procedure that is applicable to bankruptcy appeals, the clerk of the district court or BAP must advise the parties – promptly after the docketing of the appeal – that such a procedure applies, what its requirements are, and how the procedure affects the timing of the filing of briefs in the appeal.

Subdivisions (b) and (c) govern the content and format of the appendix to a brief. Subdivision (b) is similar to former Rule 8009(b), although it adds a provision permitting an additional appendix by the appellant as cross-appellee. Subdivision (c) is derived from F.R. App. P. 30(d).

Subdivision (d), which addresses the inclusion of exhibits in the appendix, is derived from F.R. App. P. 30(e).

Rule 8011 governs the methods of filing and serving briefs and appendices. It authorizes the district court or BAP to require the submission of paper copies of documents that are filed electronically.

Rule 8019. Oral Argument

(a) PARTY'S STATEMENT. Any party may file, or a district court or BAP may require, a statement explaining why oral argument should, or need not, be permitted.

(b) PRESUMPTION OF ORAL ARGUMENT AND EXCEPTIONS. Oral argument must be allowed in every case unless the district judge or all of the judges of the BAP assigned to hear the appeal determine, after examination of the briefs and record, that oral argument is unnecessary because

(1) the appeal is frivolous;

(2) the dispositive issue or issues have been authoritatively decided; or

(3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

(c) NOTICE OF ARGUMENT; POSTPONEMENT. The district court or BAP must advise all parties of the date, time, and place for oral argument, and the time allowed for each side. A motion to postpone the argument or to allow longer argument must be filed reasonably in advance of the hearing date.

(d) ORDER AND CONTENTS OF ARGUMENT. The appellant opens and concludes the argument. Counsel must not

read at length from briefs, the record, or authorities.

(e) CROSS-APPEALS AND SEPARATE APPEALS. If there is a cross-appeal, Rule 8016(b) determines which party is the appellant and which is the appellee for the purposes of oral argument. Unless the district court or BAP directs otherwise, a cross-appeal or separate appeal must be argued when the initial appeal is argued. Separate parties should avoid duplicative argument.

(f) NONAPPEARANCE OF A PARTY. If the appellee fails to appear for argument, the district court or BAP may hear appellant's argument. If the appellant fails to appear for argument, the district court or BAP may hear the appellee's argument. If neither party appears, the case will be decided on the briefs unless the district court or BAP orders otherwise.

(g) SUBMISSION ON BRIEFS. The parties may agree to submit a case for decision on the briefs, but the district court or BAP may direct that the case be argued.

(h) USE OF PHYSICAL EXHIBITS AT ARGUMENT; REMOVAL. Counsel intending to use physical exhibits other than documents at the argument must arrange to place them in the courtroom on the day of the argument before the court convenes. After the argument, counsel must remove the exhibits from the

courtroom unless the district court or BAP directs otherwise. The clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them.

COMMITTEE NOTE

This rule generally retains the provisions of former Rule 8012 and adds much of the additional detail of F.R. App. P. 34. By incorporating the more detailed provisions of the appellate rule, Rule 8019 promotes national uniformity regarding oral argument in bankruptcy appeals.

Subdivision (a), like F.R. App. P. 34(a)(1), now allows a party to submit a statement explaining why oral argument is or is not needed. It also authorizes a court to require this statement. Former Rule 8012 only authorized statements explaining why oral argument should be allowed.

Subdivision (b) retains the reasons set forth in former Rule 8012 for the district court or BAP to conclude that oral argument is not needed.

The remainder of this rule adopts the provisions of F.R. App. P. 34(b)-(g), with one exception. Rather than requiring the district court or BAP to hear appellant's argument if the appellee does not appear, subdivision (e) authorizes the district court or BAP to go forward with the argument in the appellee's absence. Should the court decide, however, to postpone the oral argument in that situation, it would be authorized to do so.

Rule 8020. Frivolous Appeals and Other Misconduct

(a) FRIVOLOUS APPEALS. If the district court or BAP determines that an appeal from a judgment, order, or decree of a bankruptcy court is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

(b) OTHER MISCONDUCT. The district court or BAP may discipline or sanction an attorney or party appearing before it for other misconduct, including failure to comply with any court order. First, however, the court must afford the attorney or party reasonable notice, opportunity to show cause to the contrary, and, if requested, a hearing.

COMMITTEE NOTE

This rule is derived from F.R. App. P. 38 and 46(c). Sanctions for both frivolous appeals and other misconduct may be imposed on parties as well as on counsel. Failure to comply with a court order, for which sanctions may be imposed, may include a failure to comply with a local court rule.

Rule 8021. Costs

(a) AGAINST WHOM ASSESSED. The following rules apply unless the law provides or the district court or BAP orders otherwise:

(1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;

(2) if a judgment, order, or decree is affirmed, costs are taxed against the appellant;

(3) if a judgment, order, or decree is reversed, costs are taxed against the appellee;

(4) if a judgment, order, or decree is affirmed or reversed in part, modified, or vacated, costs are taxed only as the district court or BAP orders.

(b) COSTS FOR AND AGAINST THE UNITED STATES. Costs for or against the United States, its agencies, or officers may be assessed under subdivision (a) only if authorized by law.

(c) COSTS TAXABLE ON APPEAL TO THE DISTRICT COURT OR BAP. The bankruptcy clerk must tax the following costs in favor of the party entitled to costs under this rule:

(1) costs incurred in the production of any required copies of a brief, appendix, exhibit, or the record;

(2) costs incurred in the preparation and transmission of the record;

(3) the cost of the reporter's transcript if necessary for the determination of the appeal;

(4) premiums paid for supersedeas bonds or other bonds to preserve rights pending appeal; and

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

(d) BILL OF COSTS; OBJECTIONS. A party who wants costs taxed must, within 14 days after entry of judgment on appeal, file with the bankruptcy clerk, with proof of service, an itemized and verified bill of costs. Objections must be filed within 14 days after service of the bill of costs, unless the court extends the time.

COMMITTEE NOTE

This rule is derived from former Rule 8014 and F.R. App. P. 39. It retains the former rule's authorization for taxing appellate costs against the losing party and its specification of the costs that may be taxed. Taxable costs do not include attorney's fees. The rule also incorporates some of the additional details regarding the taxing of costs contained in F.R. App. P. 39. Consistent with former Rule 8014, the clerk of the bankruptcy court has the responsibility for taxing all costs. Subdivision (b) is added to clarify that additional authority is required for the taxation of costs by or against federal governmental parties.

Rule 8022. Motion for Rehearing.

(a) TIME TO FILE; CONTENTS; RESPONSE; ACTION BY THE DISTRICT COURT OR BAP.

(1) *Time.* 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.

(2) *Contents*. The motion must state with particularity each point of law or fact that the movant believes the district court or BAP has overlooked or misapprehended and must argue in support of the motion. Oral argument is not permitted.

(3) *Response*. Unless the district court or BAP requests, no response to a motion for rehearing is permitted. But ordinarily, rehearing will not be granted in the absence of such a request.

(4) *Action by the District Court or BAP*. If a motion for rehearing is granted, the district court or BAP may do any of the following:

(A) make a final disposition of the appeal without reargument;

(B) restore the case to the calendar for

reargument or resubmission; or

(C) issue any other appropriate order.

(b) FORM OF MOTION; LENGTH. The motion must comply in form with Rule 8013(f)(1) and (2). Copies must be served and filed as provided by Rule 8011. Unless the district court or BAP by local rule or order provides otherwise, a motion for rehearing must not exceed 15 pages.

COMMITTEE NOTE

This rule is derived from former Rule 8015 and F.R. App. P. 40. It deletes the provision of former Rule 8015 regarding the time for appeal to the court of appeals because the matter is addressed by F.R. App. P. 6(b)(2)(A).

Rule 8023. Voluntary Dismissal

The clerk of the district court or BAP must dismiss an appeal if the parties to the appeal file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the district court or BAP.

COMMITTEE NOTE

This rule is derived from former Rule 8001(c) and F.R. App. P. 42. The provision of the former rule regarding dismissal of appeals in the bankruptcy court prior to docketing of the appeal has been deleted. Now that docketing occurs promptly after a notice of appeal is filed, *see* Rules 8003(d) and 8004(c), there is little likelihood that an appeal will be voluntarily dismissed before docketing.

The rule retains the provision of the former rule that the clerk of the district court or BAP must dismiss an appeal upon the parties' agreement. District courts and BAPs continue to have discretion to dismiss an appeal on an appellant's motion. Nothing in the rule prohibits a district court or BAP from dismissing an appeal for other reasons authorized by law, such as the failure to prosecute an appeal.

Rule 8024. Duties of Clerk on Disposition of Appeal

(a) ENTRY OF JUDGMENT ON APPEAL. The clerk of the district court or BAP must prepare, sign, and enter the judgment following receipt of the opinion of the district court or BAP or, if there is no opinion, following the instruction of the district court or BAP. The notation of a judgment in the docket constitutes entry of judgment.

(b) NOTICE OF AN ORDER OR JUDGMENT. Immediately upon the entry of a judgment or order, the clerk of the district court or BAP must transmit a notice of the entry to each party to the appeal, to the United States trustee, and to the bankruptcy clerk, together with a copy of any opinion respecting the judgment or order, and must make a note of the transmission in the docket.

(c) RETURN OF RECORD. If any original documents were transmitted as the record on appeal, they must be returned to the bankruptcy clerk on disposition of the appeal.

COMMITTEE NOTE

This rule is derived from former Rule 8016, which was adapted from F.R. App. P. 36 and 45 (c) and (d). The rule is reworded to reflect that often the record will not be physically transmitted to the district court or BAP and thus there will be no documents to return to the bankruptcy clerk. Other changes to the former rule are stylistic.

Rule 8025. Stay of District Court or BAP Judgment

(a) AUTOMATIC STAY OF JUDGMENT ON APPEAL. Unless the district court or BAP orders otherwise, its judgment is stayed for 14 days after entry of the judgment.

(b) STAY PENDING APPEAL TO THE COURT OF APPEALS.

(1) On motion and notice to the parties to the appeal, the district court or BAP may stay its judgment pending an appeal to the court of appeals.

(2) The stay must not extend beyond 30 days after the judgment of the district court or BAP is entered unless the period is extended for cause shown.

(3) If, before the expiration of a stay entered pursuant to this subdivision, there is an appeal to the court of appeals by the party who obtained the stay, the stay continues until final disposition by the court of appeals.

(4) A bond or other security may be required as a condition of the grant or continuation of a stay of the judgment.

(5) A bond or other security may be required if a trustee obtains a stay, but a bond or security may not be required if a stay is obtained by the United States or its

officer or agency, or at the direction of any department of the Government of the United States.

(c) AUTOMATIC STAY OF ORDER, JUDGMENT, OR DECREE OF BANKRUPTCY COURT. If the district court or BAP enters a judgment affirming an order, judgment, or decree of the bankruptcy court, a stay of the district court's or BAP's judgment automatically stays the bankruptcy court's order, judgment, or decree for the duration and to the extent of the appellate stay.

(d) POWER OF COURT OF APPEALS NOT LIMITED. This rule does not limit the power of a court of appeals or any of its judges to do the following:

(1) stay a judgment pending appeal;

(2) stay proceedings during the pendency of an appeal;

(3) suspend, modify, restore, vacate, or grant a stay or an injunction during the pendency of an appeal; or

(4) make any order appropriate to preserve the status quo or the effectiveness of any judgment to be entered.

COMMITTEE NOTE

This rule is derived from former Rule 8017. Most of the changes to the former rule are stylistic. Subdivision (c) is new. It provides that if a district court or BAP affirms the bankruptcy court ruling and the appellate judgment is stayed, the bankruptcy court's order, judgment, or decree that is affirmed on appeal is automatically stayed to the same extent as the stay of the appellate judgment.

Rule 8026. Rules by Circuit Councils and District Courts; Procedure When There is No Controlling Law

(a) LOCAL RULES BY CIRCUIT COUNCILS AND DISTRICT COURTS.

(1) Circuit councils that have authorized a BAP pursuant to 28 U.S.C. § 158(b) may make and amend rules governing practice and procedure for appeals from judgments, orders, or decrees of bankruptcy courts to the BAP. District courts may make and amend rules governing practice and procedure for appeals from judgments, orders, or decrees of bankruptcy courts to the district courts. Local rules must be consistent with, but not duplicative of, Acts of Congress and these Part VIII rules.

(2) Local rules must conform to any uniform numbering system prescribed by the Judicial Conference of the United States.

(3) A local rule imposing a requirement of form must not be enforced in a way that causes a party to lose any right because of a nonwillful failure to comply.

(b) PROCEDURE WHEN THERE IS NO CONTROLLING LAW.

(1) A district judge or BAP may regulate practice in any manner consistent with federal law, applicable

federal rules, the Official Forms, and local rules.

(2) No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, applicable federal rules, the Official Forms, or local rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

COMMITTEE NOTE

This rule is derived from former Rule 8018. The changes to the former rule are primarily stylistic.

Rule 8027. Suspension of Rules in Part VIII

In the interest of expediting decision or for other cause in a particular case, the district court or BAP, or where appropriate the court of appeals, may suspend the requirements or provisions of the rules in Part VIII, except Rules 8001, 8002, 8003, 8004, 8005, 8006, 8007, 8012, 8020, 8024, 8025, 8026, and 8027.

COMMITTEE NOTE

This rule is derived from former Rule 8019 and F.R. App. P. 2. In order to promote uniformity of practice and compliance with statutory authority, the rule includes a more extensive list of requirements that may not be suspended than either the former rule or the Rules of Appellate Procedure provide. Rules that may not be suspended are those governing the following:

- scope of the rules; definition of "BAP"; method of transmission;
- time for filing a notice of appeal;
- taking an appeal as of right;
- taking an appeal by leave;
- election to have appeal heard by district court instead of BAP;
- certification of direct appeal to court of appeals;
- stay pending appeal;
- corporate disclosure statement;
- sanctions for frivolous appeals and other misconduct;
- clerk's duties on disposition of appeal;
- stay of district court's or BAP's judgment;
- local rules; and
- suspension of Part VIII rules.

TAB 6C

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Federal Rules of Appellate Procedure

Rule Provision	Relevant Language	Type of Provision	Comments
Rule 3(a)(1)	"(a) Filing the Notice of Appeal. (1) An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4. At the time of filing, the appellant must **furnish** the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d)."	Providing copies to the clerk	
Rule 3(d)(1)	"The district clerk must **serve** notice of the filing of a notice of appeal by **mailing a copy** to each party's counsel of record—excluding the appellant's—or, if a party is proceeding pro se, to the party's last known address. When a defendant in a criminal case appeals, the clerk must also **serve a copy** of the notice of appeal on the defendant, either **by personal service or by mail** addressed to the defendant. The clerk must promptly **send a copy** of the notice of appeal and of the docket entries—and any later docket entries—to the clerk of the court of appeals named in the notice. The district clerk must note, on each copy, the date when the notice of appeal was filed."	Manner of service; Sending to appellate court	
Rule 3(d)(3)	"The district clerk's failure to **serve notice** does not affect the validity of the appeal. The clerk must note on the docket the names of the parties to whom the clerk **mails copies**, with the date of mailing. Service is sufficient despite the death of a party or the party's counsel."	Manner of service	
Rule 4(c)(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 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**."	Manner of filing	Involves prisoner litigation, so may still need to address paper mailings.

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 4(d)	"(d) Mistaken Filing in the Court of Appeals. If a notice of appeal in either a civil or a criminal case is mistakenly filed in the court of appeals, the clerk of that court must note on the notice the date when it was received and **send** it to the district clerk. The notice is then considered filed in the district court on the date so noted."	Sending from appellate court to district court	
Rule 5(d)(3)	"(3) The district clerk must notify the circuit clerk once the petitioner has paid the fees. Upon receiving this notice, the circuit clerk must enter the appeal on the docket. The record must be **forwarded** and filed in accordance with Rules 11 and 12(c)."	Sending to appellate court	
Rule 6(b)(2)(B)(i)	"(i) Within 14 days after filing the notice of appeal, the appellant must file with the clerk possessing the record assembled in accordance with Bankruptcy Rule 8006—and serve on the appellee—a statement of the issues to be presented on appeal and a designation of the record to be certified and **sent** to the circuit clerk."	Sending to appellate court	
Rule 6(b)(2)(C)(i)	"(C) ***Forwarding*** *the Record* . (i) When the record is complete, the district clerk or bankruptcy appellate panel clerk must number the documents constituting the record and **send** them promptly to the circuit clerk together with a list of the documents correspondingly numbered and reasonably identified. Unless directed to do so by a party or the circuit clerk, the clerk will not **send** to the court of appeals documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals. If the exhibits are unusually bulky or heavy, a party must arrange with the clerks in advance for their **transportation and receipt**."	Sending to appellate court; Transportation and receipt of exhibits	
Rule 6(b)(2)(C)(ii)	"(ii) All parties must do whatever else is necessary to enable the clerk to **assemble and forward** the record. The court of appeals may provide by rule or order that a certified copy of the docket entries be **sent** in place of the redesignated record, but any party may request at any time during the pendency of the appeal that the redesignated record be **sent**."	Sending to appellate court	
Rule 8(b)	"(b) Proceeding Against a Surety. . . . The motion and any notice that the district court prescribes may be served on the district clerk, who must promptly **mail a copy** to each surety whose address is known."	Manner of service	

Rule Provision	Relevant Language	Type of Provision	Comments
Rule 10(c)	"(c) Statement of the Evidence When the Proceedings Were Not Recorded or When a Transcript Is Unavailable. If the transcript of a hearing or trial is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement must be served on the appellee, who may serve objections or proposed amendments within 14 days after being served. The statement and any objections or proposed amendments must then be **submitted** to the district court for settlement and approval. As settled and approved, the statement must be included by the district clerk in the record on appeal."	Submission to the court	
Rule 10(d)	"(d) Agreed Statement as the Record on Appeal. 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. . . . The district clerk must then **send** it to the circuit clerk within the time provided by Rule 11. A copy of the agreed statement may be filed in place of the appendix required by Rule 30."	Submission to the court; Sending to appellate court	
Rule 10(e)(2)	"(2) If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and a supplemental record may be certified and **forwarded**:… (A) on stipulation of the parties; (B) by the district court before or after the record has been **forwarded**; or (C) by the court of appeals."	Sending to appellate court	
Rule 11(a)	"Rule 11. **Forwarding** the Record (a) Appellant's Duty. An appellant filing a notice of appeal must comply with Rule 10(b) and must do whatever else is necessary to enable the clerk to assemble and **forward** the record. If there are multiple appeals from a judgment or order, the clerk must **forward** a single record."	Sending to appellate court	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 11(b)(1)(A)	"(A) Upon receiving an order for a transcript, the reporter must enter at the foot of the order the date of its receipt and the expected completion date and **send** a copy, so endorsed, to the circuit clerk."	Sending to appellate court	
Rule 11(b)(2)	"(2) District Clerk's Duty to **Forward**. When the record is complete, the district clerk must number the documents constituting the record and **send** them promptly to the circuit clerk together with a list of the documents correspondingly numbered and reasonably identified. Unless directed to do so by a party or the circuit clerk, the district clerk will not **send** to the court of appeals documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals. If the exhibits are unusually bulky or heavy, a party must arrange with the clerks in advance for their **transportation and receipt**."	Sending to appellate court; Transportation and receipt of exhibits	
Rule 11(c)	"(c) Retaining the Record Temporarily in the District Court for Use in Preparing the Appeal. . . . Upon receipt of the appellee's brief, or earlier if the court orders or the parties agree, the appellant must request the district clerk to **forward** the record."	Sending to appellate court	
Rule 11(e)(1)	"(1) The court of appeals may, by order or local rule, provide that a certified copy of the docket entries be **forwarded** instead of the entire record. But a party may at any time during the appeal request that designated parts of the record be **forwarded**."	Sending to appellate court	
Rule 11(e)(3)	"(3) If part or all of the record is ordered retained, the district clerk must **send** to the court of appeals a copy of the order and the docket entries together with the parts of the original record allowed by the district court and copies of any parts of the record designated by the parties."	Sending to appellate court	
Rule 11(g)	"(g) Record for a Preliminary Motion in the Court of Appeals. If, before the record is **forwarded**, a party makes any of the following motions in the court of appeals: . . . the district clerk must **send** the court of appeals any parts of the record designated by any party."	Sending to appellate court	

Rule Provision	Relevant Language	Type of Provision	Comments
Rule 13(a)(1)	"(1) Review of a decision of the United States Tax Court is commenced by filing a notice of appeal with the Tax Court clerk within 90 days after the entry of the Tax Court's decision. At the time of filing, the appellant must **furnish** the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d). If one party files a timely notice of appeal, any other party may file a notice of appeal within 120 days after the Tax Court's decision is entered."	Providing copies to the clerk	
Rule 13(b)	"(b) Notice of Appeal; How Filed. The notice of appeal may be **filed either at the Tax Court clerk's office in the District of Columbia or by mail addressed to the clerk**. If **sent by mail** the notice is considered filed on the postmark date, subject to §7502 of the Internal Revenue Code, as amended, and the applicable regulations."	Manner of filing	
Rule 13(c)	"(c) Contents of the Notice of Appeal; Service; Effect of Filing and Service. Rule 3 prescribes the contents of a notice of appeal, **the manner of service**, and the effect of its filing and service. Form 2 in the Appendix of Forms is a suggested form of a notice of appeal."	Manner of service	Although this mentions "manner of service," it doesn't describe particular manners, and thus may be outside the scope of this project.
Rule 13(d)(1)	"(d) The Record on Appeal; **Forwarding**; Filing. (1) An appeal from the Tax Court is governed by the parts of Rules 10, 11, and 12 regarding the record on appeal from a district court, the time and **manner of forwarding and filing**, and the docketing in the court of appeals. References in those rules and in Rule 3 to the district court and district clerk are to be read as referring to the Tax Court and its clerk."	Sending to appellate court; Manner of filing	Although this mentions "manner of filing," it doesn't describe particular manners, and thus may be outside the scope of this project.
Rule 13(d)(2)	"(2) If an appeal from a Tax Court decision is taken to more than one court of appeals, the original **record must be sent** to the court named in the first notice of appeal filed. In an appeal to any other court of appeals, the appellant must apply to that other court to make **provision for the record**."	Sending to appellate court	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 15(c)	"(c) **Service of the Petition or Application**. The circuit clerk must **serve a copy** of the petition for review, or an application or cross-application to enforce an agency order, on each respondent **as prescribed by Rule 3(d)**, **unless a different manner of service is prescribed by statute**. At the time of filing, the petitioner must: (1) serve, or have served, a copy on each party admitted to participate in the agency proceedings, except for the respondents; (2) file with the clerk a list of those so served; and (3) **give the clerk** enough copies of the petition or application to serve each respondent."	Manner of service; Providing copies to the clerk	Although this mentions "manner of service," it doesn't describe particular manners, and thus may be outside the scope of this project.
Rule 16(b)	"(b) Omissions From or Misstatements in the Record. The parties may at any time, by stipulation, **supply** any omission from the record or correct a misstatement, or the court may so direct. If necessary, the court may direct that a supplemental record be prepared and filed."	Submission to the court	
Rule 17(b)(3)	"(3) The agency must retain any portion of the record not filed with the clerk. All parts of the record retained by the agency are a part of the record on review for all purposes and, if the court or a party so requests, must **be sent to the court** regardless of any prior stipulation."	Submission to the court	
Rule 21(a)(1)	"(1) 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."	Submission to the court	
Rule 21(a)(3)	"(3) Upon receiving the prescribed docket fee, the clerk must docket the petition and **submit** it to the court."	Submission to the court	
Rule 21(b)(7)	"(7) The circuit clerk must **send a copy** of the final disposition to the trial-court judge."	Sending from appellate court to district court	

Rule Provision	Relevant Language	Type of Provision	Comments
Rule 22(a)	"(a) Application for the Original Writ. An application for a writ of habeas corpus must be made to the appropriate district court. If made to a circuit judge, the application **must be transferred** to the appropriate district court. If a district court denies an application made or **transferred** to it, renewal of the application before a circuit judge is not permitted. The applicant may, under 28 U.S.C. §2253, appeal to the court of appeals from the district court's order denying the application."	Transferring application from circuit court to district court	May not be relevant to the e-filing project because may be referring to legally transferring rather than physically transferring.
Rule 22(b)(1)	"If an applicant files a notice of appeal, the district clerk must **send** to the court of appeals the certificate (if any) and the statement described in Rule 11(a) of the Rules Governing Proceedings Under 28 U.S.C. §2254 or §2255 (if any), along with the notice of appeal and the file of the district-court proceedings."	Sending to appellate court	
Rule 25(a)(2)(A)	"(2) Filing: Method and Timeliness. (A) *In General* . Filing may be accomplished **by mail addressed to the clerk**, but filing is not timely unless the clerk receives the papers within the time fixed for filing."	Manner of filing	
Rule 25(a)(2)(B)	"(B) *A brief or appendix* . A brief or appendix is timely filed, however, if on or before the last day for filing, it is: (i) **mailed to the clerk by First-Class Mail, or other class of mail that is at least as expeditious, postage prepaid**; or (ii) **dispatched to a third-party commercial carrier for delivery to the clerk within 3 days**."	Manner of filing	
Rule 25(a)(2)(C)	"(C) *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**."	Manner of filing	Involves prisoner litigation, so may still need to address paper mailings.

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 25(a)(2)(D)	"(D) ***Electronic Filing*** . A court of appeals may by local rule permit or require papers to be **filed**, signed, or verified **by electronic means** that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A local rule may require **filing by electronic means** only if reasonable exceptions are allowed. A paper **filed by electronic means** in compliance with a local rule constitutes a written paper for the purpose of applying these rules."	Manner of filing	
Rule 25(a)(3)	"(3) *Filing a Motion with a Judge* . If a motion requests relief that may be granted by a single judge, the judge may permit the motion to be filed with the judge; the judge must note the filing date on the motion and **give it to the clerk**."	Sending documents from the court to the clerk	
Rule 25(a)(4)	"(4) *Clerk's Refusal of Documents* . The clerk must not refuse to accept for filing any **paper presented** for that purpose solely because it is not **presented in proper form** as required by these rules or by any local rule or practice."	Presenting papers to the clerk	
Rule 25(c)(1)	"(c) Manner of Service. (1) **Service may be any of the following**: (A) **personal**, including **delivery** to a responsible person at the office of counsel; (B) by **mail**; (C) by **third-party commercial carrier for delivery within 3 days**; or (D) by **electronic means**, if the party being served consents in writing."	Manner of service	*See also* Rule 43(a)(1) ("A party's motion must be served on the representative in accordance with Rule 25.").
Rule 25(c)(2)	"(2) If authorized by local rule, a party may **use the court's transmission equipment to make electronic service** under Rule 25(c)(1)(D)."	Manner of service	

Rule Provision	Relevant Language	Type of Provision	Comments
Rule 25(c)(3)	"(3) When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, **service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court**."	Manner of service	
Rule 25(c)(4)	"(4) **Service by mail or by commercial carrier** is complete on **mailing or delivery** to the carrier. **Service by electronic means** is complete on **transmission**, unless the party making service is notified that the paper was not received by the party served."	Manner of service	
Rule 25(d)(1)(B)(iii)	"(d) Proof of Service. (1) A paper presented for filing must contain either of the following: . . . (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**."	Manner of service	
Rule 25(d)(2)	"(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."	Manner of filing	
Rule 25(e)	"(e) Number of Copies. When these rules require the filing or **furnishing** of a number of copies, a court may require a different number by local rule or by order in a particular case."	Submission to the court	

Rule Provision	Relevant Language	Type of Provision	Comments
Rule 26(a)(4)	"(4) *"Last Day" Defined* . Unless a different time is set by a statute, local rule, or court order, the last day ends: (A) for **electronic filing** in the district court, at midnight in the court's time zone; (B) for **electronic filing** in the court of appeals, at midnight in the time zone of the circuit clerk's principal office; (C) for **filing under Rules 4(c)(1), 25(a)(2)(B), and 25(a)(2)(C)—and filing by mail under Rule 13(b)**—at the latest time for the method chosen for **delivery to the post office, third-party commercial carrier, or prison mailing system**; and (D) for **filing by other means**, when the clerk's office is scheduled to close."	Manner of filing	
Rule 26(c)	"(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."	Manner of service	
Rule 28(f)	"(f) Reproduction of Statutes, Rules, Regulations, etc. If the court's determination of the issues presented requires the study of statutes, rules, regulations, etc., the relevant parts must be set out in the brief or in an addendum at the end, or may be **supplied to the court in pamphlet form**."	Submission to the court	
Rule 28(j)	"(j) Citation of Supplemental Authorities. If pertinent and significant authorities come to a party's attention after the party's brief has been filed—or after oral argument but before decision—a party may promptly **advise the circuit clerk by letter**, with a copy to all other parties, setting forth the citations. . . ."	Advising the court of information	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 28.1(e)(3)	"(3) *Certificate of Compliance* . A brief **submitted** under Rule 28.1(e)(2) must comply with Rule 32(a)(7)(C)."	Submission to the court	
Rule 29(c)(5)(B)	"An amicus brief need not comply with Rule 28, but must include the following: . . . . (5) unless the amicus curiae is one listed in the first sentence of Rule 29(a), a statement that indicates whether: . . . . (B) a party or party's counsel contributed money that was intended to fund preparing or **submitting** the brief; and . . . ."	Submission to the court	
Rule 32(a)(7)(C)(i)	"(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. . . ."	Submission to the court	
Rule 45(d)	"(d) Custody of Records and Papers. The circuit clerk has custody of the court's records and papers. Unless the court orders or instructs otherwise, the clerk must not permit an original record or paper to be taken from the clerk's office. Upon disposition of the case, **original papers constituting the record on appeal or review must be returned to the court or agency from which they were received**. The clerk must preserve a copy of any brief, appendix, or other paper that has been filed."	Sending from appellate court to district court	
Rule 47(a)(1)	"Each circuit clerk must **send** the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is promulgated or amended."	Sending documents to the Administrative Office	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 47(b)	"No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local circuit rules unless the alleged violator has been **furnished** in the particular case with **actual notice** of the requirement."	Providing notice to parties	Although general references to providing notice have been excluded from this chart, this example is included because of the use of "furnished," which has been one of the words under consideration to convey the sending of documents.

TAB 6D

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Federal Rules of Bankruptcy Procedure

Rule Provision	Relevant Language	Type of Provision	Comments
Rule 1002(b)	"(b) **Transmission** to United States Trustee. The clerk shall forthwith **transmit** to the United States trustee a copy of the petition filed pursuant to subdivision (a) of this rule."	Transmission to trustee	
Rule 1004	"After filing of an involuntary petition under §303(b)(3) of the Code, (1) the petitioning partners or other petitioners shall promptly **send** to or serve on each general partner who is not a petitioner a copy of the petition; and (2) the clerk shall promptly issue a summons for service on each general partner who is not a petitioner. Rule 1010 applies to the form and service of the summons."	Sending documents	
Rule 1004.2(b)	"The motion shall be **transmitted** to the United States trustee and served on the debtor, all persons or bodies authorized to administer foreign proceedings of the debtor, all entities against whom provisional relief is being sought under § 1519 of the Code, all parties to litigation pending in the United States in which the debtor was a party as of the time the petition was filed, and such other entities as the court may direct."	Transmission to trustee	
Rule 1007(f)	"(f) Statement of Social Security Number. An individual debtor shall **submit** a verified statement that sets out the debtor's social security number, or states that the debtor does not have a social security number. In a voluntary case, the debtor shall **submit** the statement with the petition. In an involuntary case, the debtor shall **submit** the statement within 14 days after the entry of the order for relief."	Providing documents to the court	
Rule 1007(i)	"(i) Disclosure of List of Security Holders. After notice and hearing and for cause shown, the court may direct an entity other than the debtor or trustee to disclose any list of security holders of the debtor in its possession or under its control, indicating the name, address and security held by any of them. The entity possessing this list may be required either to **produce** the list or a true copy thereof, or permit inspection or copying, or otherwise disclose the information contained on the list."	Producing documents	

Rule Provision	Relevant Language	Type of Provision	Comments
Rule 1007(*l*)	"(*l*) **Transmission** to United States Trustee. The clerk shall forthwith **transmit** to the United States trustee a copy of every list, schedule, and statement filed pursuant to subdivision (a)(1), (a)(2), (b), (d), or (h) of this rule."	Transmission to trustee	
Rule 1009(c)	"(c) Statement of Social Security Number. If a debtor becomes aware that the statement of social security number **submitted** under Rule 1007(f) is incorrect, the debtor shall promptly **submit** an amended verified statement setting forth the correct social security number. The debtor shall give notice of the amendment to all of the entities required to be included on the list filed under Rule 1007(a)(1) or (a)(2)."	Providing documents to the court	
Rule 1009(d)	"(d) **Transmission** to United States Trustee. The clerk shall promptly **transmit** to the United States trustee a copy of every amendment filed or **submitted** under subdivision (a), (b), or (c) of this rule."	Transmission to trustee; Providing documents to the court	
Rule 1010(a)	"(a) Service of Involuntary Petition and Summons; Service of Petition for Recognition of Foreign Nonmain Proceeding. . . . The summons shall be **served** with a copy of the petition **in the manner provided for service of a summons and complaint by Rule 7004(a) or (b)**. If service cannot be so made, the court may order that the summons and petition be **served by mailing copies to the party's last known address**, and **by at least one publication in a manner and form directed by the court**. The summons and petition may be served on the party anywhere. Rule 7004(e) and Rule 4(l) F.R.Civ.P. apply when service is made or attempted under this rule."	Manner of service	
Rule 1011(b)	"(b) Defenses and Objections; When Presented. Defenses and objections to the petition shall be presented in the manner prescribed by Rule 12 F.R.Civ.P. and shall be filed and served within 21 days after service of the summons, except that if **service** is made **by publication** on a party or partner not residing or found within the state in which the court sits, the court shall prescribe the time for filing and serving the response."	Manner of service	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 1017(f)(3)	"(3) A chapter 12 or chapter 13 case shall be converted without court order when the debtor files a notice of conversion under §§1208(a) or 1307(a). The filing date of the notice becomes the date of the conversion order for the purposes of applying §348(c) and Rule 1019. The clerk shall promptly **transmit** a copy of the notice to the United States trustee."	Transmission to trustee	
Rule 1019(4)	"(4) ***Turnover*** *of Records and Property* . After qualification of, or assumption of duties by the chapter 7 trustee, any debtor in possession or trustee previously acting in the chapter 11, 12, or 13 case shall, forthwith, unless otherwise ordered, **turn over** to the chapter 7 trustee all records and property of the estate in the possession or control of the debtor in possession or trustee."	Transmission to trustee	
Rule 1019(5)(A)(ii)	"(A) *Conversion of Chapter 11 or Chapter 12 Case* . Unless the court directs otherwise, if a chapter 11 or chapter 12 case is converted to chapter 7, the debtor in possession or, if the debtor is not a debtor in possession, the trustee serving at the time of conversion, shall: . . . (ii) not later than 30 days after conversion of the case, file and **transmit** to the United States trustee a final report and account;"	Transmission to trustee	
Rule 1019(5)(B)(ii)	"(B) *Conversion of Chapter 13 Case* . Unless the court directs otherwise, if a chapter 13 case is converted to chapter 7, . . . (ii) the trustee, not later than 30 days after conversion of the case, shall file and **transmit** to the United States trustee a final report and account;"	Transmission to trustee	
Rule 1019(5)(D)	"(D) ***Transmission*** *to United States Trustee* . The clerk shall forthwith **transmit** to the United States trustee a copy of every schedule filed pursuant to Rule 1019(5)."	Transmission to trustee	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 1019(6)	". . . Upon the filing of the schedule of unpaid debts incurred after commencement of the case and before conversion, the clerk, or some other person as the court may direct, shall give notice to those entities listed on the schedule of the time for filing a request for payment of an administrative expense and, unless a notice of insufficient assets to pay a dividend is **mailed** in accordance with Rule 2002(e), the time for filing a claim of a kind specified in §348(d)."	Manner of providing notice	
Rule 1021(b)	"(b) Motion. The United States trustee or a party in interest may file a motion to determine whether the debtor is a health care business. The motion shall be **transmitted** to the United States trustee and served on: . . . ."	Transmission to trustee	
Rule 2001(d)	"(d) Turnover and Report. Following qualification of the trustee selected under §702 of the Code, the interim trustee, unless otherwise ordered, shall (1) forthwith **deliver** to the trustee all the records and property of the estate in possession or subject to control of the interim trustee and, (2) within 30 days thereafter file a final report and account."	Transmission to trustee	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 2002(a)	"(a) Twenty-One-Day Notices to Parties in Interest. Except as provided in subdivisions (h), (i), (*l*), (p), and (q) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees at least 21 days' **notice by mail** of: . . . . (2) a proposed use, sale, or lease of property of the estate other than in the ordinary course of business, unless the court for cause shown shortens the time or directs **another method of giving notice**; . . . . "	Manner of providing notice	*See also* Rule 2007.1(b)(2) ("Notice of the meeting of creditors convened under § 1104(b) shall be given as provided in Rule 2002."); Rule 3017.1(c)(1) ("Notice of the time fixed for filing objections and the hearing to consider final approval of the disclosure statement shall be given in accordance with Rule 2002 . . . ."); Rule 4006 ("If an order is entered . . . the clerk shall promptly notify all parties in interest in the manner provided by Rule 2002."); Rule 4007(c) & (d) ("shall give no less than 30 days' notice of the time fixed to all creditors in the manner provided in Rule 2002."); Rule 9019(a) ("Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.").

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 2002(b)	"(b) Twenty-Eight-Day Notices to Parties in Interest. Except as provided in subdivision (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees not less than 28 days' **notice by mail** of the time fixed (1) for filing objections and the hearing to consider approval of a disclosure statement or, under §1125(f), to make a final determination whether the plan provides adequate information so that a separate disclosure statement is not necessary; and (2) for filing objections and the hearing to consider confirmation of a chapter 9, chapter 11, or chapter 13 plan."	Manner of providing notice	
Rule 2002(f)	"(f) Other Notices. Except as provided in subdivision (*l*) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, all creditors, and indenture trustees **notice by mail** of: . . . ."	Manner of providing notice	*See also* Rule 4004(a) ("At least 28 days' notice of the time so fixed shall be given to the United States trustee and all creditors as provided in Rule 2002(f) and (k) and to the trustee and the trustee's attorney.").
Rule 2002(g)(1)	"(1) Notices required to be **mailed** under Rule 2002 to a creditor, indenture trustee, or equity security holder shall be addressed as such entity or an authorized agent has directed in its last request filed in the particular case. For the purposes of this subdivision— (A) a proof of claim filed by a creditor or indenture trustee that designates a mailing address constitutes a filed request to **mail notices** to that address, unless a notice of no dividend has been given under Rule 2002(e) and a later notice of possible dividend under Rule 3002(c)(5) has not been given; and (B) a proof of interest filed by an equity security holder that designates a **mailing address** constitutes a filed request to **mail notices** to that address."	Manner of providing notice	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 2002(g)(2)	"(2) Except as provided in §342(f) of the Code, if a creditor or indenture trustee has not filed a request designating a mailing address under Rule 2002(g)(1) or Rule 5003(e), the notices shall be **mailed** to the address shown on the list of creditors or schedule of liabilities, whichever is filed later. If an equity security holder has not filed a request designating a mailing address under Rule 2002(g)(1) or Rule 5003(e), the notices shall be **mailed** to the address shown on the list of equity security holders."	Manner of providing notice	
Rule 2002(g)(3)	"(3) If a list or schedule filed under Rule 1007 includes the name and address of a legal representative of an infant or incompetent person, and a person other than that representative files a request or proof of claim designating a name and mailing address that differs from the name and address of the representative included in the list or schedule, unless the court orders otherwise, notices under Rule 2002 shall be **mailed** to the representative included in the list or schedules and to the name and address designated in the request or proof of claim."	Manner of providing notice	
Rule 2002(g)(5)	"(5) A creditor may treat a notice as not having been brought to the creditor's attention under §342(g)(1) only if, prior to issuance of the notice, the creditor has filed a statement that designates the name and address of the person or organizational subdivision of the creditor responsible for receiving notices under the Code, and that describes the procedures established by the creditor to cause such notices to be **delivered** to the designated person or subdivision."	Delivering notice	This may be outside the scope of this project, as "delivering" notice may not be much different from "providing" notice (which has been excluded). But it is included here because "delivered" has seemed to be one of the synonyms under consideration for exchanging documents.

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 2002(h)	"(h) Notices to Creditors Whose Claims are Filed. In a chapter 7 case, after 90 days following the first date set for the meeting of creditors under §341 of the Code, the court may direct that all notices required by subdivision (a) of this rule be **mailed** only to the debtor, the trustee, all indenture trustees, creditors that hold claims for which proofs of claim have been filed, and creditors, if any, that are still permitted to file claims by reason of an extension granted pursuant to Rule 3002(c)(1) or (c)(2). In a case where notice of insufficient assets to pay a dividend has been given to creditors pursuant to subdivision (e) of this rule, after 90 days following the **mailing** of a notice of the time for filing claims pursuant to Rule 3002(c)(5), the court may direct that notices be **mailed** only to the entities specified in the preceding sentence."	Manner of providing notice	
Rule 2002(i)	"(i) Notices to Committees. Copies of all notices required to be **mailed** pursuant to this rule shall be **mailed** to the committees elected under §705 or appointed under §1102 of the Code or to their authorized agents. Notwithstanding the foregoing subdivisions, the court may order that notices required by subdivision (a)(2), (3) and (6) of this rule be **transmitted** to the United States trustee and be **mailed** only to the committees elected under §705 or appointed under §1102 of the Code or to their authorized agents and to the creditors and equity security holders who serve on the trustee or debtor in possession and file a request that all notices be **mailed** to them. A committee appointed under §1114 shall receive copies of all notices required by subdivisions (a)(1), (a)(5), (b), (f)(2), and (f)(7), and such other notices as the court may direct."	Manner of providing notice; Transmission to trustee	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 2002(j)	"(j) Notices to the United States. Copies of notices required to be **mailed** to all creditors under this rule shall be **mailed** (1) in a chapter 11 reorganization case, to the Securities and Exchange Commission at any place the Commission designates, if the Commission has filed either a notice of appearance in the case or a written request to receive notices; (2) in a commodity broker case, to the Commodity Futures Trading Commission at Washington, D.C.; (3) in a chapter 11 case, to the Internal Revenue Service at its address set out in the register maintained under Rule 5003(e) for the district in which the case is pending; (4) if the papers in the case disclose a debt to the United States other than for taxes, to the United States attorney for the district in which the case is pending and to the department, agency, or instrumentality of the United States through which the debtor became indebted; or (5) if the filed papers disclose a stock interest of the United States, to the Secretary of the Treasury at Washington, D.C."	Manner of providing notice	
Rule 2002(k)	"(k) Notices to United States Trustee. Unless the case is a chapter 9 municipality case or unless the United States trustee requests otherwise, the clerk, or some other person as the court may direct, shall **transmit** to the United States trustee notice of the matters described in subdivisions (a)(2), (a)(3), (a)(4), (a)(8), (b), (f)(1), (f)(2), (f)(4), (f)(6), (f)(7), (f)(8), and (q) of this rule and notice of hearings on all applications for compensation or reimbursement of expenses. Notices to the United States trustee shall be **transmitted** within the time prescribed in subdivision (a) or (b) of this rule. The United States trustee shall also receive notice of any other matter if such notice is requested by the United States trustee or ordered by the court. Nothing in these rules requires the clerk or any other person to **transmit** to the United States trustee any notice, schedule, report, application or other document in a case under the Securities Investor Protection Act, 15 U.S.C. §78aaa et. seq."	Transmission to trustee	*See also* Rule 6004(a) ("Notice of a proposed use, sale, or lease of property, other than cash collateral, not in the ordinary course of business shall be given pursuant to Rule 2002(a)(2), (c)(1), (i), and (k) and, if applicable, in accordance with § 363(b)(2) of the Code.").
Rule 2002(*l*)	"(*l*) **Notice by Publication**. The court may order **notice by publication** if it finds that **notice by mail** is impracticable or that it is desirable to supplement the notice."	Manner of providing notice	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 2002(*o*)	"(*o*) Notice of Order for Relief in Consumer Case. In a voluntary case commenced by an individual debtor whose debts are primarily consumer debts, the clerk or some other person as the court may direct shall give the trustee and all creditors **notice by mail** of the order for relief within 21 days from the date thereof."	Manner of providing notice	
Rule 2002(p)(1)	"(1) If, at the request of the United States trustee or a party in interest, or on its own initiative, the court finds that a notice **mailed** within the time prescribed by these rules would not be sufficient to give a creditor with a foreign address to which notices under these rules are **mailed** reasonable notice under the circumstances, the court may order that the notice be supplemented with notice by other means or that the time prescribed for the **notice by mail** be enlarged."	Manner of providing notice	
Rule 2002(p)(2)	"(2) Unless the court for cause orders otherwise, a creditor with a foreign address to which notices under this rule are **mailed** shall be given at least 30 days' notice of the time fixed for filing a proof of claim under Rule 3002(c) or Rule 3003(c)."	Manner of providing notice	
Rule 2002(q)(1)	"(1) *Notice of Petition for Recognition* . The clerk, or some other person as the court may direct, shall forthwith give the debtor, all persons or bodies authorized to administer foreign proceedings of the debtor, all entities against whom provisional relief is being sought under §1519 of the Code, all parties to litigation pending in the United States in which the debtor is a party at the time of the filing of the petition, and such other entities as the court may direct, at least 21 days' **notice by mail** of the hearing on the petition for recognition of a foreign proceeding. The notice shall state whether the petition seeks recognition as a foreign main proceeding or foreign nonmain proceeding."	Manner of providing notice	

Rule Provision	Relevant Language	Type of Provision	Comments
Rule 2002(q)(2)	"(2) *Notice of Court's Intention to Communicate with Foreign Courts and Foreign Representatives* . The clerk, or some other person as the court may direct, shall give the debtor, all persons or bodies authorized to administer foreign proceedings of the debtor, all entities against whom provisional relief is being sought under §1519 of the Code, all parties to litigation pending in the United States in which the debtor is a party at the time of the filing of the petition, and such other entities as the court may direct, **notice by mail** of the court's intention to communicate with a foreign court or foreign representative."	Manner of providing notice	
Rule 2003(c)	"(c) Record of Meeting. Any examination under oath at the meeting of creditors held pursuant to §341(a) of the Code shall be recorded verbatim by the United States trustee using electronic sound recording equipment or other means of recording, and such record shall be preserved by the United States trustee and available for public access until two years after the conclusion of the meeting of creditors. Upon request of any entity, the United States trustee shall certify and **provide** a copy or transcript of such recording at the entity's expense."	Providing documents to relevant entities	
Rule 2003(d)(2)	"(2) *Disputed Election* . If the election is disputed, the United States trustee shall promptly file a report stating that the election is disputed, informing the court of the nature of the dispute, and listing the name and address of any candidate elected under any alternative presented by the dispute. No later than the date on which the report is filed, the United States trustee shall **mail** a copy of the report to any party in interest that has made a request to receive a copy of the report. . . ."	Manner of providing notice	
Rule 2003(g)	"(g) Final Meeting. If the United States trustee calls a final meeting of creditors in a case in which the net proceeds realized exceed $1,500, the clerk shall **mail** a summary of the trustee's final account to the creditors with a notice of the meeting, together with a statement of the amount of the claims allowed. The trustee shall attend the final meeting and shall, if requested, report on the administration of the estate."	Manner of providing notice	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 2006(e)	"(e) Data Required From Holders of Multiple Proxies. At any time before the voting commences at any meeting of creditors pursuant to §341(a) of the Code, or at any other time as the court may direct, a holder of two or more proxies shall file and **transmit** to the United States trustee a verified list of the proxies to be voted and a verified statement of the pertinent facts and circumstances in connection with the execution and **delivery** of each proxy . . . ."	Transmission to trustee; Sending documents	
Rule 2007(b)(2)	"(b) Selection of Members of Committee. The court may find that a committee organized by unsecured creditors before the commencement of a chapter 9 or chapter 11 case was fairly chosen if: . . . . (2) all proxies voted at the meeting for the elected committee were solicited pursuant to Rule 2006 and the lists and statements required by subdivision (e) thereof have been **transmitted** to the United States trustee; and . . . ."	Transmission to trustee	
Rule 2007.1(b)(1)	"(1) *Request for an Election* . A request to convene a meeting of creditors for the purpose of electing a trustee in a chapter 11 reorganization case shall be filed and **transmitted** to the United States trustee in accordance with Rule 5005 within the time prescribed by §1104(b) of the Code. . . ."	Transmission to trustee	
Rule 2007.1(b)(3)(B)	"(B) *Dispute Arising Out of an Election* . . . . Not later than the date on which the report of the disputed election is filed, the United States trustee shall **mail** a copy of the report and each verified statement to any party in interest that has made a request to convene a meeting under §1104(b) or to receive a copy of the report, and to any committee appointed under §1102 of the Code."	Manner of providing notice	

Rule Provision	Relevant Language	Type of Provision	Comments
Rule 2007.2(e)	"(e) Motion. A motion under this rule shall be governed by Rule 9014. The motion shall be **transmitted** to the United States trustee and served on: the debtor; the trustee; any committee elected under §705 or appointed under §1102 of the Code or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed under §1102, on the creditors included on the list filed under Rule 1007(d); and such other entities as the court may direct."	Transmission to trustee	
Rule 2012(b)	"(b) Successor Trustee. When a trustee dies, resigns, is removed, or otherwise ceases to hold office during the pendency of a case under the Code (1) the successor is automatically substituted as a party in any pending action, proceeding, or matter; and (2) the successor trustee shall prepare, file, and **transmit** to the United States trustee an accounting of the prior administration of the estate."	Transmission to trustee	
Rule 2013(b)	"(b) Summary of Record. At the close of each annual period, the clerk shall prepare a summary of the public record by individual or firm name, to reflect total fees awarded during the preceding year. The summary shall be open to examination by the public without charge. The clerk shall **transmit** a copy of the summary to the United States trustee."	Transmission to trustee	
Rule 2014(a)	"(a) Application for and Order of Employment. An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professionals pursuant to §327, §1103, or §1114 of the Code shall be made only on application of the trustee or committee. The application shall be filed and, unless the case is a chapter 9 municipality case, a copy of the application shall be **transmitted** by the applicant to the United States trustee. . . ."	Transmission to trustee	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 2015(a)(1)	"(1) in a chapter 7 liquidation case and, if the court directs, in a chapter 11 reorganization case file and **transmit** to the United States trustee a complete inventory of the property of the debtor within 30 days after qualifying as a trustee or debtor in possession, unless such an inventory has already been filed;"	Transmission to trustee	
Rule 2015(a)(5)	"(5) in a chapter 11 reorganization case, on or before the last day of the month after each calendar quarter during which there is a duty to pay fees under 28 U.S.C. §1930(a)(6), file and **transmit** to the United States trustee a statement of any disbursements made during that quarter and of any fees payable under 28 U.S.C. §1930(a)(6) for that quarter;"	Transmission to trustee	
Rule 2015(a)(6)	"(6) in a chapter 11 small business case, unless the court, for cause, sets another reporting interval, file and **transmit** to the United States trustee for each calendar month after the order for relief, on the appropriate Official Form, the report required by §308. . . ."	Transmission to trustee	
Rule 2015(b)	"(b) Chapter 12 Trustee and Debtor in Possession. In a chapter 12 family farmer's debt adjustment case, the debtor in possession shall perform the duties prescribed in clauses (2)–(4) of subdivision (a) of this rule and, if the court directs, shall file and **transmit** to the United States trustee a complete inventory of the property of the debtor within the time fixed by the court. . . ."	Transmission to trustee	
Rule 2015(c)(1)	"(1) *Business Cases* . In a chapter 13 individual's debt adjustment case, when the debtor is engaged in business, the debtor shall perform the duties prescribed by clauses (2)–(4) of subdivision (a) of this rule and, if the court directs, shall file and **transmit** to the United States trustee a complete inventory of the property of the debtor within the time fixed by the court."	Transmission to trustee	

Rule Provision	Relevant Language	Type of Provision	Comments
Rule 2015(e)	"(e) **Transmission** of Reports. In a chapter 11 case the court may direct that copies or summaries of annual reports and copies or summaries of other reports shall be **mailed** to the creditors, equity security holders, and indenture trustees. The court may also direct the **publication** of summaries of any such reports. A copy of every report or summary **mailed** or **published** pursuant to this subdivision shall be **transmitted** to the United States trustee."	Delivering documents to relevant entities; Transmission to trustee	
Rule 2015.1(a)	"(a) Reports. A patient care ombudsman, at least 14 days before making a report under §333(b)(2) of the Code, shall give notice that the report will be made to the court, unless the court orders otherwise. The notice shall be **transmitted** to the United States trustee, **posted** conspicuously at the health care facility that is the subject of the report, and served on: . . . ."	Transmission to trustee; Manner of providing notice	
Rule 2015.1(b)	"(b) Authorization to Review Confidential Patient Records. A motion by a patient care ombudsman under §333(c) to review confidential patient records shall be governed by Rule 9014, served on the patient and any family member or other contact person whose name and address have been given to the trustee or the debtor for the purpose of providing information regarding the patient's health care, and **transmitted** to the United States trustee subject to applicable nonbankruptcy law relating to patient privacy. . . ."	Transmission to trustee	
Rule 2016(a)	"(a) Application for Compensation or Reimbursement. . . . Unless the case is a chapter 9 municipality case, the applicant shall **transmit** to the United States trustee a copy of the application."	Transmission to trustee	

Rule Provision	Relevant Language	Type of Provision	Comments
Rule 2016(b)	"(b) Disclosure of Compensation Paid or Promised to Attorney for Debtor. Every attorney for a debtor, whether or not the attorney applies for compensation, shall file and **transmit** to the United States trustee within 14 days after the order for relief, or at another time as the court may direct, the statement required by §329 of the Code including whether the attorney has shared or agreed to share the compensation with any other entity. . . . A supplemental statement shall be filed and **transmitted** to the United States trustee within 14 days after any payment or agreement not previously disclosed."	Transmission to trustee	
Rule 2016(c)	"(c) Disclosure of Compensation Paid or Promised to Bankruptcy Petition Preparer. Before a petition is filed, every bankruptcy petition preparer for a debtor shall **deliver** to the debtor, the declaration under penalty of perjury required by §110(h)(2). . . ."	Delivering documents to parties	
Rule 3001(e)(2)	"(2) *Transfer of Claim Other than for Security after Proof Filed* . If a claim other than one based on a publicly traded note, bond, or debenture has been transferred other than for security after the proof of claim has been filed, evidence of the transfer shall be filed by the transferee. The clerk shall immediately **notify** the alleged transferor **by mail** of the filing of the evidence of transfer and that objection thereto, if any, must be filed within 21 days of the **mailing** of the notice or within any additional time allowed by the court. . . ."	Manner of providing notice	
Rule 3001(e)(3)	"(3) *Transfer of Claim for Security Before Proof Filed* . If a claim other than one based on a publicly traded note, bond, or debenture has been transferred for security before proof of the claim has been filed, the transferor or transferee or both may file a proof of claim for the full amount. The proof shall be supported by a statement setting forth the terms of the transfer. If either the transferor or the transferee files a proof of claim, the clerk shall immediately **notify** the other **by mail** of the right to join in the filed claim. . . ."	Manner of providing notice	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 3001(e)(4)	"(4) *Transfer of Claim for Security after Proof Filed* . If a claim other than one based on a publicly traded note, bond, or debenture has been transferred for security after the proof of claim has been filed, evidence of the terms of the transfer shall be filed by the transferee. The clerk shall immediately **notify** the alleged transferor **by mail** of the filing of the evidence of transfer and that objection thereto, if any, must be filed within 21 days of the **mailing** of the notice or within any additional time allowed by the court. . . ."	Manner of providing notice	
Rule 3001(e)(5)	"(5) *Service of Objection or Motion; Notice of Hearing* . A copy of an objection filed pursuant to paragraph (2) or (4) or a motion filed pursuant to paragraph (3) or (4) of this subdivision together with a notice of a hearing shall be **mailed** or otherwise **delivered** to the transferor or transferee, whichever is appropriate, at least 30 days prior to the hearing."	Manner of providing notice	
Rule 3002(c)(5)	"(5) If notice of insufficient assets to pay a dividend was given to creditors under Rule 2002(e), and subsequently the trustee notifies the court that payment of a dividend appears possible, the clerk shall give at least 90 days' **notice by mail** to creditors of that fact and of the date by which proofs of claim must be filed."	Manner of providing notice	
Rule 3002(c)(6)	"(6) If notice of the time to file a proof of claim has been **mailed** to a creditor at a foreign address, on motion filed by the creditor before or after the expiration of the time, the court may extend the time by not more than 60 days if the court finds that the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim."	Manner of providing notice	
Rule 3007(a)	"(a) Objections to Claims. An objection to the allowance of a claim shall be in writing and filed. A copy of the objection with notice of the hearing thereon shall be **mailed** or otherwise **delivered** to the claimant, the debtor or debtor in possession, and the trustee at least 30 days prior to the hearing."	Manner of service	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 3009	"In a chapter 7 case, dividends to creditors shall be paid as promptly as practicable. Dividend checks shall be made payable to and **mailed** to each creditor whose claim has been allowed, unless a power of attorney authorizing another entity to receive dividends has been executed and filed in accordance with Rule 9010. In that event, dividend checks shall be made payable to the creditor and to the other entity and shall be **mailed** to the other entity."	Mailing dividend checks	This may be outside the scope of this project, as it involves mailing a check, not documents.
Rule 3015(d)	"(d) Notice and Copies. The plan or a summary of the plan shall be included with each notice of the hearing on confirmation **mailed** pursuant to Rule 2002. If required by the court, the debtor shall **furnish** a sufficient number of copies to enable the clerk to include a copy of the plan with the notice of the hearing."	Manner of providing notice; Providing documents to the court	
Rule 3015(e)	"(e) **Transmission** to United States Trustee. The clerk shall forthwith **transmit** to the United States trustee a copy of the plan and any modification thereof filed pursuant to subdivision (a) or (b) of this rule."	Transmission to trustee	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 3015(g)	"(g) Modification of Plan After Confirmation. A request to modify a plan pursuant to §1229 or §1329 of the Code shall identify the proponent and shall be filed together with the proposed modification. The clerk, or some other person as the court may direct, shall give the debtor, the trustee, and all creditors not less than 21 days' **notice by mail** of the time fixed for filing objections and, if an objection is filed, the hearing to consider the proposed modification, unless the court orders otherwise with respect to creditors who are not affected by the proposed modification. A copy of the notice shall be **transmitted** to the United States trustee. A copy of the proposed modification, or a summary thereof, shall be included with the notice. If required by the court, the proponent shall **furnish** a sufficient number of copies of the proposed modification, or a summary thereof, to enable the clerk to include a copy with each notice. Any objection to the proposed modification shall be filed and served on the debtor, the trustee, and any other entity designated by the court, and shall be **transmitted** to the United States trustee. An objection to a proposed modification is governed by Rule 9014."	Manner of providing notice; Transmission to trustee; Providing documents to the court	
Rule 3016(a)	"(a) Identification of Plan. Every proposed plan and any modification thereof shall be dated and, in a chapter 11 case, identified with the name of the entity or entities **submitting** or filing it."	Providing documents to the court	
Rule 3017(a)	"(a) Hearing on Disclosure Statement and Objections. . . . The plan and the disclosure statement shall be **mailed** with the notice of the hearing only to the debtor, any trustee or committee appointed under the Code, the Securities and Exchange Commission and any party in interest who requests in writing a copy of the statement or plan. . . . In a chapter 11 reorganization case, every notice, plan, disclosure statement, and objection required to be served or **mailed** pursuant to this subdivision shall be **transmitted** to the United States trustee within the time provided in this subdivision."	Manner of providing notice; Transmission to trustee	

Rule Provision	Relevant Language	Type of Provision	Comments
Rule 3017(d)	"(d) **Transmission** and Notice to United States Trustee, Creditors, and Equity Security Holders. Upon approval of a disclosure statement,—except to the extent that the court orders otherwise with respect to one or more unimpaired classes of creditors or equity security holders—the debtor in possession, trustee, proponent of the plan, or clerk as the court orders shall **mail** to all creditors and equity security holders, and in a chapter 11 reorganization case shall **transmit** to the United States trustee, ... In addition, notice of the time fixed for filing objections and the hearing on confirmation shall be **mailed** to all creditors and equity security holders in accordance with Rule 2002(b), and a form of ballot conforming to the appropriate Official Form shall be **mailed** to creditors and equity security holders entitled to vote on the plan. If the court opinion is not **transmitted** or only a summary of the plan is **transmitted**, the court opinion or the plan shall be **provided** on request of a party in interest at the plan proponent's expense. If the court orders that the disclosure statement and the plan or a summary of the plan shall not be **mailed** to any unimpaired class, notice that the class is designated in the plan as unimpaired and notice of the name and address of the person from whom the plan or summary of the plan and disclosure statement may be obtained upon request and at the plan proponent's expense, shall be **mailed** to members of the unimpaired class together with the notice of the time fixed for filing objections to and the hearing on confirmation. . . ."	Transmission to trustee; Providing documents to relevant entities	
Rule 3017(e)	"(e) **Transmission** to Beneficial Holders of Securities. At the hearing held pursuant to subdivision (a) of this rule, the court shall consider the procedures for **transmitting** the documents and information required by subdivision (d) of this rule to beneficial holders of stock, bonds, debentures, notes, and other securities, determine the adequacy of the procedures, and enter any orders the court deems appropriate."	Providing documents to relevant entities	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 3017(f)	"(f) Notice and **Transmission** of Documents to Entities Subject to an Injunction Under a Plan. If a plan provides for an injunction against conduct not otherwise enjoined under the Code and an entity that would be subject to the injunction is not a creditor or equity security holder, at the hearing held under Rule 3017(a), the court shall consider procedures for **providing** the entity with: (1) at least 28 days' notice of the time fixed for filing objections and the hearing on confirmation of the plan containing the information described in Rule 2002(c)(3); and (2) to the extent feasible, a copy of the plan and disclosure statement."	Providing documents to relevant entities	
Rule 3017.1(c)(2)	"(2) *Objections* . Objections to the disclosure statement shall be filed, **transmitted** to the United States trustee, and served on the debtor, the trustee, any committee appointed under the Code and any other entity designated by the court at any time before final approval of the disclosure statement or by an earlier date as the court may fix."	Transmitting to trustee	
Rule 3018(c)	"(c) Form of Acceptance or Rejection. An acceptance or rejection shall be in writing, identify the plan or plans accepted or rejected, be signed by the creditor or equity security holder or an authorized agent, and conform to the appropriate Official Form. If more than one plan is **transmitted** pursuant to Rule 3017, an acceptance or rejection may be filed by each creditor or equity security holder for any number of plans **transmitted** and if acceptances are filed for more than one plan, the creditor or equity security holder may indicate a preference or preferences among the plans so accepted."	Providing documents to relevant entities	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 3019(b)	"(b) Modification of Plan After Confirmation in Individual Debtor Case. . . . The clerk, or some other person as the court may direct, shall give the debtor, the trustee, and all creditors not less than 21 days' **notice by mail** of the time fixed to file objections and, if an objection is filed, the hearing to consider the proposed modification, unless the court orders otherwise with respect to creditors who are not affected by the proposed modification. A copy of the notice shall be **transmitted** to the United States trustee, together with a copy of the proposed modification. Any objection to the proposed modification shall be filed and served on the debtor, the proponent of the modification, the trustee, and any other entity designated by the court, and shall be **transmitted** to the United States trustee."	Manner of providing notice; Transmission to trustee	
Rule 3020(b)(1)	"(1) *Objection* . . . . Unless the case is a chapter 9 municipality case, a copy of every objection to confirmation shall be **transmitted** by the objecting party to the United States trustee within the time fixed for filing objections. . . ."	Transmission to trustee	
Rule 3020(c)(2)	"(2) Notice of entry of the order of confirmation shall be **mailed** promptly to the debtor, the trustee, creditors, equity security holders, other parties in interest, and, if known, to any identified entity subject to an injunction provided for in the plan against conduct not otherwise enjoined under the Code."	Manner of providing notice	
Rule 3020(c)(3)	"(3) Except in a chapter 9 municipality case, notice of entry of the order of confirmation shall be **transmitted** to the United States trustee as provided in Rule 2002(k)."	Transmission to trustee	
Rule 4001(a)(2)	"(2) *Ex Parte Relief* . . . . The party obtaining relief under this subdivision and §362(f) or §363(e) shall immediately give oral notice thereof to the trustee or debtor in possession and to the debtor and forthwith **mail** or otherwise **transmit** to such adverse party or parties a copy of the order granting relief. . . ."	Delivering documents to parties	

Rule Provision	Relevant Language	Type of Provision	Comments
Rule 4001(d)(2)	"(2) *Objection* . Notice of the motion and the time within which objections may be filed and served on the debtor in possession or trustee shall be **mailed** to the parties on whom service is required by paragraph (1) of this subdivision and to such other entities as the court may direct. Unless the court fixes a different time, objections may be filed within 14 days of the **mailing** of the notice."	Manner of providing notice	
Rule 4002(b)(3)	"(3) *Tax Return* . At least 7 days before the first date set for the meeting of creditors under §341, the debtor shall **provide** to the trustee a copy of the debtor's federal income tax return for the most recent tax year ending immediately before the commencement of the case and for which a return was filed, including any attachments, or a transcript of the tax return, or **provide** a written statement that the documentation does not exist."	Transmission to trustee	
Rule 4002(b)(4)	"(4) *Tax Returns Provided to Creditors* . If a creditor, at least 14 days before the first date set for the meeting of creditors under §341, requests a copy of the debtor's tax return that is to be **provided** to the trustee under subdivision (b)(3), the debtor, at least 7 days before the first date set for the meeting of creditors under §341, shall **provide** to the requesting creditor a copy of the return, including any attachments, or a transcript of the tax return, or **provide** a written statement that the documentation does not exist."	Transmission to trustee; Providing documents to relevant entities	
Rule 4002(b)(5)	"(5) *Confidentiality of Tax Information* . The debtor's obligation to **provide** tax returns under Rule 4002(b)(3) and (b)(4) is subject to procedures for safeguarding the confidentiality of tax information established by the Director of the Administrative Office of the United States Courts."	Providing documents to relevant entities; Transmission to trustee	
Rule 4003(b)(2)	"(2) The trustee may file an objection to a claim of exemption at any time prior to one year after the closing of the case if the debtor fraudulently asserted the claim of exemption. The trustee shall **deliver** or **mail** the objection to the debtor and the debtor's attorney, and to any person filing the list of exempt property and that person's attorney."	Manner of service	

Rule Provision	Relevant Language	Type of Provision	Comments
Rule 4003(b)(4)	"(4) A copy of any objection shall be **delivered** or **mailed** to the trustee, the debtor and the debtor's attorney, and the person filing the list and that person's attorney."	Transmission to trustee	
Rule 4004(g)	"(g) Notice of Discharge. The clerk shall promptly **mail** a copy of the final order of discharge to those specified in subdivision (a) of this rule."	Manner of service	
Rule 5003(e)	"(e) Register of Mailing Addresses of Federal and State Governmental Units and Certain Taxing Authorities. . . . If more than one address for a department, agency, or instrumentality is included in the register, the clerk shall also include information that would enable a user of the register to determine the circumstances when each address is applicable, and **mailing** notice to only one applicable address is sufficient to provide effective notice. . . ."	Manner of providing notice	
Rule 5005(a)(1)	"(1) *Place of Filing* . The lists, schedules, statements, proofs of claim or interest, complaints, motions, applications, objections and other papers required to be filed by these rules, except as provided in 28 U.S.C. §1409, shall be filed with the clerk in the district where the case under the Code is pending. The judge of that court may permit the papers to be filed with the judge, in which event the filing date shall be noted thereon, and they shall be forthwith **transmitted** to the clerk. The clerk shall not refuse to accept for filing any petition or other paper presented for the purpose of filing solely because it is not presented in proper form as required by these rules or any local rules or practices."	Transmission to the clerk	
Rule 5005(a)(2)	"(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 these rules, the Federal Rules of Civil Procedure made applicable by these rules, and §107 of the Code."	Manner of filing	

Rule Provision	Relevant Language	Type of Provision	Comments
Rule 5005(b)(1)	"(b) **Transmittal** to the United States Trustee. (1) The complaints, motions, applications, objections and other papers required to be **transmitted** to the United States trustee by these rules shall be **mailed** or **delivered** to an office of the United States trustee, or to another place designated by the United States trustee, in the district where the case under the Code is pending."	Transmission to trustee	
Rule 5005(b)(2)	"(2) The entity, other than the clerk, **transmitting** a paper to the United States trustee shall promptly file as proof of such **transmittal** a verified statement identifying the paper and stating the date on which it was **transmitted** to the United States trustee."	Transmission to trustee	
Rule 5005(b)(3)	"(3) Nothing in these rules shall require the clerk to **transmit** any paper to the United States trustee if the United States trustee requests in writing that the paper not be **transmitted**."	Transmission to trustee	
Rule 5005(c)	"(c) Error in Filing or **Transmittal**. A paper intended to be filed with the clerk but erroneously **delivered** to the United States trustee, the trustee, the attorney for the trustee, a bankruptcy judge, a district judge, the clerk of the bankruptcy appellate panel, or the clerk of the district court shall, after the date of its receipt has been noted thereon, be **transmitted** forthwith to the clerk of the bankruptcy court. A paper intended to be **transmitted** to the United States trustee but erroneously **delivered** to the clerk, the trustee, the attorney for the trustee, a bankruptcy judge, a district judge, the clerk of the bankruptcy appellate panel, or the clerk of the district court shall, after the date of its receipt has been noted thereon, be **transmitted** forthwith to the United States trustee. In the interest of justice, the court may order that a paper erroneously **delivered** shall be deemed filed with the clerk or **transmitted** to the United States trustee as of the date of its original **delivery**."	Transmission to trustee; Transmission to clerk	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 5006	"The clerk shall **issue** a certified copy of the record of any proceeding in a case under the Code or of any paper filed with the clerk on payment of any prescribed fee."	Issuing the record	This may be outside the scope of this project, because it refers to issuing the record, rather than actually transmitting it.
Rule 6002(a)	"(a) Accounting Required. Any custodian required by the Code to deliver property in the custodian's possession or control to the trustee shall promptly file and **transmit** to the United States trustee a report and account with respect to the property of the estate and the administration thereof."	Transmission to trustee	
Rule 6002(b)	"(b) Examination of Administration. On the filing and **transmittal** of the report and account required by subdivision (a) of this rule and after an examination has been made into the superseded administration, after notice and a hearing, the court shall determine the propriety of the administration, including the reasonableness of all disbursements."	Transmission to trustee	
Rule 6004(d)	"(d) Sale of Property Under $2,500. Notwithstanding subdivision (a) of this rule, when all of the nonexempt property of the estate has an aggregate gross value less than $2,500, it shall be sufficient to give a general notice of intent to sell such property other than in the ordinary course of business to all creditors, indenture trustees, committees appointed or elected pursuant to the Code, the United States trustee and other persons as the court may direct. An objection to any such sale may be filed and served by a party in interest within 14 days of the **mailing** of the notice, or within the time fixed by the court. An objection is governed by Rule 9014."	Manner of providing notice	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 6004(f)(1)	"(1) *Public or Private Sale* . All sales not in the ordinary course of business may be by private sale or by public auction. Unless it is impracticable, an itemized statement of the property sold, the name of each purchaser, and the price received for each item or lot or for the property as a whole if sold in bulk shall be filed on completion of a sale. If the property is sold by an auctioneer, the auctioneer shall file the statement, **transmit** a copy thereof to the United States trustee, and **furnish** a copy to the trustee, debtor in possession, or chapter 13 debtor. If the property is not sold by an auctioneer, the trustee, debtor in possession, or chapter 13 debtor shall file the statement and **transmit** a copy thereof to the United States trustee."	Transmission to trustee; Providing documents to relevant entities	
Rule 6004(g)(1)	"(1) *Motion* . A motion for authority to sell or lease personally identifiable information under §363(b)(1)(B) shall include a request for an order directing the United States trustee to appoint a consumer privacy ombudsman under §332. Rule 9014 governs the motion which shall be served on: any committee elected under §705 or appointed under §1102 of the Code, or if the case is a chapter 11 reorganization case and no committee of unsecured creditors has been appointed under §1102, on the creditors included on the list of creditors filed under Rule 1007(d); and on such other entities as the court may direct. The motion shall be **transmitted** to the United States trustee."	Transmission to trustee	
Rule 6007(a)	"(a) Notice of Proposed Abandonment or Disposition; Objections; Hearing. Unless otherwise directed by the court, the trustee or debtor in possession shall give notice of a proposed abandonment or disposition of property to the United States trustee, all creditors, indenture trustees, and committees elected pursuant to §705 or appointed pursuant to §1102 of the Code. A party in interest may file and serve an objection within 14 days of the **mailing** of the notice, or within the time fixed by the court. If a timely objection is made, the court shall set a hearing on notice to the United States trustee and to other entities as the court may direct."	Manner of providing notice	

Rule Provision	Relevant Language	Type of Provision	Comments
Rule 6011(a)	"(a) **Notice by Publication** Under §351(1)(A). A notice regarding the claiming or disposing of patient records under §351(1)(A) shall not identify any patient by name or other identifying information, but shall: . . . ."	Manner of providing notice	
Rule 6011(b)	"(b) **Notice by Mail** Under §351(1)(B). Subject to applicable nonbankruptcy law relating to patient privacy, a notice regarding the claiming or disposing of patient records under §351(1)(B) shall, in addition to including the information in subdivision (a), direct that a patient's family member or other representative who receives the notice inform the patient of the notice. Any notice under this subdivision shall be **mailed** to the patient and any family member or other contact person whose name and address have been given to the trustee or the debtor for the purpose of providing information regarding the patient's health care, to the Attorney General of the State where the health care facility is located, and to any insurance company known to have provided health care insurance to the patient."	Manner of providing notice	
Rule 7004(a)(1)	"(1) Except as provided in Rule 7004(a)(2), Rule 4(a), (b), (c)(1), (d)(1), (e)–(j), (*l*), and (m) F.R.Civ.P. applies in adversary proceedings. **Personal service** under Rule 4(e)–(j) F.R.Civ.P. may be made by any person at least 18 years of age who is not a party, and the summons may be **delivered** by the clerk to any such person."	Manner of service	
Rule 7004(a)(2)	"(2) The clerk may sign, seal, and **issue a summons electronically** by putting an “s/” before the clerk's name and including the court's seal on the summons."	Manner of issuing the summons	This may be outside the scope of this project because it seems to be referring to the act of signing and sealing, not actually delivering the summons.

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 7004(b)	"(b) **Service by First Class Mail**. Except as provided in subdivision (h), in addition to the methods of service authorized by Rule 4(e)–(j) F.R.Civ.P., service may be made within the United States by **first class mail postage prepaid** as follows: (1) Upon an individual other than an infant or incompetent, by **mailing** a copy of the summons and complaint to the individual's dwelling house or usual place of abode or to the place where the individual regularly conducts a business or profession. (2) Upon an infant or an incompetent person, by **mailing** a copy of the summons and complaint to the person upon whom process is prescribed to be served by the law of the state in which service is made when an action is brought against such a defendant in the courts of general jurisdiction of that state. The summons and complaint in that case shall be addressed to the person required to be served at that person's dwelling house or usual place of abode or at the place where the person regularly conducts a business or profession. (3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association, by **mailing** a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also **mailing** a copy to the defendant.	Manner of service	*See also* Rule 9014(b) ("The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004.").

Rule Provision	Relevant Language	Type of Provision	Comments
	(4) Upon the United States, by **mailing** a copy of the summons and complaint addressed to the civil process clerk at the office of the United States attorney for the district in which the action is brought and by **mailing** a copy of the summons and complaint to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or an agency of the United States not made a party, by also **mailing** a copy of the summons and complaint to that officer or agency. The court shall allow a reasonable time for service pursuant to this subdivision for the purpose of curing the failure to **mail** a copy of the summons and complaint to multiple officers, agencies, or corporations of the United States if the plaintiff has **mailed** a copy of the summons and complaint either to the civil process clerk at the office of the United States attorney or to the Attorney General of the United States. (5) Upon any officer or agency of the United States, by **mailing** a copy of the summons and complaint to the United States as prescribed in paragraph (4) of this subdivision and also to the officer or agency. If the agency is a corporation, the **mailing** shall be as prescribed in paragraph (3) of this subdivision of this rule. The court shall allow a reasonable time for service pursuant to this subdivision for the purpose of curing the failure to **mail** a copy of the summons and complaint to multiple officers, agencies, or corporations of the United States if the plaintiff has **mailed** a copy of the summons and complaint either to the civil process clerk at the office of the United States attorney or to the Attorney General of the United States. If the United States trustee is the trustee in the case and service is made upon the United States trustee solely as trustee, service may be made as prescribed in paragraph (10) of this subdivision of this rule.		

Rule Provision	Relevant Language	Type of Provision	Comments
	(6) Upon a state or municipal corporation or other governmental organization thereof subject to suit, by **mailing** a copy of the summons and complaint to the person or office upon whom process is prescribed to be served by the law of the state in which service is made when an action is brought against such a defendant in the courts of general jurisdiction of that state, or in the absence of the designation of any such person or office by state law, then to the chief executive officer thereof. (7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if a copy of the summons and complaint is **mailed** to the entity upon whom service is prescribed to be served by any statute of the United States or by the law of the state in which service is made when an action is brought against such a defendant in the court of general jurisdiction of that state. (8) Upon any defendant, it is also sufficient if a copy of the summons and complaint is **mailed** to an agent of such defendant authorized by appointment or by law to receive service of process, at the agent's dwelling house or usual place of abode or at the place where the agent regularly carries on a business or profession and, if the authorization so requires, by **mailing** also a copy of the summons and complaint to the defendant as provided in this subdivision.		

Rule Provision	Relevant Language	Type of Provision	Comments
	(9) Upon the debtor, after a petition has been filed by or served upon the debtor and until the case is dismissed or closed, by **mailing** a copy of the summons and complaint to the debtor at the address shown in the petition or to such other address as the debtor may designate in a filed writing. (10) Upon the United States trustee, when the United States trustee is the trustee in the case and service is made upon the United States trustee solely as trustee, by **mailing** a copy of the summons and complaint to an office of the United States trustee or another place designated by the United States trustee in the district where the case under the Code is pending."		
Rule 7004(c)	"(c) **Service by Publication**. If a party to an adversary proceeding to determine or protect rights in property in the custody of the court cannot be served as provided in Rule 4(e)–(j) F.R.Civ.P. or subdivision (b) of this rule, the court may order the summons and complaint to be **served by mailing copies thereof by first class mail**, postage prepaid, to the party's last known address, and by at least one **publication** in such manner and form as the court may direct."	Manner of service	
Rule 7004(e)	"(e) Summons: Time Limit for Service Within the United States. Service made under Rule 4(e), (g), (h)(1), (i), or (j)(2) F.R.Civ.P. shall be by **delivery** of the summons and complaint within 14 days after the summons is issued. If service is by any authorized form of **mail**, the summons and complaint shall be **deposited in the mail** within 14 days after the summons is issued. If a summons is not timely **delivered** or **mailed**, another summons shall be issued and served. This subdivision does not apply to service in a foreign country."	Manner of service	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 7004(h)	"(h) Service of Process on an Insured Depository Institution. Service on an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act) in a contested matter or adversary proceeding shall be made by **certified mail** addressed to an officer of the institution unless— (1) the institution has appeared by its attorney, in which case the attorney shall be **served by first class mail**; (2) the court orders otherwise after service upon the institution by **certified mail** of notice of an application to permit service on the institution by **first class mail** sent to an officer of the institution designated by the institution; or (3) the institution has waived in writing its entitlement to service by **certified mail** by designating an officer to receive service."	Manner of service	
Rule 8002(a)	"(a) Fourteen-Day Period. . . . . If a notice of appeal is mistakenly filed with the district court or the bankruptcy appellate panel, the clerk of the district court or the clerk of the bankruptcy appellate panel shall note thereon the date on which it was received and **transmit** it to the clerk and it shall be deemed filed with the clerk on the date so noted."	Transmission to the clerk	
Rule 8003(b)	"(b) **Transmittal**; Determination of Motion. The clerk shall **transmit** the notice of appeal, the motion for leave to appeal and any answer thereto to the clerk of the district court or the clerk of the bankruptcy appellate panel as soon as all parties have filed answers or the time for filing an answer has expired. The motion and answer shall be submitted without oral argument unless otherwise ordered."	Transmission to the clerk	

Rule Provision	Relevant Language	Type of Provision	Comments
Rule 8004	"The clerk shall serve notice of the filing of a notice of appeal by **mailing** a copy thereof to counsel of record of each party other than the appellant or, if a party is not represented by counsel, to the party's last known address. Failure to serve notice shall not affect the validity of the appeal. The clerk shall note on each copy served the date of the filing of the notice of appeal and shall note in the docket the names of the parties to whom copies are **mailed** and the date of the **mailing**. The clerk shall forthwith **transmit** to the United States trustee a copy of the notice of appeal, but failure to **transmit** such notice shall not affect the validity of the appeal."	Manner of service; Transmission to trustee	
Rule 8006	". . . . Any party filing a designation of the items to be included in the record shall **provide** to the clerk a copy of the items designated or, if the party fails to **provide** the copy, the clerk shall prepare the copy at the party's expense. If the record designated by any party includes a transcript of any proceeding or a part thereof, the party shall, immediately after filing the designation, **deliver** to the reporter and file with the clerk a written request for the transcript and make satisfactory arrangements for payment of its cost. All parties shall take any other action necessary to enable the clerk to assemble and **transmit** the record."	Transmission to the clerk; Delivering documents to the reporter; Transmitting the record	
Rule 8007(a)	"Rule 8007. Completion and **Transmission** of the Record; Docketing of the Appeal (a) Duty of Reporter To Prepare and File Transcript. On receipt of a request for a transcript, the reporter shall acknowledge on the request the date it was received and the date on which the reporter expects to have the transcript completed and shall **transmit** the request, so endorsed, to the clerk or the clerk of the bankruptcy appellate panel. . . ."	Transmitting the record; Transmission to the clerk	

Rule Provision	Relevant Language	Type of Provision	Comments
Rule 8007(b)	"(b) Duty of Clerk To **Transmit** Copy of Record; Docketing of Appeal. When the record is complete for purposes of appeal, the clerk shall **transmit** a copy thereof forthwith to the clerk of the district court or the clerk of the bankruptcy appellate panel. On receipt of the **transmission** the clerk of the district court or the clerk of the bankruptcy appellate panel shall enter the appeal in the docket and give notice promptly to all parties to the judgment, order, or decree appealed from of the date on which the appeal was docketed. If the bankruptcy appellate panel directs that additional copies of the record be **furnished**, the clerk of the bankruptcy appellate panel shall notify the appellant and, if the appellant fails to **provide** the copies, the clerk shall prepare the copies at the expense of the appellant."	Transmitting the record	
Rule 8007(c)	"(c) Record for Preliminary Hearing. If prior to the time the record is **transmitted** a party moves in the district court or before the bankruptcy appellate panel for dismissal, for a stay pending appeal, for additional security on the bond on appeal or on a supersedeas bond, or for any intermediate order, the clerk at the request of any party to the appeal shall **transmit** to the clerk of the district court or the clerk of the bankruptcy appellate panel a copy of the parts of the record as any party to the appeal shall designate."	Transmitting the record	
Rule 8008(a)	"(a) Filing. Papers required or permitted to be filed with the clerk of the district court or the clerk of the bankruptcy appellate panel may be **filed by mail** addressed to the clerk, but filing is not timely unless the papers are received by the clerk within the time fixed for filing, except that briefs are deemed filed on the day of **mailing**. . . . The district court or bankruptcy appellate panel may require that additional copies be **furnished**. Rule 5005(a)(2) applies to papers filed with the clerk of the district court or the clerk of the bankruptcy appellate panel if **filing by electronic means** is authorized by local rule promulgated pursuant to Rule 8018."	Manner of filing; Providing documents to the court	

Rule Provision	Relevant Language	Type of Provision	Comments
Rule 8008(c)	"(c) Manner of Service. **Service may be personal or by mail**. **Personal service** includes **delivery** of the copy to a clerk or other responsible person at the office of counsel. **Service by mail** is complete on **mailing**."	Manner of service	
Rule 8010(b)	"(b) Reproduction of Statutes, Rules, Regulations, or Similar Material. If determination of the issues presented requires reference to the Code or other statutes, rules, regulations, or similar material, relevant parts thereof shall be reproduced in the brief or in an addendum or they may be **supplied** to the court in pamphlet form."	Providing documents to the court	
Rule 8014	". . . . Costs incurred in the production of copies of briefs, the appendices, and the record and in the preparation and **transmission** of the record, the cost of the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal and the fee for filing the notice of appeal shall be taxed by the clerk as costs of the appeal in favor of the party entitled to costs under this rule."	Transmitting the record	
Rule 8016(b)	"(b) Notice of Orders or Judgments; Return of Record. Immediately on the entry of a judgment or order the clerk of the district court or the clerk of the bankruptcy appellate panel shall **transmit** a notice of the entry to each party to the appeal, to the United States trustee, and to the clerk, together with a copy of any opinion respecting the judgment or order, and shall make a note of the **transmission** in the docket. Original papers **transmitted** as the record on appeal shall be returned to the clerk on disposition of the appeal."	Delivering notice; Transmitting the record	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 8018(b)	"(b) Procedure When There is No Controlling Law. A bankruptcy appellate panel or district judge may regulate practice in any manner consistent with federal law, these rules, Official Forms, and local rules of the circuit council or district court. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, Official Forms, or the local rules of the circuit council or district court unless the alleged violator has been **furnished** in the particular case with actual notice of the requirement."	Delivering notice	
Rule 9001(8)	"(8) "**Mail**" means **first class, postage prepaid**."	Manner of providing notice	This may be outside the scope of this project, since it is just a definition.
Rule 9006(a)(4)	"(4) *"Last Day" Defined* . Unless a different time is set by a statute, local rule, or order in the case, the last day ends: (A) for **electronic filing**, at midnight in the court's time zone; and (B) for filing by other means, when the clerk's office is scheduled to close."	Manner of filing	
Rule 9006(e)	"(e) Time of Service. Service of process and service of any paper other than process or of **notice by mail** is complete on **mailing**."	Manner of service; Manner of providing notice	
Rule 9006(f)	"(f) 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)."	Manner of service	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 9008	"Rule 9008. **Service or Notice by Publication** Whenever these rules require or authorize **service or notice by publication**, the court shall, to the extent not otherwise specified in these rules, determine the form and manner thereof, including the newspaper or other medium to be used and the number of publications."	Manner of service; Manner of providing notice	
Rule 9011(b)	"(b) Representations to the Court. By presenting to the court (whether by signing, filing, **submitting**, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, ..."	Providing documents to the court	
Rule 9022(a)	"(a) Judgment or Order of Bankruptcy Judge. Immediately on the entry of a judgment or order the clerk shall serve a notice of entry in the manner provided in Rule 5(b) F.R.Civ.P. on the contesting parties and on other entities as the court directs. Unless the case is a chapter 9 municipality case, the clerk shall forthwith **transmit** to the United States trustee a copy of the judgment or order. Service of the notice shall be noted in the docket. Lack of notice of the entry does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 8002."	Transmission to trustee	
Rule 9022(b)	"(b) Judgment or Order of District Judge. Notice of a judgment or order entered by a district judge is governed by Rule 77(d) F.R.Civ.P. Unless the case is a chapter 9 municipality case, the clerk shall forthwith **transmit** to the United States trustee a copy of a judgment or order entered by a district judge."	Transmission to trustee	

Rule Provision	Relevant Language	Type of Provision	Comments
Rule 9027(e)(3)	"(3) Any party who has filed a pleading in connection with the removed claim or cause of action, other than the party filing the notice of removal, shall file a statement admitting or denying any allegation in the notice of removal that upon removal of the claim or cause of action the proceeding is core or non-core. If the statement alleges that the proceeding is non-core, it shall state that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge. A statement required by this paragraph shall be signed pursuant to Rule 9011 and shall be filed not later than 14 days after the filing of the notice of removal. Any party who files a statement pursuant to this paragraph shall **mail** a copy to every other party to the removed claim or cause of action."	Delivering documents to parties	
Rule 9027(h)	"(h) **Record Supplied**. When a party is entitled to copies of the records and proceedings in any civil action or proceeding in a federal or a state court, to be used in the removed civil action or proceeding, and the clerk of the federal or state court, on demand accompanied by payment or tender of the lawful fees, fails to **deliver** certified copies, the court may, on affidavit reciting the facts, direct such record to be **supplied** by affidavit or otherwise. Thereupon the proceedings, trial and judgment may be had in the court, and all process awarded, as if certified copies had been filed."	Transmitting the record	
Rule 9029(b)	"(b) Procedure When There is No Controlling Law. A judge may regulate practice in any manner consistent with federal law, these rules, Official Forms, and local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, Official Forms, or the local rules of the district unless the alleged violator has been **furnished** in the particular case with actual notice of the requirement."	Delivering notice	
Rule 9033(a)	"(a) Service. In non-core proceedings heard pursuant to 28 U.S.C. §157(c)(1), the bankruptcy judge shall file proposed findings of fact and conclusions of law. The clerk shall serve forthwith copies on all parties by **mail** and note the date of **mailing** on the docket."	Manner of service	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 9034	"Unless the United States trustee requests otherwise or the case is a chapter 9 municipality case, any entity that files a pleading, motion, objection, or similar paper relating to any of the following matters shall **transmit** a copy thereof to the United States trustee within the time required by these rules for service of the paper: . . . . (k) any other matter in which the United States trustee requests copies of filed papers or the court orders copies **transmitted** to the United States trustee."	Transmission to trustee	
Rule 9036	"Rule 9036. **Notice by Electronic Transmission** Whenever the clerk or some other person as directed by the court is required to send **notice by mail** and the entity entitled to receive the notice requests in writing that, instead of **notice by mail**, all or part of the information required to be contained in the notice be sent by a specified type of **electronic transmission**, the court may direct the clerk or other person to send the information by such **electronic transmission**. **Notice by electronic means** is complete on transmission."	Manner of providing notice	
Rule 9037(a)	"(a) Redacted Filings. Unless the court orders otherwise, in an **electronic or paper filing** made with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual, other than the debtor, known to be and identified as a minor, or a financial-account number, a party or nonparty making the filing may include only: . . . ."	Manner of filing	

TAB 6E

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Federal Rules of Civil Procedure

Rule Provision	Relevant Language	Type of Provision	Comments
Rule 4(b)	"(b) Issuance. On or after filing the complaint, the plaintiff may **present** a summons to the clerk for signature and seal. If the summons is properly completed, the clerk must sign, seal, and **issue it** to the plaintiff for service on the defendant. A summons—or a copy of a summons that is addressed to multiple defendants—must be **issued** for each defendant to be served."	Presentation and issuance of summons	
Rule 4(c)(1)	"(1) In General. A summons must be served with a copy of the complaint. The plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m) and must **furnish** the necessary copies to the person who makes service."	Providing copies to process server	
Rule 4(d)(1)(G)	"(d) Waiving Service. (1) *Requesting a Waiver* . . . . . The notice and request must: . . . . (G) **be sent by first-class mail or other reliable means**."	Sending documents between parties	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 4(e)	"(e) Serving an Individual Within a Judicial District of the United States. Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been filed—may be served in a judicial district of the United States by: (1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or (2) doing any of the following: (A) **delivering a copy of the summons and of the complaint to the individual personally**; (B) **leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there**; or (C) **delivering a copy of each to an agent authorized by appointment or by law to receive service of process**."	Manner of service	*See also* Rule 27(a)(2) ("The notice may be served either inside or outside the district or state in the manner provided in Rule 4."); Rule 71.1(d)(3)(A) ("When a defendant whose address is known resides within the United States or a territory subject to the administrative or judicial jurisdiction of the United States, personal service of the notice (without a copy of the complaint) must be made in accordance with Rule 4."); Suppl. R. B(2)(a) ("(a) the complaint, summons, and process of attachment or garnishment have been served on the defendant in a manner authorized by Rule 4."); Rule 4(i)(3) ("(3) Officer or Employee Sued Individually. To serve a United States officer or employee sued in an individual capacity . . . , a party must serve the United States and also serve the officer or employee under Rule 4(e), (f), or (g).").

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 4(f)	"(f) Serving an Individual in a Foreign Country. Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been filed—may be served at a place not within any judicial district of the United States: . . . (C) unless prohibited by the foreign country's law, by: (i) **delivering a copy of the summons and of the complaint to the individual personally**; or (ii) **using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt**; or (3) by other means not prohibited by international agreement, as the court orders."	Manner of service	
Rule 4(g)	"(g) Serving a Minor or an Incompetent Person. A minor or an incompetent person in a judicial district of the United States must be **served by following state law** for serving a summons or like process on such a defendant in an action brought in the courts of general jurisdiction of the state where service is made. A minor or an incompetent person who is not within any judicial district of the United States must be served in the manner prescribed by Rule 4(f)(2)(A), (f)(2)(B), or (f)(3)."	Manner of service	This provision only indirectly addresses manner of service, by reference to other provisions.

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 4(h)	"(h) Serving a Corporation, Partnership, or Association. Unless federal law provides otherwise or the defendant's waiver has been filed, a domestic or foreign corporation, or a partnership or other unincorporated association that is subject to suit under a common name, must be **served**: (1) in a judicial district of the United States: (A) in the manner prescribed by Rule 4(e)(1) for serving an individual; or (B) by **delivering a copy** of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and—if the agent is one authorized by statute and the statute so requires—by also **mailing a copy** of each to the defendant; or (2) at a place not within any judicial district of the United States, in any manner prescribed by Rule 4(f) for serving an individual, except **personal delivery** under (f)(2)(C)(i)."	Manner of service	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 4(i)(1)	"(i) Serving the United States and Its Agencies, Corporations, Officers, or Employees. (1) *United States* . To serve the United States, a party must: (A)(i) **deliver a copy** of the summons and of the complaint to the United States attorney for the district where the action is brought—or to an assistant United States attorney or clerical employee whom the United States attorney designates in a writing filed with the court clerk—or (ii) **send a copy of each by registered or certified mail** to the civil-process clerk at the United States attorney's office; (B) **send a copy of each by registered or certified mail** to the Attorney General of the United States at Washington, D.C.; and (C) if the action challenges an order of a nonparty agency or officer of the United States, **send a copy of each by registered or certified mail** to the agency or officer."	Manner of service	
Rule 4(i)(2)	"(2) *Agency; Corporation; Officer or Employee Sued in an Official Capacity* . To serve a United States agency or corporation, or a United States officer or employee sued only in an official capacity, a party must serve the United States and also **send a copy of the summons and of the complaint by registered or certified mail** to the agency, corporation, officer, or employee."	Manner of service	
Rule 4(j)(1)	"(j) Serving a Foreign, State, or Local Government. (1) *Foreign State* . A foreign state or its political subdivision, agency, or instrumentality must be **served in accordance with 28 U.S.C. §1608**."	Manner of service	This provision only indirectly addresses manner of service, by reference to other provisions.

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 4(j)(2)	"(2) *State or Local Government* . A state, a municipal corporation, or any other state-created governmental organization that is subject to suit must be **served by**: (A) **delivering a copy** of the summons and of the complaint to its chief executive officer; or (B) **serving a copy of each in the manner prescribed by that state's law** for serving a summons or like process on such a defendant."	Manner of service	
Rule 4(*l*)(2)(B)	"(2) *Service Outside the United States* . Service not within any judicial district of the United States must be proved as follows: . . . (B) if made under Rule 4(f)(2) or (f)(3), by a receipt signed by the addressee, or by other evidence satisfying the court that the summons and complaint were **delivered** to the addressee."	Manner of service	

Rule Provision	Relevant Language	Type of Provision	Comments
Rule 5(b)(2)	"(2) *Service in General* . A **paper is served** under this rule by: (A) **handing it to the person**; (B) **leaving it**: (i) **at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office**; or (ii) **if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there**; (C) **mailing it to the person's last known address**—in which event service is **complete upon mailing**; (D) **leaving it with the court clerk** if the person has no known address; (E) **sending it 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; or (F) **delivering it 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**."	Manner of service	*See also* Rule 6(d) (referring back to manner of service and providing extra time for certain types of service); Rule11(c)(2) ("The motion must be served under Rule 5…."); Rule 25(a)(3) ("A motion to substitute … must be served on the parties as provided in Rule 5 and on nonparties as provided in Rule 4. A statement noting death must be served in the same manner."); Rule 25(b) (""The motion [related to incompetency] must be served as provided in Rule 25(a)(3)."); Rule 71.1(f) ("The plaintiff need not serve a copy of an amendment, but must serve notice of the filing, as provided in Rule 5(b), on every affected party . . . ").
Rule 5(b)(3)	"(3) *Using Court Facilities* . If a local rule so authorizes, a party may **use the court's transmission facilities to make service** under Rule 5(b)(2)(E)."	Manner of service	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 5(d)(2)	"(2) *How Filing Is Made—In General* . A paper is **filed by delivering it**: (A) to the clerk; or (B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly **send** it to the clerk."	Manner of filing; Sending to clerk	
Rule 5(d)(3)	"(3) ***Electronic Filing*** *, Signing, or Verification* . A court may, by local rule, allow papers to be **filed**, signed, or verified **by electronic means** that are consistent with any technical standards established by the Judicial Conference of the United States. A local rule may require **electronic filing** only if reasonable exceptions are allowed. A paper **filed electronically** in compliance with a local rule is a written paper for purposes of these rules."	Manner of filing	
Rule 5.1(a)(2)	"(2) **serve** the notice and paper on the Attorney General of the United States if a federal statute is questioned—or on the state attorney general if a state statute is questioned—**either by certified or registered mail or by sending it to an electronic address designated by the attorney general for this purpose**."	Manner of service	
Rule 5.2(a)	"(a) Redacted Filings. Unless the court orders otherwise, in an **electronic or paper filing** with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing may include only: . . . ."	Manner of filing	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 5.2(c)	"(c) Limitations on Remote Access to **Electronic Files**; Social-Security Appeals and Immigration Cases. Unless the court orders otherwise, in an action for benefits under the Social Security Act, and in an action or proceeding relating to an order of removal, to relief from removal, or to immigration benefits or detention, access to an **electronic file** is authorized as follows: (1) the parties and their attorneys may have **remote electronic access to any part of the case file**, including the administrative record; (2) any other person may have **electronic access to the full record** at the courthouse, but may have **remote electronic access** only to: (A) the docket maintained by the court; and (B) an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record."	Manner of keeping record; Access to record	
Rule 5.2(e)(2)	"(e) Protective Orders. For good cause, the court may by order in a case: . . . . (2) limit or prohibit a nonparty's **remote electronic access** to a document filed with the court."	Access to record	
Rule 6(a)(4)	"(4) *"Last Day" Defined* . Unless a different time is set by a statute, local rule, or court order, the last day ends: (A) **for electronic filing**, at midnight in the court's time zone; and (B) **for filing by other means**, when the clerk's office is scheduled to close."	Manner of filing	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 11(b)	"(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, **submitting**, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: . . . ."	Providing documents to the court	
Rule 15(c)(2)	"(2) *Notice to the United States* . When the United States or a United States officer or agency is added as a defendant by amendment, the notice requirements of Rule 15(c)(1)(C)(i) and (ii) are satisfied if, during the stated period, **process was delivered or mailed** to the United States attorney or the United States attorney's designee, to the Attorney General of the United States, or to the officer or agency."	Manner of service	
Rule 26(a)(1)(A)	"(a) Required Disclosures. (1) *Initial Disclosure* . (A) *In General* . Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, **provide** to the other parties: . . . ."	Exchanging discovery	
Rule 26(a)(2)(B)	"(B) *Witnesses Who Must* ***Provide*** *a Written Report* . Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. . . ."	Exchanging discovery	
Rule 26(a)(2)(C)	"(C) *Witnesses Who Do Not* ***Provide*** *a Written Report* . Unless otherwise stipulated or ordered by the court, if the witness is not required to **provide** a written report, this disclosure must state . . . ."	Exchanging discovery	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 26(a)(3)(A)	"(A) *In General* . In addition to the disclosures required by Rule 26(a)(1) and (2), a party must **provide** to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment: (i) the name and, if not previously **provided**, the address and telephone number of each witness—separately identifying those the party expects to present and those it may call if the need arises; (ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and (iii) an identification of each document or other exhibit, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises."	Exchanging discovery	"Provide," as used here, may be outside the scope of this project because it is a general term, without specifying the manner of providing the document.
Rule 26(b)(4)(A)	"(A) *Deposition of an Expert Who May Testify* . A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is **provided**."	Exchanging discovery	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 26(b)(4)(C)	"(C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses* . Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to **provide** a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications: (i) relate to compensation for the expert's study or testimony; (ii) identify facts or data that the party's attorney **provided** and that the expert considered in forming the opinions to be expressed; or (iii) identify assumptions that the party's attorney **provided** and that the expert relied on in forming the opinions to be expressed."	Exchanging discovery; Sending information from attorney to expert	"Provided," as used in the second and third instance in this provision, may not have to do with exchanging physical documents.
Rule 26(c)(1)(H)	"(1) *In General* . . . . The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: . . . . (H) requiring that the parties simultaneously **file specified documents or information in sealed envelopes**, to be opened as the court directs."	Manner of filing	
Rule 26(c)(2)	"(2) *Ordering Discovery* . If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person **provide** or permit **discovery**."	Exchanging discovery	"Provide," as used here, may be outside the scope of this project because it is a general term, without specifying the manner of providing the document.

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 26(f)(2)	"(2) *Conference Content; Parties' Responsibilities* . In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for **submitting** to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person."	Providing documents to the court	
Rule 26(f)(4)(B)	"(4) *Expedited Schedule* . If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule: . . . (B) require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, or excuse the parties from **submitting** a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference."	Providing documents to the court	
Rule 27(a)(2)	"(2) *Notice and Service* . At least 21 days before the hearing date, the petitioner must serve each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing. The notice may be served either inside or outside the district or state in the manner provided in Rule 4. If that service cannot be made with reasonable diligence on an expected adverse party, the court may order **service by publication or otherwise**. The court must appoint an attorney to represent persons not served in the manner provided in Rule 4 and to cross-examine the deponent if an unserved person is not otherwise represented. If any expected adverse party is a minor or is incompetent, Rule 17(c) applies."	Manner of service	*See also* Rule 27(b)(2) ("The party who wants to perpetuate testimony may move for leave to take the depositions, on the same notice and service as if the action were pending in the district court.").

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 30(c)(3)	"(3) *Participating Through Written Questions* . Instead of participating in the oral examination, a party may **serve written questions in a sealed envelope** on the party noticing the deposition, who must **deliver** them to the officer. The officer must ask the deponent those questions and record the answers verbatim."	Manner of service; Transmission between party and deposing officer	
Rule 30(f)(1)	"Certification and **Delivery**; Exhibits; Copies of the Transcript or Recording; Filing. (1) *Certification and* ***Delivery*** . The officer must certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony. The certificate must accompany the record of the deposition. Unless the court orders otherwise, the officer must **seal the deposition in an envelope or package** bearing the title of the action and marked “Deposition of [witness's name]” and must promptly **send it** to the attorney who arranged for the transcript or recording. The attorney must store it under conditions that will protect it against loss, destruction, tampering, or deterioration."	Transmission between party and deposing officer	Although the reference to sealing the deposition in an envelope does not refer to transferring documents, it is highlighted because it implies the mode of sending. Separately, this provision also mentions "storing" the deposition, the manner of which might vary depending on whether done electronically or in paper.
Rule 30(f)(3)	"(3) *Copies of the Transcript or Recording* . Unless otherwise stipulated or ordered by the court, the officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the officer must **furnish** a copy of the transcript or recording to any party or the deponent."	Transmission between party and deposing officer	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 31(b)	"(b) **Delivery** to the Officer; Officer's Duties. The party who noticed the deposition must **deliver** to the officer a copy of all the questions served and of the notice. The officer must promptly proceed in the manner provided in Rule 30(c), (e), and (f) to: (1) take the deponent's testimony in response to the questions; (2) prepare and certify the deposition; and (3) **send** it to the party, attaching a copy of the questions and of the notice."	Transmission between party and deposing officer	
Rule 32(c)	"(c) Form of Presentation. Unless the court orders otherwise, a party must **provide** a transcript of any deposition testimony the party offers, but may **provide** the court with the testimony in nontranscript form as well. On any party's request, deposition testimony offered in a jury trial for any purpose other than impeachment must be presented in nontranscript form, if available, unless the court for good cause orders otherwise."	Providing documents to the court	Although this provision also mentions "presenting" "in nontranscript form," this reference likely falls outside the scope of this project. General references to presenting to the court, without referencing the manner of doing so, have been excluded.
Rule 32(d)(4)	"(4) *To Completing and Returning the Deposition* . An objection to how the officer transcribed the testimony—or prepared, signed, certified, sealed, endorsed, **sent**, or otherwise dealt with the deposition—is waived unless a motion to suppress is made promptly after the error or irregularity becomes known or, with reasonable diligence, could have been known."	Transmission between party and deposing officer	

Rule Provision	Relevant Language	Type of Provision	Comments
Rule 34(b)(2)(E)	"(E) *Producing the Documents or Electronically Stored Information* . Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information: (i) A party must **produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request**; (ii) If a request does not specify a form for producing electronically stored information, a party must **produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms**; and (iii) A party need not produce the same electronically stored information in more than one form."	Manner of production	While this spreadsheet excludes general references to "producing" documents in discovery, this provision is included because it refers to the manner of production
Rule 35(b)(1)	"(1) *Request by the Party or Person Examined* . The party who moved for the examination must, on request, **deliver** to the requester a copy of the examiner's report, together with like reports of all earlier examinations of the same condition. The request may be made by the party against whom the examination order was issued or by the person examined."	Sending documents between parties	
Rule 35(b)(3)	"(3) *Request by the Moving Party* . After **delivering** the reports, the party who moved for the examination may request—and is entitled to receive—from the party against whom the examination order was issued like reports of all earlier or later examinations of the same condition. But those reports need not be **delivered** by the party with custody or control of the person examined if the party shows that it could not obtain them."	Sending documents between parties	
Rule 35(b)(5)	"(5) *Failure to* ***Deliver*** *a Report* . The court on motion may order—on just terms—that a party **deliver** the report of an examination. If the report is not **provided**, the court may exclude the examiner's testimony at trial."	Sending documents between parties	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 36(a)(2)	"(2) *Form; Copy of a Document* . Each matter must be separately stated. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise **furnished** or made available for inspection and copying."	Sending documents between parties	
Rule 37(e)	"(e) Failure to **Provide** Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to **provide** electronically stored information lost as a result of the routine, good-faith operation of an electronic information system."	Exchanging discovery	
Rule 37(f)	"(f) Failure to Participate in Framing a Discovery Plan. If a party or its attorney fails to participate in good faith in developing and **submitting** a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure."	Providing documents to the court	
Rule 44.1	"A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not **submitted** by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law."	Providing documents to the court	
Rule 45(b)(1)	"(1) *By Whom; Tendering Fees; Serving a Copy of Certain Subpoenas* . Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires **delivering** a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law. . . ."	Manner of service	

Rule Provision	Relevant Language	Type of Provision	Comments
Rule 45(d)(1)(A)	"(1) *Producing Documents or Electronically Stored Information* . These procedures apply to producing documents or electronically stored information: (A) *Documents* . A person responding to a subpoena to produce documents must **produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand**."	Manner of production	While this spreadsheet excludes general references to "producing" documents in discovery, this provision is included because it refers to the manner of production.
Rule 45(d)(1)(B)	"(B) *Form for Producing Electronically Stored Information Not Specified* . If a subpoena does not specify a form for producing electronically stored information, the person responding must **produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms**."	Manner of production	While this spreadsheet excludes general references to "producing" documents in discovery, this provision is included because it refers to the manner of production.
Rule 49(b)(1)	"(1) *In General* . The court may **submit** to the jury forms for a general verdict, together with written questions on one or more issues of fact that the jury must decide. . . ."	Providing documents to the jury	
Rule 51(a)(1)	"(1) *Before or at the Close of the Evidence* . At the close of the evidence or at any earlier reasonable time that the court orders, a party may file and **furnish** to every other party written requests for the jury instructions it wants the court to give."	Sending documents between parties	
Rule 56(h)	"(h) Affidavit or Declaration **Submitted** in Bad Faith. If satisfied that an affidavit or declaration under this rule is **submitted** in bad faith or solely for delay, the court — after notice and a reasonable time to respond — may order the **submitting** party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions."	Providing documents to the court	
Rule 65.1	". . . The surety's liability may be enforced on motion without an independent action. The motion and any notice that the court orders may be served on the court clerk, who must promptly **mail a copy** of each to every surety whose address is known."	Manner of service	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 67(a)	"(a) Depositing Property. If any part of the relief sought is a money judgment or the disposition of a sum of money or some other deliverable thing, a party—on notice to every other party and by leave of court—may deposit with the court all or part of the money or thing, whether or not that party claims any of it. The depositing party must **deliver** to the clerk a copy of the order permitting deposit."	Providing documents to the court	
Rule 70(a)	"(a) Party's Failure to Act; Ordering Another to Act. If a judgment requires a party to convey land, to **deliver** a deed or other document, or to perform any other specific act and the party fails to comply within the time specified, the court may order the act to be done—at the disobedient party's expense—by another person appointed by the court. When done, the act has the same effect as if done by the party."	Sending documents pursuant to judgment	
Rule 71.1(c)(5)	"(5) *Filing; Additional Copies* . In addition to filing the complaint, the plaintiff must **give** the clerk at least one copy for the defendants' use and additional copies at the request of the clerk or a defendant."	Providing documents to the court	
Rule 71.1(d)(1)	"(1) ***Delivering*** *Notice to the Clerk* . On filing a complaint, the plaintiff must promptly **deliver** to the clerk joint or several notices directed to the named defendants. When adding defendants, the plaintiff must **deliver** to the clerk additional notices directed to the new defendants."	Providing documents to the court	
Rule 71.1(d)(2)(B)	"(B) *Conclusion* . The notice must conclude with the name, telephone number, and e-mail address of the plaintiff's attorney and an **address within the district in which the action is brought where the attorney may be served**."	Manner of service	This only indirectly touches on manner of service, by mentioning that it will be to an address (presumably physical).

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 71.1(d)(3)(A)	"(A) ***Personal Service*** . When a defendant whose address is known resides within the United States or a territory subject to the administrative or judicial jurisdiction of the United States, **personal service** of the notice (without a copy of the complaint) must be made in accordance with Rule 4."	Manner of service	*See also* Rule 71.1(g) ("If a defendant dies, becomes incompetent, or transfers an interest after being joined, the court may, on motion and notice of hearing, order that the proper party be substituted. Service of the motion and notice on a nonparty must be made as provided in Rule 71.1(d)(3).").

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 71.1(d)(3)(B)	"(B) ***Service by Publication*** . (i) A defendant may be **served by publication** only when the plaintiff's attorney files a certificate stating that the attorney believes the defendant cannot be **personally served**, because after diligent inquiry within the state where the complaint is filed, the defendant's place of residence is still unknown or, if known, that it is beyond the territorial limits of **personal service**. **Service is then made by publishing the notice—once a week for at least 3 successive weeks—in a newspaper published in the county where the property is located or, if there is no such newspaper, in a newspaper with general circulation where the property is located**. Before the last publication, a copy of the notice must also be **mailed** to every defendant who cannot be **personally served** but whose place of residence is then known. Unknown owners may be **served by publication** in the same manner by a notice addressed to "Unknown Owners." (ii) **Service by publication** is complete on the date of the last publication. The plaintiff's attorney must prove **publication and mailing** by a certificate, attach a printed copy of the published notice, and mark on the copy the newspaper's name and the dates of publication."	Manner of service	
Rule 71.1(d)(4)	"(4) *Effect of* ***Delivery*** *and Service* . **Delivering** the notice to the clerk and serving it have the same effect as serving a summons under Rule 4."	Providing documents to the court	
Rule 71.1(f)	"(f) Amending Pleadings. . . . In addition, the plaintiff must **give** the clerk at least one copy of each amendment for the defendants' use, and additional copies at the request of the clerk or a defendant. . . ."	Providing documents to the court	
Rule 72(b)(1)	"(1) *Findings and Recommendations* . . . . The magistrate judge must enter a recommended disposition, including, if appropriate, proposed findings of fact. The clerk must promptly **mail** a copy to each party."	Manner of service	

Rule Provision	Relevant Language	Type of Provision	Comments
Rule 83(a)(1)	"(1) *In General* . After giving public notice and an opportunity for comment, a district court, acting by a majority of its district judges, may adopt and amend rules governing its practice. . . . Copies of rules and amendments must, on their adoption, be **furnished** to the judicial council and the Administrative Office of the United States Courts and be made available to the public."	Providing local rules to judicial council and AO	
Rule 83(b)	"(b) Procedure When There Is No Controlling Law. . . . No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local rules unless the alleged violator has been **furnished** in the particular case with actual notice of the requirement."	Furnishing notice	General statements of providing notice, notifying, etc. have been excluded from this chart, but this example of "furnish[ing]" notice is included because "furnishing" has been one of the possible terms discussed for use in rules describing sharing of documents, either electronically or otherwise.

SUPPLEMENTAL ADMIRALTY RULES

Rule Provision	Relevant Language	Type of Provision	Comments
Rule B(1)(d)(i)	"(d)(i) If the property is a vessel or tangible property on board a vessel, the summons, process, and any supplemental process must be **delivered** to the marshal for service."	Delivering process for service	
Rule B(1)(d)(ii)	"(ii) If the property is other tangible or intangible property, the summons, process, and any supplemental process must be **delivered** to a person or organization authorized to serve it, who may be (A) a marshal; (B) someone under contract with the United States; (C) someone specially appointed by the court for that purpose; or, (D) in an action brought by the United States, any officer or employee of the United States."	Delivering process for service	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule B(2)	"(2) Notice to Defendant. No default judgment may be entered except upon proof—which may be by affidavit—that: (a) the complaint, summons, and process of attachment or garnishment have been served on the defendant in a manner authorized by Rule 4; (b) the plaintiff or the garnishee has **mailed** to the defendant the complaint, summons, and process of attachment or garnishment, **using any form of mail requiring a return receipt**; or (c) the plaintiff or the garnishee has tried diligently to give notice of the action to the defendant but could not do so."	Manner of service	*See also* Rule D ("In all actions for possession, partition, . . . the process shall be by a warrant of arrest of the vessel, cargo, or other property, and by **notice in the manner provided by Rule B(2)** to the adverse party or parties.").
Rule C(3)(b)(i)	"(i) If the property that is the subject of the action is a vessel or tangible property on board a vessel, the warrant and any supplemental process must be **delivered** to the marshal for service."	Delivering process for service	
Rule C(3)(b)(ii)	"(ii) If the property that is the subject of the action is other property, tangible or intangible, the warrant and any supplemental process must be **delivered** to a person or organization authorized to enforce it, who may be: (A) a marshal; (B) someone under contract with the United States; (C) someone specially appointed by the court for that purpose; or, (D) in an action brought by the United States, any officer or employee of the United States."	Delivering process for service	
Rule C(4)	"(4) Notice. No notice other than execution of process is required when the property that is the subject of the action has been released under Rule E(5). If the property is not released within 14 days after execution, the plaintiff must promptly—or within the time that the court allows—**give public notice of the action and arrest in a newspaper designated by court order and having general circulation in the district**, but **publication** may be terminated if the property is released before **publication** is completed. . . ."	Manner of providing notice	

Rule Provision	Relevant Language	Type of Provision	Comments
Rule E(3)(b)	"*Issuance and* ***Delivery*** . Issuance and **delivery** of process in rem, or of maritime attachment and garnishment, shall be held in abeyance if the plaintiff so requests."	Manner of service	
Rule E(4)(a)	"(a) *In General* . Upon issuance and **delivery** of the process, or, in the case of summons with process of attachment and garnishment, when it appears that the defendant cannot be found within the district, the marshal or other person or organization having a warrant shall forthwith execute the process in accordance with this subdivision (4), making due and prompt return."	Manner of service	
Rule F(4)	"(4) Notice to Claimants. . . . The notice shall be **published in such newspaper or newspapers as the court may direct** once a week for four successive weeks prior to the date fixed for the filing of claims. The plaintiff not later than the day of second **publication** shall also **mail** a copy of the notice to every person known to have made any claim against the vessel or the plaintiff arising out of the voyage or trip on which the claims sought to be limited arose. In cases involving death a copy of such notice shall be **mailed** to the decedent at the decedent's last known address, and also to any person who shall be known to have made any claim on account of such death."	Manner of providing notice	
Rule F(6)	"(6) Information To Be Given Claimants. Within 30 days after the date specified in the notice for filing claims, or within such time as the court thereafter may allow, the plaintiff shall **mail** to the attorney for each claimant (or if the claimant has no attorney to the claimant) a list setting forth (a) the name of each claimant, (b) the name and address of the claimant's attorney (if the claimant is known to have one), (c) the nature of the claim, i.e., whether property loss, property damage, death, personal injury etc., and (d) the amount thereof."	Manner of providing notice	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule G(3)(c)(i)	"(i) The warrant and any supplemental process must be **delivered** to a person or organization authorized to execute it, who may be: (A) a marshal or any other United States officer or employee; (B) someone under contract with the United States; or (C) someone specially appointed by the court for that purpose."	Delivering process for service	
Rule G(3)(c)(iv)	"(iv) If executing a warrant on property outside the United States is required, the warrant may be **transmitted** to an appropriate authority for serving process where the property is located."	Delivering process for service	
Rule G(4)(a)(i)	"(a) ***Notice by Publication*** . (i) *When* ***Publication*** *Is Required* . A judgment of forfeiture may be entered only if the government has **published notice** of the action within a reasonable time after filing the complaint or at a time the court orders. But notice need not be **published** if: (A) the defendant property is worth less than $1,000 and direct notice is sent under Rule G(4)(b) to every person the government can reasonably identify as a potential claimant; or (B) the court finds that the cost of **publication** exceeds the property's value and that other means of notice would satisfy due process."	Manner of providing notice	
Rule G(4)(a)(iii)	"(iii) *Frequency of* ***Publication*** . **Published notice** must appear: (A) once a week for three consecutive weeks; or (B) only once if, before the action was filed, notice of nonjudicial forfeiture of the same property was **published** on an official internet government forfeiture site for at least 30 consecutive days, or in a **newspaper of general circulation** for three consecutive weeks in a district where **publication** is authorized under Rule G(4)(a)(iv)."	Manner of providing notice	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule G(4)(a)(iv)	"(iv) *Means of* ***Publication*** . The government should select from the following options a means of **publication** reasonably calculated to notify potential claimants of the action: (A) if the property is in the United States, **publication in a newspaper generally circulated** in the district where the action is filed, where the property was seized, or where property that was not seized is located; (B) if the property is outside the United States, **publication in a newspaper generally circulated** in a district where the action is filed, in a **newspaper generally circulated** in the country where the property is located, or in **legal notices published and generally circulated** in the country where the property is located; or (C) instead of (A) or (B), **posting a notice on an official internet government forfeiture site** for at least 30 consecutive days."	Manner of providing notice	
Rule G(4)(b)(i)	"(i) *Direct Notice Required* . The government must **send** notice of the action and a copy of the complaint to any person who reasonably appears to be a potential claimant on the facts known to the government before the end of the time for filing a claim under Rule G(5)(a)(ii)(B)."	Manner of providing notice	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule G(4)(b)(iii)	"(iii) *Sending Notice* . (A) The **notice must be sent by means reasonably calculated to reach the potential claimant**. (B) Notice may be **sent** to the potential claimant or to the attorney representing the potential claimant with respect to the seizure of the property or in a related investigation, administrative forfeiture proceeding, or criminal case. (C) Notice **sent** to a potential claimant who is incarcerated must be **sent** to the place of incarceration. (D) Notice to a person arrested in connection with an offense giving rise to the forfeiture who is not incarcerated when notice is **sent** may be **sent to the address** that person last gave to the agency that arrested or released the person. (E) Notice to a person from whom the property was seized who is not incarcerated when notice is **sent** may be **sent to the last address** that person gave to the agency that seized the property."	Manner of providing notice	
Rule G(4)(b)(iv)	"(iv) *When Notice Is Sent* . Notice by the following means is sent on the date when it is **placed in the mail, delivered to a commercial carrier, or sent by electronic mail**."	Manner of providing notice	
Rule G(4)(b)(v)	"(v) *Actual Notice* . A potential claimant who had actual notice of a forfeiture action may not oppose or seek relief from forfeiture because of the government's failure to **send** the required notice."	Manner of providing notice	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule G(5)(a)(ii)	"(ii) Unless the court for good cause sets a different time, the claim must be filed: (A) by the time stated in a direct notice **sent** under Rule G(4)(b); (B) if notice was **published** but direct notice was not **sent** to the claimant or the claimant's attorney, no later than 30 days after final **publication** of newspaper notice or legal notice under Rule G(4)(a) or no later than 60 days after the first day of **publication on an official internet government forfeiture site**; or (C) if notice was not **published** and direct notice was not **sent** to the claimant or the claimant's attorney: (1) if the property was in the government's possession, custody, or control when the complaint was filed, no later than 60 days after the filing, not counting any time when the complaint was under seal or when the action was stayed before execution of a warrant issued under Rule G(3)(b); or (2) if the property was not in the government's possession, custody, or control when the complaint was filed, no later than 60 days after the government complied with 18 U.S.C. §985(c) as to real property, or 60 days after process was executed on the property under Rule G(3)."	Manner of providing notice	

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Federal Rules of Criminal Procedure

Rule Provision	Relevant Language	Type of Provision	Comments
Rule 1(b)(11)	"(11) "Telephone" means any technology for **transmitting** live electronic voice communication."	Transmitting voice communications	This may fall outside the scope of this project because it does not seem to apply to sharing documents. It is included because of the use of "transmitting."
Rule 4(c)(3)(A)	"(A) A warrant is executed by arresting the defendant. Upon arrest, an officer possessing the original or a duplicate original warrant must **show** it to the defendant. If the officer does not possess the warrant, the officer must inform the defendant of the warrant's existence and of the offense charged and, at the defendant's request, must **show** the original or a duplicate original warrant to the defendant as soon as possible."	Showing documents	*See also* Rule 9(c)(1)(A) ("The warrant must be executed or the summons served as provided in Rule 4(c)(1), (2), and (3).").
Rule 4(c)(3)(B)	"(B) A summons is served on an individual defendant: (i) by **delivering** a copy to the defendant personally; or (ii) by **leaving a copy at the defendant's residence or usual place of abode** with a person of suitable age and discretion residing at that location and by **mailing** a copy to the defendant's last known address."	Manner of service	
Rule 4(c)(3)(C)	"(C) A summons is served on an organization by **delivering** a copy to an officer, to a managing or general agent, or to another agent appointed or legally authorized to receive service of process. A copy must also be **mailed** to the organization's last known address within the district or to its principal place of business elsewhere in the United States."	Manner of service	

Rule Provision	Relevant Language	Type of Provision	Comments
Rule 4(c)(4)(A)	"(4) *Return* (A) After executing a warrant, the officer must **return** it to the judge before whom the defendant is brought in accordance with Rule 5. The officer may do so **by reliable electronic means**. At the request of an attorney for the government, an unexecuted warrant must be brought back to and canceled by a magistrate judge or, if none is reasonably available, by a state or local judicial officer."	Manner of returning a warrant	*See also* Rule 9(c)(2) ("A warrant or summons must be returned in accordance with Rule 4(c)(4).").
Rule 4(c)(4)(B)	"(B) The person to whom a summons was **delivered** for service must return it on or before the return day."	Presentation and/or issuance of summons	
Rule 4(c)(4)(C)	"(C) At the request of an attorney for the government, a judge may **deliver** an unexecuted warrant, an unserved summons, or a copy of the warrant or summons to the marshal or other authorized person for execution or service."	Presentation and/or issuance of summons	
Rule 4(d)	"(d) Warrant **by Telephone or Other Reliable Electronic Means**. In accordance with Rule 4.1, a magistrate judge may issue a warrant or summons **based on information communicated by telephone or other reliable electronic means**."	Providing information to the court	
Rule 4.1(a)	"(a) In General. A magistrate judge may consider **information communicated by telephone or other reliable electronic means** when reviewing a complaint or deciding whether to issue a warrant or summons."	Providing information to the court	
Rule 4.1(b)(2)(A)	"(A) Testimony Limited to Attestation. If the applicant does no more than attest to the contents of a written affidavit **submitted by reliable electronic means**, the judge must acknowledge the attestation in writing on the affidavit."	Submitting documents to the court	
Rule 4.1(b)(3)	"(3) Preparing a Proposed Duplicate Original of a Complaint, Warrant, or Summons. The applicant must prepare a proposed duplicate original of a complaint, warrant, or summons, and must read or otherwise **transmit** its contents verbatim to the judge."	Submitting documents to the court	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 4.1(b)(4)	"(4) Preparing an Original Complaint, Warrant, or Summons. If the applicant reads the contents of the proposed duplicate original, the judge must enter those contents into an original complaint, warrant, or summons. If the applicant **transmits** the contents **by reliable electronic means**, the transmission received by the judge may serve as the original."	Submitting documents to the court	
Rule 4.1(b)(5)	"(5) Modification. The judge may modify the complaint, warrant, or summons. The judge must then: (A) **transmit** the modified version to the applicant **by reliable electronic means**; or (B) file the modified original and direct the applicant to modify the proposed duplicate original accordingly."	Transmitting documents to applicant for warrant	
Rule 4.1(b)(6)	"(6) Issuance. To issue the warrant or summons, the judge must: . . . . (C) **transmit** the warrant or summons **by reliable electronic means** to the applicant or direct the applicant to sign the judge's name and enter the date and time on the duplicate original."	Transmitting documents to applicant for warrant	
Rule 5(c)(3)(D)	"(D) the magistrate judge must transfer the defendant to the district where the offense was allegedly committed if: (i) the government **produces** the warrant, a certified copy of the warrant, **or a reliable electronic form** of either; and (ii) the judge finds that the defendant is the same person named in the indictment, information, or warrant; . . . ."	Submitting documents to the court	
Rule 5(c)(3)(E)	"(E) when a defendant is transferred and discharged, the clerk must promptly **transmit** the papers and any bail to the clerk in the district where the offense was allegedly committed."	Transmission of papers between courts	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 5.1(g)	"(g) Recording the Proceedings. . . . A copy of the recording and a transcript may be **provided** to any party upon request and upon any payment required by applicable Judicial Conference regulations."	Providing documents to parties	
Rule 6(e)(3)(B)	"(B) A person to whom information is disclosed under Rule 6(e)(3)(A)(ii) may use that information only to assist an attorney for the government in performing that attorney's duty to enforce federal criminal law. An attorney for the government must promptly **provide** the court that impaneled the grand jury with the names of all persons to whom a disclosure has been made, and must certify that the attorney has advised those persons of their obligation of secrecy under this rule."	Providing information to the court	
Rule 6(e)(3)(G)	"(G) If the petition to disclose arises out of a judicial proceeding in another district, the petitioned court must transfer the petition to the other court unless the petitioned court can reasonably determine whether disclosure is proper. If the petitioned court decides to transfer, it must **send** to the transferee court the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand-jury secrecy. . . ."	Transmission of papers between courts	
Rule 6(f)	"(f) Indictment and Return. A grand jury may indict only if at least 12 jurors concur. The grand jury—or its foreperson or deputy foreperson—must return the indictment to a magistrate judge in open court. To avoid unnecessary cost or delay, the magistrate judge may take the return by video teleconference from the court where the grand jury sits. If a complaint or information is pending against the defendant and 12 jurors do not concur in the indictment, the foreperson must promptly and in writing **report** the lack of concurrence to the magistrate judge."	Manner of reporting to court	This provision also mentions "returning" an indictment to the judge, but because "returning" seems to be used in the legal sense, rather than in the physical sense, it probably falls outside the scope of this project.
Rule 9(d)	"(d) Warrant by Telephone or Other Means. In accordance with Rule 4.1, a magistrate judge may issue an arrest warrant or summons based on **information communicated by telephone or other reliable electronic means**."	Providing information to the court	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 12.3(a)(4)(D)(i)	"(D) Victim's Address and Telephone Number. If the government intends to rely on a victim's testimony to oppose the defendant's public-authority defense and the defendant establishes a need for the victim's address and telephone number, the court may: (i) order the government to **provide** the information in writing to the defendant or the defendant's attorney; . . . ."	Providing documents to parties	
Rule 14(b)	"(b) Defendant's Statements. Before ruling on a defendant's motion to sever, the court may order an attorney for the government to **deliver** to the court for in camera inspection any defendant's statement that the government intends to use as evidence."	Submitting documents to the court	
Rule 15(e)(3)	"(3) The government must **provide** to the defendant or the defendant's attorney, for use at the deposition, any statement of the deponent in the government's possession to which the defendant would be entitled at trial."	Providing documents to parties	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 16(a)(1)(B)	"(B) *Defendant's Written or Recorded Statement* . Upon a defendant's request, the government must **disclose** to the defendant, and make available for inspection, copying, or photographing, all of the following: (i) any relevant written or recorded statement by the defendant if: • statement is within the government's possession, custody, or control; and • the attorney for the government knows—or through due diligence could know—that the statement exists; (ii) the portion of any written record containing the substance of any relevant oral statement made before or after arrest if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent; and (iii) the defendant's recorded testimony before a grand jury relating to the charged offense."	Providing documents to parties	Although general references to "disclosing" have been excluded from this chart, this reference seemed so similar to exchanging documents in discovery that it seemed potentially relevant to the project.
Rule 16(a)(1)(C)	"(C) *Organizational Defendant* . Upon a defendant's request, if the defendant is an organization, the government must **disclose** to the defendant any statement described in Rule 16(a)(1)(A) and (B) if the government contends that the person making the statement: (i) was legally able to bind the defendant regarding the subject of the statement because of that person's position as the defendant's director, officer, employee, or agent; or (ii) was personally involved in the alleged conduct constituting the offense and was legally able to bind the defendant regarding that conduct because of that person's position as the defendant's director, officer, employee, or agent."	Providing documents to parties	Although general references to "disclosing" have been excluded from this chart, this reference seemed so similar to exchanging documents in discovery that it seemed potentially relevant to the project.

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 16(a)(1)(D)	"(D) *Defendant's Prior Record* . Upon a defendant's request, the government must **furnish** the defendant with a copy of the defendant's prior criminal record that is within the government's possession, custody, or control if the attorney for the government knows—or through due diligence could know—that the record exists."	Providing documents to parties	
Rule 16(a)(1)(G)	"(G) *Expert Witnesses* . At the defendant's request, the government must **give** to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) and the defendant complies, the government must, at the defendant's request, **give** to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial on the issue of the defendant's mental condition. The summary **provided** under this subparagraph must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications."	Providing documents to parties	
Rule 16(b)(1)(C)	"(C) *Expert Witnesses* . The defendant must, at the government's request, **give** to the government a written summary of any testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial, ..."	Providing documents to parties	
Rule 17(c)(1)	"(c) **Producing** Documents and Objects. (1) *In General* . A subpoena may order the witness to **produce** any books, papers, documents, data, or other objects the subpoena designates. The court may direct the witness to **produce** the designated items in court before trial or before they are to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them."	Providing documents to parties or the court	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 17(d)	"(d) Service. A marshal, a deputy marshal, or any nonparty who is at least 18 years old may serve a subpoena. The server must **deliver** a copy of the subpoena to the witness and must tender to the witness one day's witness-attendance fee and the legal mileage allowance. . . ."	Manner of service	
Rule 20(b)	"(b) Clerk's Duties. After receiving the defendant's statement and the required approvals, the clerk where the indictment, information, or complaint is pending must **send** the file, or a certified copy, to the clerk in the transferee district."	Transmission of papers between courts	
Rule 20(c)	"(c) Effect of a Not Guilty Plea. If the defendant pleads not guilty after the case has been transferred under Rule 20(a), the clerk must **return** the papers to the court where the prosecution began, and that court must restore the proceeding to its docket. . . ."	Transmission of papers between courts	
Rule 20(d)(2)	"(2) *Clerk's Duties* . After receiving the juvenile's written consent and the required approvals, the clerk where the indictment, information, or complaint is pending or where the alleged offense occurred must **send** the file, or a certified copy, to the clerk in the transferee district."	Transmission of papers between courts	
Rule 21(c)	"(c) Proceedings on Transfer. When the court orders a transfer, the clerk must **send** to the transferee district the file, or a certified copy, and any bail taken. The prosecution will then continue in the transferee district."	Transmission of papers between courts	
Rule 26.2(a)	"(a) Motion to **Produce**. After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, must order an attorney for the government or the defendant and the defendant's attorney to **produce**, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter of the witness's testimony."	Providing documents to parties	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 26.2(b)	"(b) **Producing** the Entire Statement. If the entire statement relates to the subject matter of the witness's testimony, the court must order that the statement be **delivered** to the moving party."	Providing documents to parties	
Rule 26.2(c)	"(c) **Producing** a Redacted Statement. . . . After excising any privileged or unrelated portions, the court must order **delivery** of the redacted statement to the moving party. If the defendant objects to an excision, the court must preserve the entire statement with the excised portion indicated, under seal, as part of the record."	Providing documents to parties	
Rule 26.2(e)	"(e) Sanction for Failure to **Produce** or **Deliver** a Statement. If the party who called the witness disobeys an order to **produce** or **deliver** a statement, the court must strike the witness's testimony from the record. . . ."	Providing documents to parties	
Rule 30(a)	"(a) In General. Any party may request in writing that the court instruct the jury on the law as specified in the request. The request must be made at the close of the evidence or at any earlier time that the court reasonably sets. When the request is made, the requesting party must **furnish** a copy to every other party."	Providing documents to parties	
Rule 32(c)(1)(A)	"(A) *In General* . The probation officer must conduct a presentence investigation and **submit** a report to the court before it imposes sentence unless: . . . ."	Submitting documents to the court	
Rule 32(c)(1)(B)	"(B) *Restitution* . If the law permits restitution, the probation officer must conduct an investigation and **submit** a report that contains sufficient information for the court to order restitution."	Submitting documents to the court	
Rule 32(e)(1)	"(1) *Time to Disclose* . Unless the defendant has consented in writing, the probation officer must not **submit** a presentence report to the court or disclose its contents to anyone until the defendant has pleaded guilty or nolo contendere, or has been found guilty."	Submitting documents to the court	
Rule 32(e)(2)	"(2) *Minimum Required Notice* . The probation officer must **give** the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period."	Providing documents to parties	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 32(g)	"(g) **Submitting** the Report. At least 7 days before sentencing, the probation officer must **submit** to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer's comments on them."	Submitting documents to the court	
Rule 32(i)(2)	"(2) *Introducing Evidence;* ***Producing*** *a Statement* . The court may permit the parties to introduce evidence on the objections. If a witness testifies at sentencing, Rule 26.2(a)–(d) and (f) applies. If a party fails to comply with a Rule 26.2 order to **produce** a witness's statement, the court must not consider that witness's testimony."	Providing documents to parties	
Rule 32.1(a)(5)(B)(i)	"(5) *Appearance in a District Lacking Jurisdiction* . If the person is arrested or appears in a district that does not have jurisdiction to conduct a revocation hearing, the magistrate judge must: . . . . (B) if the alleged violation did not occur in the district of arrest, transfer the person to the district that has jurisdiction if: (i) the government **produces** certified copies of the judgment, warrant, and warrant application, or **produces** copies of those certified documents **by reliable electronic means**; and . . . ."	Submitting documents to the court	
Rule 32.1(e)	"(e) **Producing** a Statement. Rule 26.2(a)–(d) and (f) applies at a hearing under this rule. If a party fails to comply with a Rule 26.2 order to **produce** a witness's statement, the court must not consider that witness's testimony."	Providing documents to parties	
Rule 32.2(b)(1)(B)	"(B) *Evidence and Hearing* . The court's determination may be based on evidence already in the record, including any written plea agreement, and on any additional evidence or information **submitted** by the parties and accepted by the court as relevant and reliable. . . ."	Submitting documents to the court	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 32.2(b)(5)(B)	"(B) *Special Verdict Form* . If a party timely requests to have the jury determine forfeiture, the government must **submit** a proposed Special Verdict Form listing each property subject to forfeiture and asking the jury to determine whether the government has established the requisite nexus between the property and the offense committed by the defendant."	Submitting documents to the court	
Rule 32.2(b)(6)(A)	"(A) ***Publishing*** *and* ***Sending*** *Notice* . If the court orders the forfeiture of specific property, the government must **publish** notice of the order and **send** notice to any person who reasonably appears to be a potential claimant with standing to contest the forfeiture in the ancillary proceeding."	Manner of providing notice	
Rule 32.2(b)(6)(C)	"(C) *Means of* ***Publication*** *; Exceptions to* ***Publication*** *Requirement* . **Publication** must take place **as described in Supplemental Rule G(4)(a)(iii) of the Federal Rules of Civil Procedure**, and may be **by any means described in Supplemental Rule G(4)(a)(iv)**. **Publication** is unnecessary if any exception in Supplemental Rule G(4)(a)(i) applies."	Manner of providing notice	
Rule 32.2(b)(6)(D)	"(D) *Means of* ***Sending*** *the Notice* . The notice may be **sent** in accordance with Supplemental Rules G(4)(b)(iii)–(v) of the Federal Rules of Civil Procedure."	Manner of providing notice	
Rule 41(d)(2)(A)	"(A) *Warrant on an Affidavit* . When a federal law enforcement officer or an attorney for the government **presents** an affidavit in support of a warrant, the judge may require the affiant to appear personally and may examine under oath the affiant and any witness the affiant produces."	Submitting documents to the court	
Rule 41(d)(3)	"(3) *Requesting a Warrant by Telephonic or Other Reliable Electronic Means* . In accordance with Rule 4.1, a magistrate judge may issue a warrant based on **information communicated by telephone or other reliable electronic means**."	Providing information to the court	

Rule Provision	Relevant Language	Type of Provision	Comments
Rule 41(f)(1)(C)	"(C) *Receipt* . The officer executing the warrant must **give** a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken or leave a copy of the warrant and receipt at the place where the officer took the property."	Providing warrant to affected party	This seems to contemplate in-person exchange of documents, so may be outside the scope of this project.
Rule 41(f)(1)(D)	"(D) *Return* . The officer executing the warrant must promptly return it—together with a copy of the inventory—to the magistrate judge designated on the warrant. The officer may do so **by reliable electronic means**. The judge must, on request, **give** a copy of the inventory to the person from whom, or from whose premises, the property was taken and to the applicant for the warrant."	Manner of returning a warrant; Providing warrant to affected party	
Rule 41(f)(2)(B)	"(B) *Return* . Within 10 days after the use of the tracking device has ended, the officer executing the warrant must return it to the judge designated in the warrant. The officer may do so **by reliable electronic means**."	Manner of returning a warrant	
Rule 41(f)(2)(C)	"(C) *Service* . Within 10 days after the use of the tracking device has ended, the officer executing a tracking-device warrant must serve a copy of the warrant on the person who was tracked or whose property was tracked. **Service** may be accomplished **by delivering** a copy to the person who, or whose property, was tracked; or by **leaving a copy** at the person's residence or usual place of abode with an individual of suitable age and discretion who resides at that location and by **mailing a copy** to the person's **last known address**. Upon request of the government, the judge may delay notice as provided in Rule 41(f)(3)."	Manner of service	
Rule 41(i)	"(i) **Forwarding** Papers to the Clerk. The magistrate judge to whom the warrant is returned must attach to the warrant a copy of the return, of the inventory, and of all other related papers and must **deliver** them to the clerk in the district where the property was seized."	Transmission of papers between courts	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 45(a)(4)	"(4) *"Last Day" Defined* . Unless a different time is set by a statute, local rule, or court order, the last day ends: (A) for **electronic filing**, at midnight in the court's time zone; and (B) for **filing by other means**, when the clerk's office is scheduled to close."	Manner of filing	
Rule 45(c)	"(c) 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)."	Manner of service	This is a very general means of describing manner of service, and may be outside the scope of this project.
Rule 46(f)(3)(C)	"(C) *Motion to Enforce* . The court may, upon the government's motion, enforce the surety's liability without an independent action. The government must serve any motion, and notice as the court prescribes, on the district clerk. If so served, the clerk must promptly **mail** a copy to the surety at its last known address."	Manner of service	
Rule 46(j)	"(j) Producing a Statement. (1) *In General* . Rule 26.2(a)–(d) and (f) applies at a detention hearing under 18 U.S.C. §3142, unless the court for good cause rules otherwise. (2) *Sanctions for Not* ***Producing*** *a Statement* . If a party disobeys a Rule 26.2 order to **produce** a witness's statement, the court must not consider that witness's testimony at the detention hearing."	Submitting documents to the court	
Rule 49(b)	"(b) How Made. **Service must be made in the manner provided for a civil action**. When these rules or a court order requires or permits service on a party represented by an attorney, service must be made on the attorney instead of the party, unless the court orders otherwise."	Manner of service	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 49(c)	"(c) Notice of a Court Order. When the court issues an order on any post-arraignment motion, the clerk must **provide notice in a manner provided for in a civil action**. Except as Federal Rule of Appellate Procedure 4 (b) provides otherwise, the clerk's failure to give notice does not affect the time to appeal, or relieve—or authorize the court to relieve—a party's failure to appeal within the allowed time."	Manner of providing notice	This is a very general means of describing manner of notice, and may be outside the scope of this project.
Rule 49(d)	"(d) Filing. A party must file with the court a copy of any paper the party is required to serve. A paper must be **filed in a manner provided for in a civil action**."	Manner of filing	This is a very general means of describing manner of filing, and may be outside the scope of this project.
Rule 49(e)	"(e) **Electronic Service and Filing**. A court may, by local rule, allow papers to be **filed**, signed, or verified **by electronic means** that are consistent with any technical standards established by the Judicial Conference of the United States. A local rule may require **electronic filing** only if reasonable exceptions are allowed. A paper **filed electronically** in compliance with a local rule is written or in writing under these rules."	Manner of filing; Manner of service	
Rule 49.1(a)	"(a) Redacted Filings. Unless the court orders otherwise, in an **electronic or paper filing** with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, a financial-account number, or the home address of an individual, a party or nonparty making the filing may include only: . . . ."	Manner of filing	
Rule 49.1(e)(2)	"(e) Protective Orders. For good cause, the court may by order in a case: . . . . (2) limit or prohibit a nonparty's **remote electronic access** to a document filed with the court."	Manner of accessing docket	

Rule Provision	**Relevant Language**	**Type of Provision**	**Comments**
Rule 57(b)	"(b) Procedure When There Is No Controlling Law. A judge may regulate practice in any manner consistent with federal law, these rules, and the local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator was **furnished** with actual notice of the requirement before the noncompliance."	Providing notice	
Rule 57(c)	"(c) Effective Date and Notice. . . . Copies of local rules and their amendments, when promulgated, must be **furnished** to the judicial council and the Administrative Office of the United States Courts and must be made available to the public."	Providing local rules to judicial council and AO	

Rule Provision	Relevant Language	Type of Provision	Comments
Rule 58(d)(2)	"(2) *Notice to Appear* . If the defendant fails to pay a fixed sum, request a hearing, or appear in response to a citation or violation notice, the district clerk or a magistrate judge may issue a notice for the defendant to appear before the court on a date certain. The notice may give the defendant an additional opportunity to pay a fixed sum in lieu of appearance. The district clerk must **serve the notice on the defendant by mailing a copy to the defendant's last known address**."	Manner of service	

Rules Governing § 2254 Proceedings

Rule Provision	Relevant Language	Type of Provision	Comments
Rule 3(d)	"(d) 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."	Manner of filing	Deals with prisoner filings, so may have different implications for electronic filing.
Rule 4	"The clerk must promptly **forward** the petition to a judge under the court's assignment procedure, and the judge must promptly examine it. . . ."	Forwarding documents to the court	

Rule Provision	Relevant Language	Type of Provision	Comments
Rule 5(c)	"(c) Contents: Transcripts. The answer must also indicate what transcripts (of pretrial, trial, sentencing, or post-conviction proceedings) are available, when they can be **furnished**, and what proceedings have been recorded but not transcribed. The respondent must attach to the answer parts of the transcript that the respondent considers relevant. The judge may order that the respondent **furnish** other parts of existing transcripts or that parts of untrascribed recordings be transcribed and **furnished**. If a transcript cannot be obtained, the respondent may **submit** a narrative summary of the evidence."	Submitting documents to the court	
Rule 5(d)	"(d) Contents: Briefs on Appeal and Opinions. The respondent must also file with the answer a copy of: (1) any brief that the petitioner **submitted** in an appellate court contesting the conviction or sentence, or contesting an adverse judgment or order in a post-conviction proceeding; (2) any brief that the prosecution **submitted** in an appellate court relating to the conviction or sentence . . . ."	Submitting documents to the court	
Rule 5(e)	"(e) The petitioner may **submit** a reply to the respondent's answer or other pleadings within a time fixed by the judge."	Submitting documents to the court	
Rule 7(a)	"(a) In General. If the petition is not dismissed, the judge may direct the parties to expand the record by **submitting** additional materials relating to the petition. . . ."	Submitting documents to the court	
Rule 7(b)	"(b) Types of Materials. The materials that may be required include letters predating the filing of the petition, documents, exhibits, and answers under oath to written interrogatories propounded by the judge. Affidavits may also be **submitted** and considered as part of the record."	Submitting documents to the court	

Rule Provision	Relevant Language	Type of Provision	Comments
Rule 8(a)	"(a) Determining Whether to Hold a Hearing. If the petition is not dismissed, the judge must review the answer, any transcripts and records of state-court proceedings, and any materials **submitted** under Rule 7 to determine whether an evidentiary hearing is warranted."	Submitting documents to the court	

Rules Governing § 2255 Proceedings

Rule Provision	Relevant Language	Type of Provision	Comments
Rule 3(b)	"(b) Filing and Service. The clerk must file the motion and enter it on the criminal docket of the case in which the challenged judgment was entered. The clerk must then **deliver** or serve a copy of the motion on the United States attorney in that district, together with a notice of its filing."	Manner of providing notice	
Rule 3(d)	"(d) 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."	Manner of filing	Deals with prisoner filings, so may have different implications for electronic filing.
Rule 4(a)	"(a) Referral to a Judge. The clerk must promptly **forward** the motion to the judge who conducted the trial and imposed sentence or, if the judge who imposed sentence was not the trial judge, to the judge who conducted the proceedings being challenged. If the appropriate judge is not available, the clerk must **forward** the motion to a judge under the court's assignment procedure."	Forwarding documents to the court	

Rule Provision	Relevant Language	Type of Provision	Comments
Rule 5(c)	"(c) Records of Prior Proceedings. If the answer refers to briefs or transcripts of the prior proceedings that are not available in the court's records, the judge must order the government to **furnish** them within a reasonable time that will not unduly delay the proceedings."	Submitting documents to the court	
Rule 5(d)	"(d) Reply. The moving party may **submit** a reply to the respondent's answer or other pleading within a time fixed by the judge."	Submitting documents to the court	
Rule 7(a)	"(a) In General. If the motion is not dismissed, the judge may direct the parties to expand the record by **submitting** additional materials relating to the motion. . . ."	Submitting documents to the court	
Rule 7(b)	"(b) Types of Materials. The materials that may be required include letters predating the filing of the motion, documents, exhibits, and answers under oath to written interrogatories propounded by the judge. Affidavits may also be **submitted** and considered as part of the record."	Submitting documents to the court	
Rule 8(a)	"(a) Determining Whether to Hold a Hearing. If the motion is not dismissed, the judge must review the answer, any transcripts and records of prior proceedings, and any materials **submitted** under Rule 7 to determine whether an evidentiary hearing is warranted."	Submitting documents to the court	
Rule 8(d)	"(d) **Producing** a Statement. Federal Rule of Criminal Procedure 26.2(a)-(d) and (f) applies at a hearing under this rule. If a party does not comply with a Rule 26.2(a) order to **produce** a witness's statement, the court must not consider the witness's testimony."	Submitting documents to the court	

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TAB 6G

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Federal Rules of Evidence

Rule Provision	Relevant Language	Type of Provision	Comments
Rule 612(b)	"(b) Adverse Party's Options; Deleting Unrelated Matter. Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be **delivered** to the adverse party. Any portion deleted over objection must be preserved for the record."	Delivering documents to adverse party	
Rule 612(c)	"(c) Failure to Produce or **Deliver** the Writing. If a writing is not produced or is not **delivered** as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or — if justice so requires — declare a mistrial."	Delivering documents to adverse party	

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TAB 6H

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Items Omitted from Chart on E-Filing Rules

Appellate

- References to "filing," without discussing manner of filing
  - e.g., Rules 1(a)(2); 3(a)(2); 3(b)(1); 3(b)(2); 3(c)(2); 3(d)(2); 3(e); 4(a)(1)(A); 4(a)(1)(B); 4(a)(1)(B)(iv); 4(a)(2); 4(a)(3); 4(a)(4)(A); 4(a)(4)(B)(i); 4(a)(4)(B)(ii); 4(a)(4)(B)(iii); 4(a)(5)(A)(ii); 4(b)(1)(A); 4(b)(1)(B); 4(b)(2); 4(b)(3)(A); 4(b)(3)(B); 4(b)(4); 4(b)(5); 4(c)(2); 4(c)(3); 5(a)(2); 5(c); 5(d)(1)(B); 5(d)(2); 6(b)(2)(A)(i); 6(b)(2)(A)(ii); 6(b)(2)(A)(iii); 30(a)(1)(3) ("*file* 4 legible copies with the clerk").
- References to the court "entering" an order.
  - e.g., Rule 4(a)(4)(B)(i) ("after the court announces or *enters* a judgment.").
- General references to "service," but not the manner of providing service
  - e.g., Rule 5(a)(1); Rule 5(b)(2); Rule 6(b)(2)(B)(i); Rule 6(b)(2)(B)(ii) ("file with the clerk and *serve* on the appellant"); Rule 10(b)(3)(B); Rule 25(b) ("*serve* a copy on the other parties. . . . *Service* . . . must be made on the party's counsel."); Rule 30(a)(1)(3) ("*serve* one copy on counsel for each party"); Rule 30(e) ("one copy must be *served* on counsel"); Rule 45(c) ("*serve* a notice of entry on each party"; "*Service* on a party represented by counsel must be made on counsel.").
- References to providing notice, but not mentioning manner of doing so.
  - e.g., Rule 4(a)(5)(B) ("*notice* must be given"); 4(a)(6) ("did not receive *notice* under . . . Rule . . . 77. . . ."); Rule 5(d)(3) ("clerk must *notify* the circuit clerk"; "Upon receiving this *notice* . . . ."); Rule 6(b)(2)(D) ("immediately *notify* all parties of the filing date"); Rule 8(a)(2)(C); Rule 10(b)(3)(C); Rule 11(b)(1)(B); Rule 11(b)(1)(C); Rule 12(c) ("immediately *notify* all parties . . . ."); Rule 47(b) ("violator has been furnished in the particular case with actual *notice* of the requirement.").
  - See also "advise," e.g., Rule 22(b)(5) ("the clerk must *advise* the parties . . . .").
- References to "receipt" or "receiving"
  - e.g., Rule 11(c) ("*receipt* of the appellee's brief"); Rule 12(a) ("Upon *receiving* the copy of the notice of appeal . . . ."); Rule 12(c).
- References to docketing
  - e.g., Rule 13(d)(1) ("*docketing* in the court of appeals.")
- References to "attaching" documents
  - e.g., Rule 24(a)(1) ("The party must *attach* an affidavit . . . .").
  - See also "include," e.g., Rule 24(a)(5) ("The motion must *include* a copy of the affidavit . . . ."); Rule 27(a)(2)(B)(iii) ("must *include* a copy of the trial court's opinion or agency's decision as a separate exhibit. . . .").
  - See also "accompanied by," e.g., Rule 29(b) ("The motion must be *accompanied by* the proposed brief . . . .").
- Generic references to "submitting to the court" when it seems to not be referring to physical submission (even if it might involve some paperwork)
  - e.g., Rule 10(e)(1) ("the difference must be *submitted* to and settled by the court . . . .").
- References to "certifying" something to the attorney general
  - e.g., Rule 44(a) ("The clerk must then *certify* that fact to the Attorney General.").

Bankruptcy

- Generic references to filing, without mentioning manner
  - e.g., Rule 1002(a) ("A petition commencing a case under the Code shall be *filed* with the Clerk.").
- Annexing documents
  - e.g., Rule 1003(a) ("shall *annex* to the original and each copy of the petition a copy of all documents. . . .").
- Generic references to service, without mentioning manner
  - e.g., Rule 1004 ("*serve* on each general partner"; "the clerk shall promptly issue a summons for *service* on each general partner. . . .").
- Generic references to "notice," without mentioning the manner
  - e.g., Rule 1007(a)(5) ("on *notice* to the United States trustee . . . ."); Rule 1009(a) ("The debtor shall give *notice* of the amendment to the trustee and to any entity affected thereby."); Rule 2002(d) ("shall in the manner and form directed by the court give *notice* to all equity security holders . . . .").
- Generic references to "receiving"
  - e.g., Rule 1007(b)(1)(E) ("copies of all payment advices or other evidence of payment, if any, *received* by the debtor. . . .")
- References to "attaching" documents
  - e.g., Rule 1007(b)(3)(A) ("an *attached* certificate and debt repayment plan . . . .").
- Generic references to "disclosing"
  - e.g., Rule 1007(i) ("the court may direct an entity other than the debtor or trustee to *disclose* any list of security holders of the debtor in its possession . . . .").
- Generic references to entering an order
  - e.g., Rule 1013(b) ("the court . . . shall *enter an order* for the relief requested . . . .").
- References to "transferring" information
  - e.g., Rule 2002(c)(1) ("The notice . . . shall state whether the sale is consistent with any policy prohibiting the *transfer* of the information.").
- References to "producing" documents, if it seems to be done in person
  - e.g., Rule 2004(c) ("The attendance of an entity for examination and for the *production* of documents . . . .").
- References to "presenting" something to the court
  - e.g., Rule 8011(c) ("A motion for a stay, or for other emergency relief may be denied if not *presented* promptly."); Rule 9011(b) ("By *presenting* to the court (whether by signing, filing, submitting or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . .").
- References to "issuing" documents
  - e.g., Rule 1004 ("the clerk shall promptly *issue* a summons for service . . . .").

Civil

- Generic references to "filing," without mentioning manner
  - e.g., Rule 3 ("A civil action is commenced by *filing* a complaint with the court.").
- Generic references to "service," without mentioning manner
  - e.g., Rule 4(b) ("for *service* on the defendant"); Rule 38(b)(1) ("[A] party may demand a jury trial by . . . *serving* the other parties with a written demand . . . .").
  - See also "delivered," if used in reference to physical property, rather than documents.
- References to "accompanied by"
  - e.g., Rule 4(d)(1)(C) ("be *accompanied by* a copy of the complaint. . . .")
- Generic references to "notice," without mentioning manner
  - e.g., Rule 4(m) ("on its own after *notice* to the plaintiff . . . ."); Rule 15(c)(1)(C)(i) ("*received such notice* of the action . . . ."); Rule 23(e)(1) ("The court must direct *notice* in a reasonable manner to all class members . . . ."); Rule 71.1(e)(1) ("The defendant must then be *given notice* of all later proceedings affecting the defendant.").
- Generic references to "certify"
  - e.g., Rule 5.1(b) ("The court must, under 28 U.S.C. § 2403, *certify* to the appropriate attorney general. . . .").
- References to "entering an order"
  - e.g., Rule 5.1(c) ("may not *enter* a final judgment. . . .")
- Generic references to "present"
  - e.g., Rule 12(d) ("must be given a reasonable opportunity to *present* all material that is pertinent. . . ."); Rule 26(a)(3)(A) ("the designation of those witnesses whose testimony the party expects to *present* by deposition . . . ."); Rule 26(b)(4)(A) ("A party may depose any person who has been identified as an expert whose opinions may be *presented* at trial."); Rule 26(b)(5)(B) ("may promptly *present* the information to the court under seal . . . .").
- Generic references to "electronically stored information" (seems outside the scope of the project as it doesn't relate to transferring documents when used generically).
  - e.g., Rule 16(b)(3)(B)(iii) ("provide for disclosure or discovery of *electronically stored information*").
- Generic references to exchanging documents (because this seems akin to generic references to "filing," unless a specific mode of exchange is specified
  - e.g., Rule 16(c)(2)(G) (at the pretrial conference, the judge may consider "scheduling the filing and *exchange* of any pretrial briefs.")
- Generic references to "noting" something on the record
  - e.g., Rule 25(a)(2) ("The death should be *noted* on the record.").
- References to "making disclosures" or to "disclosing"
  - e.g., Rule 26(a)(1)(C) ("A party must *make the initial disclosures* at or within 14 days . . . ."); Rule 26(a)(2)(A) ("In addition to the disclosures requires by Rule 26(a)(1), a party must *disclose* to the other parties the identity of any witness it may use at trial . . . ."); Rule 45(b)(3)(A)(iii) (requiring quashing of a subpoena that "requires *disclosure* of privileged or other protected matter . . . ."); Rule

45(b)(3)(B)(i) (permitting quashing a subpoena that requires "*disclosing* an unretained expert's opinion . . . .").
    - See also "revealing" information, e.g., Rule 26(c)(1)(G) ("requiring that a trade secret . . . not be *revealed* or be *revealed* only in a specified way . . . .").
- References to "offering" evidence
    - e.g., Rule 26(a)(3)(A)(iii) ("separately identifying those items the party expects to *offer* and those it may *offer* if the need arises.").
- References to "obtaining" or "receiving" information
    - e.g., Rule 26(a)(2)(C)(ii) ("the party seeking discovery has had ample opportunity to *obtain* the information by discovery in the action. . . ."); Rule 26(b)(5)(B) ("may notify any party that *received* the information . . . ."); Rule 65(a)(2) ("Even when consolidation is not ordered, evidence that is *received* on the motion and that would be admissible at trial becomes a part of the trial record and need not be repeated at trial."); Rule 35(b)(4) ("By requesting and *obtaining* the examiner's report, or by deposing the examiner, the party examined waives any privilege. . . ."); Rule 35(b)(6) ("This subdivision does not preclude *obtaining* an examiner's report or deposing an examiner under other rules.").
- References to means of recording, but not to transmitting items
    - e.g., Rule 26(b)(3)(C)(ii) ("a contemporaneous stenographic, mechanical, electrical, or other *recording*—or a transcription of it—that recites substantially verbatim the person's oral statement."); Rule 30(b)(3)(A) ("testimony may be *recorded* by audio, audiovisual, or stenographic means.").
- Generic references to "producing" information for discovery
    - e.g., Rule 26(b)(5)(B) ("*Information Produced*. If information *produced* in discovery is subject to a claim of privilege...."); Rule 30(f)(2)(A) ("Documents and tangible things *produced* for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition."); Rule 34(a)(1) ("A party may serve on any other party a request . . . to *produce* and permit the requesting party . . . to inspect, copy, test, or sample the following items . . . : (A) any designated documents or electronically stored information. . . ."); Rule 32(b)(1)(C) ("The request . . . may specify the form or forms in which electronically stored information is to be *produced*."); Rule 34(b)(2)(D) ("[T]he response may state an objection to a requested form for *producing* electronically stored information. If the responding party objects to a requested form—or if no form was specified in the request—the party must state the form or forms it intends to use."); Rule 45(a)(i)(A)(iii) ("Every subpoena must . . . command each person to whom it is directed to . . . *produce* designated documents . . . ."); Rule 45(a)(1)(C) ("A subpoena may specify the form or forms in which electronically stored information is to be *produced*.").
- Generic references to "returning" information
    - e.g., Rule 26(b)(5)(B) ("After being notified, a party must promptly *return*, sequester or destroy the specified information and any copies . . . .").
- References to "issuing" documents
    - e.g., Rule 45(a)(3) ("The clerk must *issue* a subpoena...."); Supp. R. C(3)(a)(ii) ("the

clerk must promptly *issue* a summons and a warrant for the arrest of the vessel . . . .").

- General references to "submitting" that don't seem to refer to the physical transfer of documents.
  - e.g., Rule 33(d)(3)(C) ("An objection to the form of a written question . . . is waived if not served in writing on the party *submitting* the question . . . ."); Rule 49(a)(1)(A) ("The court may require . . . a special verdict . . .by . . . "*submitting* written questions susceptible of a categorical or other brief answer.").

Criminal

- General references to "issuing" or "entering" orders, warrants, or summonses
  - e.g., Rule 4(a) ("the judge must *issue* an arrest warrant . . . .").
- General references to "executing" a warrant
  - e.g., Rule 4(c)(1) ("Only a marshal or other authorized officer may *execute* a warrant.").
- Means of recording testimony
  - e.g., Rule 4.1(b)(2)(B)(i) ("have the testimony *recorded* verbatim by an electronic recording device, by a court reporter, or in writing . . . .").
- General references to "filing"
  - e.g., Rule 5.1(a)(3) ("the government *files* an information under Rule 7(b) . . . .").
- General references to "disclosing"
  - e.g., Rule 6(e)(3)(C) ("An attorney for the government may *disclose* any grand-jury matter . . . ."); Rule 11(c)(2) ("The parties must *disclose* the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to *disclose* the plea agreement in camera."); Rule 12.3(b)(1) ("Both an attorney for the government and the defendant must promptly *disclose* in writing to the other party the name of any additional witness . . . ."); Rule 16(c) ("A party who discovers additional evidence or material before or during trial must promptly *disclose* its existence to the other party or the court . . . .").
- General references to "receiving" information
  - e.g., Rule 6(e)(3)(D)(i) ("Any official who *receives* information under Rule 6(e)(3)(D) may use the information only as necessary . . . ."); Rule 32(f)(1) ("Within 14 days after *receiving* the presentence report . . . ."); Rule 10(b)(2) ("the defendant, in a written waiver signed by both the defendant and defense counsel, has waived appearance and has affirmed that the defendant *received* a copy of the indictment or information . . . .").
- References to "returning" a document to the court that do not seem to implicate a physical transfer and/or that do not mention the manner of returning.
  - e.g., Rule 6(f) ("The grand jury . . . must *return* the indictment to a magistrate judge in open court."); Rule 41(e)(2)(A) ("The warrant must command the officer to . . . *return* the warrant to the magistrate judge . . . .").
- General references to "notifying" or "providing notice"
  - e.g., Rule 12(b)(4)(A) ("At the arraignment or as soon afterward as practicable, the government may *notify* the defendant of its intent to use specified evidence at trial

. . . ."); Rule 26.1 ("A party intending to raise an issue of foreign law must provide the court and all parties with reasonable written *notice*.").
    - But see Rule 57(b) ("No sanction . . . may be imposed for noncompliance . . . unless the alleged violator was *furnished with actual notice* . . . .").
- General references to "serving" or "service"
    - e.g., Rule 12.1(a)(2) ("Within 14 days after the request, or at some other time the court sets, the defendant must *serve* written notice on an attorney for the government of any intended alibi defense . . . .").
- References to "requesting in writing"
    - e.g., Rule 12.3(a)(4)(A) ("An attorney for the government may *request in writing* that the defendant disclose the name . . . of each witness . . . .").
- References to "producing" or "giving" when it seems to be done in person
    - e.g., Rule 15(a)(1) ("if the court orders the deposition to be taken, it may also require the deponent to *produce* at the deposition any designated material that is not privileged, including any book, paper, document, record, recording, or data."); Rule 32(i)(1)(B) ("At sentencing, the court . . . must *give* to the defendant and an attorney for the government a written summary . . . .").
- References to "providing" information, without any specific reference to exchanging documents
    - e.g., Rule 34(b)(2)(B) ("information *provided* by the defendant to the government . . . ."); Rule 34(b)(2)(C) ("information the usefulness of which could not reasonably have been anticipated by the defendant until more than one year after sentencing and which was promptly *provided* to the government . . . .").
- In the Section 2254 Rules, references to "presenting" if not necessarily referring to the physical act of presenting a document.
    - e.g., Rule 9 ("Before *presenting* a second or successive petition, the petition must obtain an order . . . .").
- References to "submitting" something to the court that do not discuss the physical transfer of documents
    - e.g., Section 2254 Rule 11(a) ("the court may direct the parties to *submit* arguments on whether the certificate should issue. . . .").

Evidence

- General references to "providing notice"
    - e.g., Rule 404(b)(2)(A) ("the prosecutor must . . . *provide reasonable notice* of the general nature of any such evidence . . . .").
- References to "furnishing" or "offering" when it doesn't refer to transfer of documents
    - e.g., Rule 408(a)(1) ("Evidence of the following is not admissible . . . (1) *furnishing*, promising, or *offering*—or accepting, promising to accept, or *offering* to accept—a valuable consideration in compromising or attempting to compromise a claim . . . .").
- General references to "filing"
    - e.g., Rule 412(c)(1)(A) ("If a party intends to offer evidence under Rule 412(b), the party must: (A) *file* a motion that specifically describes . . . .").

- General references to "serving"
  - e.g., Rule 412(c)(1)(C) ("*serve* the motion on all parties . . . .").
- General references to "notifying"
  - e.g., Rule 412(c)(1)(D) ("*notify* the victim . . . .").
- General references to "disclosing"
  - e.g., Rule 413(b) ("If the prosecutor intends to offer this evidence, the prosecutor must *disclose* it to the defendant . . . .").
- References to "producing" documents
  - e.g., Rule 612(b) ("an adverse party is entitled to have the writing *produced* at the hearing . . . ."); Rule 1004(c) ("the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to *produce* it at the trial or hearing . . . .").
- References to "showing" documents if it appears to be done in person
  - e.g., Rule 613(a) ("(a) *Showing* or Disclosing the Statement During Examination. When examining a witness about the witness's prior statement, a party need not *show* it or disclose its contents to the witness. But the party must, on request, *show* it or disclose its contents to an adverse party's attorney.").
- References to "transmitting," when referring generally to information
  - e.g., Rule 803(6)(A) ("A record of an act, event, condition, opinion, or diagnosis if . . . the record was made at or near the time by—or from information *transmitted* by—someone with knowledge . . . .").
- References to "reporting" of records
  - e.g., Rule 803(9) ("A record of a birth, death, or marriage, if *reported* to a public office in accordance with a legal duty.").

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TAB 7A

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MEMORANDUM

DATE: March 28, 2012

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 09-AP-B

During the Committee's consideration of the proposal to treat federally recognized Native American tribes the same as states for purposes of Rule 29's amicus-filing provisions, participants suggested that additional information would be useful. This memo encloses the results of those further inquiries.

As the Committee discussed at its fall 2011 meeting, Judge Sutton had previously consulted the Chief Judges in the Eighth, Ninth, and Tenth Circuits – the three circuits in which Indian tribes most frequently file amicus briefs. Participants at the fall meeting suggested that it would be useful for Judge Sutton to consult the Chief Judges of the remaining circuits for their circuits' views on whether the list of amicus filers who do not need party consent or court leave should include municipalities and Indian tribes. I enclose Judge Sutton's letter and the responses received to date (from judges in the First, Fourth, Seventh, Eleventh, and Federal Circuits).

In addition, a participant in the fall 2011 discussions suggested that it would be helpful to know what other provisions in the Appellate Rules (or other sets of national Rules) treat states differently from other litigants. I enclose a spreadsheet showing the results of my research concerning such provisions in the Appellate Rules and Civil Rules (time constraints prevented me from completing this research with respect to the other sets of national rules). The spreadsheet suggests to me the following initial observations:

- There are three provisions that refer generically to governments without specifying which governments. See Appellate Rule 26.1(a) (referring to a "nongovernmental corporate party"); Civil Rule 7.1(a) (same); Civil Rule 25(d) (referring to a "public officer").

- There are a number of rules that treat the federal government specially. Two of those rules – Appellate Rules 4 and 40 – were the subject of a proposal, a few years ago, to revise the rules to treat states the same as the federal government; the Committee decided not to proceed with that proposal.

- There are many rules that treat states specially; some of these rules also treat the federal government specially. One or two rules (Civil Rule 4(j)(2) and arguably Civil Rule 26(a)(1)(B)) treat state and local governments specially. In some instances, a rule does not concern states as litigants but rather mandates or permits the application of state law.

Encls.

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TAB 7B

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

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JEFFREY S. SUTTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

December 22, 2011

The Honorable Sandra L. Lynch
United States Court of Appeals
for the First Circuit
John Joseph Moakley U.S. Courthouse
One Courthouse Way, Room 8710
Boston, Massachusetts 02210

Dear Sandy:

I write in my capacity as Chair of the Judicial Conference Advisory Committee on Appellate Rules, to seek your Circuit's input concerning a proposal to amend Appellate Rule 29(a)'s list of entities that may file amicus briefs without party consent or court leave. In particular, we would like to know your court's reaction to amending the list to include municipalities and federally recognized Native American Tribes.

The proposal arose from a suggestion that the Appellate Rules be amended to treat federally recognized Native American Tribes the same as States under Rule 29(a). Rule 29(a) says: "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." Rule 1(b) defines "state" to "include[] the District of Columbia and any United States commonwealth or territory." The proponent of the suggestion argues that Rule 29(a) should accord Tribes the same dignity as States—namely, the ability to file amicus briefs without having to seek party consent or court leave.

The Rule 29(a) list, you may be interested to know, differs from the list found in Supreme Court Rule 37.4. That rule says: "No motion for leave to file an amicus curiae brief is necessary if the brief is presented on behalf of the United States by the Solicitor General; on behalf of any agency of the United States allowed by law to appear before this Court when submitted by the agency's authorized legal representative; on behalf of a State, Commonwealth, Territory, or Possession when submitted by its Attorney General; or on behalf of a city, county, town, or similar entity when submitted by its authorized law officer." Like Rule 29(a), Supreme Court Rule 37.4 omits Tribes from the list of consent-free amicus filers; unlike Rule 29(a), it includes municipal governments on the list.

At the committee's request, Marie Leary of the Federal Judicial Center studied amicus filings in the courts of appeals to determine whether and how often the Tribes are denied leave to file amicus briefs. I enclose a copy of her report. Ms. Leary and her colleagues at the FJC searched the CM/ECF database of the courts of appeals; the search was limited to the time span after the relevant courts of appeals had gone "live" in CM/ECF. (For that reason, the FJC study excluded the Second, Eleventh, and Federal Circuits. *See* the enclosed report at page 2 and footnote 1.) Ms. Leary found 180 motions filed by Tribes seeking court permission to file an amicus brief. Of those, 157 were granted, 12 were not ruled on and 11 were denied (no explanations were given for 7 and the other 4 were denied for procedural reasons).

Because Ms. Leary found that most of the activity occurred in the Eighth, Ninth, and Tenth Circuits, I wrote the Chief Judges of those circuits to share with them Ms. Leary's research and to ask for their views on the question of whether a rule authorizing Tribes to file amicus briefs without party consent or court leave should be adopted either in the Appellate Rules or in local circuit rules. The responses varied widely, with one court favoring a change through a national rule, one court expressing indifference, and one court opposing the change.

At our most recent meeting, several committee members urged me to write the other circuits to seek input on the proposed amendment and to broaden the question to whether the list of amicus filers who do not need consent should include Tribes and municipalities. Hence this letter.

In thinking about this proposal, you may wish to consider one other thing—the intersection between the list of amicus filers who do not need consent and Rule 29(c)(5). Rule 29(c)(5) says that, "unless the amicus curiae is one listed in the first sentence of Rule 29(a)," an amicus brief must include:

> a statement that indicates whether: (A) a party's counsel authored the brief in whole or in part; (B) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and (C) a person – other than the amicus curiae, its members, or its counsel – contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person.

This authorship-and-funding disclosure requirement, added in 2010, is modeled on a similar requirement in Supreme Court Rule 37.6.

Any input on the proposal, whether formal or informal, would be greatly appreciated, particularly if possible before our next meeting (April 12 and 13). I will follow up this letter with a phone call in the next month or so. Thank you for your consideration and hope you are well.

Sincerely,

Jeffrey S. Sutton
Chair, Advisory Committee on Appellate Rules

JSS:jmf
Enclosures

Copies (without enclosures):

Peter G. McCabe
Secretary
Judicial Conference Standing Committee
on Rules of Practice and Procedure

Jonathan C. Rose
Rules Committee Officer

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January 24, 2012

Honorable Jeffrey S. Sutton
United States Court of Appeals
Joseph P. Kinneary
United States Courthouse
85 Marconi Boulevard, Room 260
Columbus, OH 43215

RE: Appellate Rule 29A

Dear Jeff:

This will respond to your December 22, 2011 letter to me concerning possible changes in Appellate Rule 29(a). I circulated your letter to the members of the court and wanted to report back on the various views. Some had no views or were indifferent.

Of those expressing views, there was more support for allowing the Native American tribes an entitlement to file an amicus brief, as states have. This would recognize the fact that the tribes are sovereign entities. That said, at least one judge noted that some circuits have denied such requests and thought there must have been good reasons.

There were more mixed views on whether municipalities should have a similar entitlement. Many of the judges on the court would disfavor this proposal for a variety of reasons. Municipalities are not sovereign entities but merely creatures of the state. One judge suggested that the attorney general for the state should be making the decision about whether the municipality ought to play a role in the federal court litigation.

My overarching concern with both proposals is that they not lead to the recusal of any member of this court, which each has the potential to do. We are a small court (of only six active judges) and the recusal of any one judge creates a major problem for us. It may well determine whether en banc review is granted. In my view, the chances of recusal go up when municipalities are involved, because of the identity of both the municipality and of counsel. At least in this circuit, I think the tribes pose less of a risk of recusal. The Supreme Court does not have the same recusal concerns the Courts of

Appeals have and, in that respect, their rules on amicus are not an appropriate model. By the same token, the recusal of one judge on the Ninth Circuit does not have the effect the recusal of one judge has on the First Circuit. This goes to the issue of the wisdom of a national rule.

I attach a memorandum from our Clerk of Court and Head of our Staff Attorneys which, inter alia, covers this topic.

No one commented on the intersection of this issue with Rule 29(c)(5). My personal view is the information required is very useful to have and would be useful to have for both tribes and municipalities.

I hope this information will be of some use and that the committee in making its decisions will be mindful of the variations among the circuits and whether there is really a need for a national rule.

Sincerely,

Sandra L. Lynch

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MEMORANDUM

TO: Chief Judge Lynch

FROM: Margaret Carter
Kathy Lanza

DATE: January 23, 2012

RE: Proposed Amendments to Appellate Rule 29(a)

We have reviewed the proposed amendment to Fed. R. App. P. 29(a) and the judges' comments. We agree that there is a strong symbolic argument for amending the rule to include Native American Tribes among the entities entitled to file an amicus brief without leave of court. The argument is less strong for municipalities, which are not sovereign entities but rather creatures of the state. Judge Howard raises a good point that by granting unilateral power to a municipality to file an amicus brief we would preclude the state attorney general from objecting to, and perhaps, preventing such a filing.

There is another issue to consider. Amicus briefs can cause recusals, either because of the potential amici or the attorneys representing them. We are a small court and recusals can create serious problems. If the Rules Committee expands the list of entities that can file an amicus brief as of right, it thereby increases the risk that there will be unavoidable recusals. This could potentially be a problem for our court. It is unclear whether we have the authority to strike a brief that creates a recusal problem where the amicus has a right to file the brief without party consent or court leave.

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Appellate Rule 29(a)

Judge William B Traxler Jr to: Jeffrey 12/29/2011 03:17 PM

Sent by: Mary Lee Mowry

Dear Judge Sutton:

I am indifferent as to whether Appellate Rule 29(a) is amended as mentioned in your letter. To the best of my knowledge, we have never had the question raised. Perhaps these are issues best left to the individual circuits.

Sincerely,

Bill Traxler

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
219 SOUTH DEARBORN STREET
CHICAGO, ILLINOIS 60604

FRANK H. EASTERBROOK
CHIEF JUDGE

March 16, 2012

Hon. Jeffrey S. Sutton
Chair, Advisory Committee on Appellate Rules
260 Joseph P. Kinneary Courthouse
85 Marconi Boulevard
Columbus, Ohio 43215

Dear Jeff:

Your letter of December 22, 2011, asks for this circuit's views about a proposed amendment to Fed. R. App. P. 29(a) that would treat Indian tribes the same as states for the purpose of filing amicus briefs. (Actually your letter asks about "Native American Tribes," but the word in the Constitution of the United States is "Indian," which is good enough for me. Even those with a penchant for political correctness should recognize that most tribes call themselves Indians.)

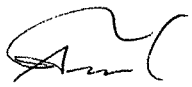
I have asked several of my colleagues, and the universal response is a yawn. The table from the FJC shows that there have been no requests by tribes in this circuit. If there were to be one, it is unlikely to be turned down (let alone ignored, which seems to be common in the ninth circuit). The upshot is that the circuit has no advice to offer the Advisory Committee.

For my own part, however, I have one query: has the Advisory Committee considered whether native corporations in Alaska should be treated as tribes? The Alaska Native Claims Settlement Act of 1970 abolished tribes (and tribal reservations) and substituted 13 corporate organizations. Tribal members were given shares in the corporations. (The web site of Olgoonik Development Corp., www.olgoonik.com, shows the nature and scope of the ventures.) Today each corporation can decide who owns shares. Most have restricted new ownership to children of existing shareholders, and people who claim native descent in Alaska refer to themselves as "shareholders" rather than "tribal members", though many continue to identify their ethnicity as Inupiat, Tlingit, Chugach, or another of the historical tribes.

The corporations are profit-making businesses, which suggests treating them as corporations for the purpose of Rule 29. But they also have assumed many of the social-welfare and community-development functions of the former tribes, which suggests classifying them as tribes for the purpose of Rule 29 (should it be amended). I don't have any view on how the rule should be worded. I just want to ensure that Alaska's native organizations aren't overlooked.

All the best.

Sincerely,



Frank H. Easterbrook

Cc: Peter G. McCabe
Jonathan C. Rose

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United States Court of Appeals
ELEVENTH CIRCUIT
MONTGOMERY, AL 36101-0867

JOEL F. DUBINA
CHIEF JUDGE

P.O. BOX 867
TELEPHONE (334) 954-3560

January 31, 2012

Honorable Jeffrey S. Sutton
Chair, Advisory Committee on Appellate Rules
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Washington, D.C. 20544

Re: Proposal to Amend Appellate Rule 29(a)'s List of Entities That May File Amicus Briefs Without Party Consent or Court Leave

Dear Jeff:

After I received your letter of December 22, 2011, concerning the above issue, I sent a copy of your letter and memorandum to my colleagues asking them for their views on the proposal to amend. As I suspected, my colleagues were about equally divided on whether the proposed rule change that expands the list of entities that may file amicus briefs without party consent or court leave should be adopted. I know that this is probably not much help to you or your committee but, that is the way the court came out on the issue.

I will look forward to seeing you in Washington in March.

Warmest personal regards.

Cordially,

Joel F. Dubina
CHIEF JUDGE

JFD:dv

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United States Court of Appeals
for the Federal Circuit

Chambers of
Alan D. Lourie
Circuit Judge

717 Madison Place, N.W.
Washington, D.C. 20439
Phone: 202-633-5851

January 30, 2012

The Honorable Jeffrey S. Sutton, Chair
Advisory Committee on Appellate Rules
United States Court of Appeals for the Sixth Circuit
Joseph P. Kinneary United States Courthouse
85 Marconi Boulevard, Room 260
Columbus, OH 43215

Dear Judge Sutton:

Chief Judge Rader has asked me, as chairman of our court's Rules Committee, to respond to your December 22, 2011 request for our views on whether Appellate Rule 29(a) should be amended to permit Native American Tribes to submit amicus briefs to appellate courts without leave of court or consent of all the parties.

Your letter included an analysis by the FJC, the results of which show that most such requests for leave to file in other circuits (81-100%) are granted. Our court was not included because we are not yet on CM/ECF.

Our experience at the Federal Circuit is that Indian tribes are more likely to be parties in our court than to file amicus briefs. They sue the government in the Court of Federal Claims under the Tucker Act for damages, generally for breach of trust or contract, or takings. We hear the appeals. In the last ten years, we have had close to 40 such cases with Indian tribes as parties. In the same period, we have had five requests from Indian tribes to file amicus briefs and they have all been granted. Thus, whether or not the rule is changed doesn't especially matter to us. If we receive motions to file amicus briefs, we will likely grant them. On the other hand, if they were able to be filed without a motion, that should not impact us especially as we would likely have granted them anyway. In fact, a few of our judges suggested that might be preferable. Thus, we would be prepared to accept whatever view the Committee adopts.

I hope this brief recitation of our views is helpful.

Sincerely,

Alan D. Lourie

Alan D. Lourie

cc: Chief Judge Rader

✓ Mr. Peter C. McCabe, Secretary
Judicial Conference Standing Committee
on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, DC 20544

Mr. Jonathan C. Rose,
Rules Committee Officer
Administrative Office of the United States Courts
One Columbus Circle, N.E., Room 7-290
Washington, DC 20544

TAB 7C

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Rule set	Rule	Subpart	Entity treated specially	Text	Comments
Appellate	1	(b)	State	In these rules, 'state' includes the District of Columbia and any United States commonwealth or territory.	
Appellate	4	(a)(1)(B)	Federal	The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is: (i) the United States; (ii) a United States agency; (iii) a United States officer or employee sued in an official capacity; or (iv) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf--including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.	The Appellate Rules Committee in fall 2007 removed from its agenda a proposal (Item No. 06-06) to amend Rules 4(a)(1)(B) and 40(a)(1) so as to treat state-government litigants the same as federal-government litigants for purposes of the time to take an appeal or to seek rehearing.
Appellate	22	(b)(1)	Both state and federal	In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c)....	
Appellate	22	(b)(3)	Both state and federal	A certificate of appealability is not required when a state or its representative or the United States or its representative appeals.	

Appellate	26	(a)(6)	Federal	“Legal holiday” means: (A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; (B) any day declared a holiday by the President or Congress; and	
Appellate	26	(a)(6)	State	…. "Legal holiday" means: …. (C) for periods that are measured after an event, any other day declared a holiday by the state where either of the following is located: the district court that rendered the challenged judgment or order, or the circuit clerk’s principal office.	
Appellate	26.1	(a)	"Governmental" corporate parties	Any 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.	
Appellate	29	(a)	Both state and federal	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.	
Appellate	29	(c)(5)	Both state and federal	.... An amicus brief ... must include the following: ... (5) unless the amicus curiae is one listed in the first sentence of Rule 29(a), a statement that indicates whether: (A) a party’s counsel authored the brief in whole or in part; (B) a party or a party’s counsel contributed money that was intended to fund preparing or submitting the brief; and (C) a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person	
Appellate	39	(b)	Federal	Costs for or against the United States, its agency, or officer will be assessed under Rule 39(a) only if authorized by law.	

Appellate	40	(a)(1)	Federal	Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment. But in a civil case, unless an order shortens or extends the time, the petition may be filed by any party within 45 days after entry of judgment if one of the parties is: (A) the United States; (B) a United States agency; (C) a United States officer or employee sued in an official capacity; or (D) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf--including all instances in which the United States represents that person when the court of appeals' judgment is entered or files the petition for that person.	See note, above, concerning Item 06-06.
Appellate	44	(a)	Both state and federal	If a party questions the constitutionality of an Act of Congress in a proceeding in which the United States or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the Attorney General.	See 28 U.S.C. § 2403(a).
Appellate	44	(b)	Both state and federal	If a party questions the constitutionality of a statute of a State in a proceeding in which that State or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the attorney general of the State.	See 28 U.S.C. § 2403(b).

Appellate	46	(a)(1)	Both state and federal	An attorney is eligible for admission to the bar of a court of appeals if that attorney is of good moral and professional character and is admitted to practice before the Supreme Court of the United States, the highest court of a state, another United States court of appeals, or a United States district court (including the district courts for Guam, the Northern Mariana Islands, and the Virgin Islands).	
Civil	4	(e)(1)	State	Unless federal law provides otherwise, an individual— other than a minor, an incompetent person, or a person whose waiver has been filed—may be served in a judicial district of the United States by: (1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or	
Civil	4	(g)	State	A minor or an incompetent person in a judicial district of the United States must be served by following state law for serving a summons or like process on such a defendant in an action brought in the courts of general jurisdiction of the state where service is made. A minor or an incompetent person who is not within any judicial district of the United States must be served in the manner prescribed by Rule 4(f)(2)(A), (f)(2)(B), or (f)(3).	

Civil	4	(i)(1)	Federal	(1) United States. To serve the United States, a party must: (A)(i) deliver a copy of the summons and of the complaint to the United States attorney for the district where the action is brought—or to an assistant United States attorney or clerical employee whom the United States attorney designates in a writing filed with the court clerk—or (ii) send a copy of each by registered or certified mail to the civil-process clerk at the United States attorney's office; (B) send a copy of each by registered or certified mail to the Attorney General of the United States at Washington, D.C.; and (C) if the action challenges an order of a nonparty agency or officer of the United States, send a copy of each by registered or certified mail to the agency or officer.	
Civil	4	(i)(2)	Federal	To serve a United States agency or corporation, or a United States officer or employee sued only in an official capacity, a party must serve the United States and also send a copy of the summons and of the complaint by registered or certified mail to the agency, corporation, officer, or employee.	
Civil	4	(i)(3)	Federal	To serve a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf (whether or not the officer or employee is also sued in an official capacity), a party must serve the United States and also serve the officer or employee under Rule 4(e), (f), or (g).	
Civil	4	(i)(4)	Federal	The court must allow a party a reasonable time to cure its failure to: (A) serve a person required to be served under Rule 4(i)(2), if the party has served either the United States attorney or the Attorney General of the United States; or (B) serve the United States under Rule 4(i)(3), if the party has served the United States officer or employee.	

Civil	4	(j)(1)	Foreign	A foreign state or its political subdivision, agency, or instrumentality must be served in accordance with 28 U.S.C. § 1608.	1608 = statutory provision governing service under the Foreign Sovereign Immunities Act.
Civil	4	(j)(2)	Municipal and state	State or Local Government. A state, a municipal corporation, or any other state-created governmental organization that is subject to suit must be served by: (A) delivering a copy of the summons and of the complaint to its chief executive officer; or (B) serving a copy of each in the manner prescribed by that state's law for serving a summons or like process on such a defendant.	
Civil	4	(k)(1)(A)	State	Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant: (A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located; ….	
Civil	4	(n)(2)	State	On a showing that personal jurisdiction over a defendant cannot be obtained in the district where the action is brought by reasonable efforts to serve a summons under this rule, the court may assert jurisdiction over the defendant's assets found in the district. Jurisdiction is acquired by seizing the assets under the circumstances and in the manner provided by state law in that district.	

Civil	5.1	(a)	Both state and federal	A party that files a pleading, written motion, or other paper drawing into question the constitutionality of a federal or state statute must promptly: (1) file a notice of constitutional question stating the question and identifying the paper that raises it, if: (A) a federal statute is questioned and the parties do not include the United States, one of its agencies, or one of its officers or employees in an official capacity; or (B) a state statute is questioned and the parties do not include the state, one of its agencies, or one of its officers or employees in an official capacity; and (2) serve the notice and paper on the Attorney General of the United States if a federal statute is questioned--or on the state attorney general if a state statute is questioned--either by certified or registered mail or by sending it to an electronic address designated by the attorney general for this purpose.	
Civil	5.1	(b)	Both state and federal	The court must, under 28 U.S.C. § 2403, certify to the appropriate attorney general that a statute has been questioned.	
Civil	5.1	(c)	Both state and federal	Unless the court sets a later time, the attorney general may intervene within 60 days after the notice is filed or after the court certifies the challenge, whichever is earlier. Before the time to intervene expires, the court may reject the constitutional challenge, but may not enter a final judgment holding the statute unconstitutional.	
Civil	6	(a)(6)	Federal	“Legal holiday” means: (A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; (B) any day declared a holiday by the President or Congress; and	

Civil	6	(a)(6)	State	“Legal holiday” means: … (C) for periods that are measured after an event, any other day declared a holiday by the state where the district court is located.	
Civil	7.1	(a)	"Governmental" corporate parties	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.	
Civil	12	(a)(2)	Federal	The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.	
Civil	12	(a)(3)	Federal	A United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later.	
Civil	13	(d)	Federal	These rules do not expand the right to assert a counterclaim--or to claim a credit--against the United States or a United States officer or agency.	
Civil	15	(c)(2)	Federal	When the United States or a United States officer or agency is added as a defendant by amendment, the notice requirements of Rule 15(c)(1)(C)(i) and (ii) are satisfied if, during the stated period, process was delivered or mailed to the United States attorney or the United States attorney's designee, to the Attorney General of the United States, or to the officer or agency.	
Civil	17	(a)(2)	Federal	When a federal statute so provides, an action for another's use or benefit must be brought in the name of the United States.	

Civil	17	(b)	Both state and federal	Capacity to sue or be sued is determined as follows: (1) for an individual who is not acting in a representative capacity, by the law of the individual's domicile; (2) for a corporation, by the law under which it was organized; and (3) for all other parties, by the law of the state where the court is located, except that: (A) a partnership or other unincorporated association with no such capacity under that state's law may sue or be sued in its common name to enforce a substantive right existing under the United States Constitution or laws; and (B) 28 U.S.C. §§ 754 and 959(a) govern the capacity of a receiver appointed by a United States court to sue or be sued in a United States court.	
Civil	24	(b)(2)	Both state and federal	On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on: (A) a statute or executive order administered by the officer or agency; or (B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.	
Civil	25	(d)	"public officer[s]"	An action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending. The officer's successor is automatically substituted as a party. Later proceedings should be in the substituted party's name, but any misnomer not affecting the parties' substantial rights must be disregarded. The court may order substitution at any time, but the absence of such an order does not affect the substitution.	

Civil	26	(a)(1)(B)	Three -- federal, state and municipal	The following proceedings are exempt from initial disclosure: ... (iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision; ... (vi) an action by the United States to recover benefit payments; (vii) an action by the United States to collect on a student loan guaranteed by the United States;	
Civil	27	(a)(4)	State	A deposition to perpetuate testimony may be used under Rule 32(a) in any later-filed district-court action involving the same subject matter if the deposition either was taken under these rules or, although not so taken, would be admissible in evidence in the courts of the state where it was taken.	
Civil	32	(a)(8)	Both state and federal	A deposition lawfully taken and, if required, filed in any federal- or state-court action may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest, to the same extent as if taken in the later action. A deposition previously taken may also be used as allowed by the Federal Rules of Evidence.	
Civil	39	(c)(2)	Federal	In an action not triable of right by a jury, the court, on motion or on its own: (1) may try any issue with an advisory jury; or (2) may, with the parties' consent, try any issue by a jury whose verdict has the same effect as if a jury trial had been a matter of right, unless the action is against the United States and a federal statute provides for a nonjury trial.	

Civil	41	(a)(1)(B)	Both state and federal	Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal-or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.	
Civil	44	(a)(1)	Various	Domestic Record. Each of the following evidences an official record--or an entry in it--that is otherwise admissible and is kept within the United States, any state, district, or commonwealth, or any territory subject to the administrative or judicial jurisdiction of the United States: (A) an official publication of the record; or (B) a copy attested by the officer with legal custody of the record--or by the officer's deputy--and accompanied by a certificate that the officer has custody. The certificate must be made under seal: (i) by a judge of a court of record in the district or political subdivision where the record is kept; or (ii) by any public officer with a seal of office and with official duties in the district or political subdivision where the record is kept.	

Civil	44	(a)(2)	Foreign	(A) In General. Each of the following evidences a foreign official record--or an entry in it--that is otherwise admissible: (i) an official publication of the record; or (ii) the record--or a copy--that is attested by an authorized person and is accompanied either by a final certification of genuineness or by a certification under a treaty or convention to which the United States and the country where the record is located are parties. (B) Final Certification of Genuineness. A final certification must certify the genuineness of the signature and official position of the attester or of any foreign official whose certificate of genuineness relates to the attestation or is in a chain of certificates of genuineness relating to the attestation. A final certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. (C) Other Means of Proof. If all parties have had a reasonable opportunity to investigate a foreign record's authenticity and accuracy, the court may, for good cause, either: (i) admit an attested copy without final certification; or (ii) permit the record to be evidenced by an attested summary with or without a final certification.	
Civil	44	(b)	"domestic" and "foreign"	A written statement that a diligent search of designated records revealed no record or entry of a specified tenor is admissible as evidence that the records contain no such record or entry. For domestic records, the statement must be authenticated under Rule 44(a)(1). For foreign records, the statement must comply with (a)(2)(C)(ii).	

Civil	44.1		Foreign	A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.	
Civil	45	(b)(1)	Federal	Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies. If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served, a notice must be served on each party.	
Civil	45	(b)(2)	State	Subject to Rule 45(c)(3)(A)(ii), a subpoena may be served at any place: (A) within the district of the issuing court; (B) outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection; (C) within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection; or (D) that the court authorizes on motion and for good cause, if a federal statute so provides.	
Civil	45	(b)(3)	Foreign	28 U.S.C. § 1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country.	

Civil	54	(d)(1)	Federal	Unless a federal statute, these rules, or a court order provides otherwise, costs--other than attorney's fees--should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law....	
Civil	55	(d)	Federal	A default judgment may be entered against the United States, its officers, or its agencies only if the claimant establishes a claim or right to relief by evidence that satisfies the court.	
Civil	62	(e)	Federal	The court must not require a bond, obligation, or other security from the appellant when granting a stay on an appeal by the United States, its officers, or its agencies or on an appeal directed by a department of the federal government.	
Civil	62	(f)	State	If a judgment is a lien on the judgment debtor's property under the law of the state where the court is located, the judgment debtor is entitled to the same stay of execution the state court would give.	
Civil	64	(a)	State	At the commencement of and throughout an action, every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment. But a federal statute governs to the extent it applies.	
Civil	65	(c)	Federal	The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security.	
Civil	69	(a)(1)	State	A money judgment is enforced by a writ of execution, unless the court directs otherwise. The procedure on execution--and in proceedings supplementary to and in aid of judgment or execution--must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies.	

Civil	69	(a)(2)	State	In aid of the judgment or execution, the judgment creditor or a successor in interest whose interest appears of record may obtain discovery from any person--including the judgment debtor--as provided in these rules or by the procedure of the state where the court is located.	
Civil	69	(b)	Federal	When a judgment has been entered against a revenue officer in the circumstances stated in 28 U.S.C. § 2006, or against an officer of Congress in the circumstances stated in 2 U.S.C. § 118, the judgment must be satisfied as those statutes provide.	
Civil	71.1	(k)	State	This rule governs an action involving eminent domain under state law. But if state law provides for trying an issue by jury--or for trying the issue of compensation by jury or commission or both--that law governs.	
Civil	81	(a)(5)	Federal	These rules apply to proceedings to compel testimony or the production of documents through a subpoena issued by a United States officer or agency under a federal statute, except as otherwise provided by statute, by local rule, or by court order in the proceedings.	This is a borderline example, included for the sake of completeness.
Civil	81	(c)(3)(A)	State	A party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal. If the state law did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time. The court must so order at a party's request and may so order on its own. A party who fails to make a demand when so ordered waives a jury trial.	This is another borderline example; removal occurs only from state court.
Civil	81	(d)(1)	State	When these rules refer to state law, the term “law” includes the state's statutes and the state's judicial decisions.	
Civil	81	(d)(2)	State	The term “state” includes, where appropriate, the District of Columbia and any United States commonwealth or territory.	This definition was revised in 2009.

Civil	Supp Rule B	(1)(d)(ii)	Federal	If the property is other tangible or intangible property, the summons, process, and any supplemental process must be delivered to a person or organization authorized to serve it, who may be (A) a marshal; (B) someone under contract with the United States; (C) someone specially appointed by the court for that purpose; or, (D) in an action brought by the United States, any officer or employee of the United States.	This rule, in the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions, deals with attachment & garnishment in an in personam action. See also similar provision in Supp Rule C(3)(b)(ii).
Civil	Supp Rule B	(1)(e)	State	The plaintiff may invoke state-law remedies under Rule 64 for seizure of person or property for the purpose of securing satisfaction of the judgment	
Civil	Supp Rule C	1	Federal	Statutory provisions exempting vessels or other property owned or possessed by or operated by or for the United States from arrest or seizure are not affected by this rule. When a statute so provides, an action against the United States or an instrumentality thereof may proceed on in rem principles.	
Civil	Supp Rule E	(4)(f)	Federal	Whenever property is arrested or attached, any person claiming an interest in it shall be entitled to a prompt hearing at which the plaintiff shall be required to show why the arrest or attachment should not be vacated or other relief granted consistent with these rules. This subdivision shall have no application to suits for seamen's wages when process is issued upon a certification of sufficient cause filed pursuant to Title 46, U.S.C. §§ 603 and 604 or to actions by the United States for forfeitures for violation of any statute of the United States.	

Civil	Supp Rule E	7	Federal	(a) When a person who has given security for damages in the original action asserts a counterclaim that arises from the transaction or occurrence that is the subject of the original action, a plaintiff for whose benefit the security has been given must give security for damages demanded in the counterclaim unless the court for cause shown, directs otherwise. Proceedings on the original claim must be stayed until this security is given unless the court directs otherwise. (b) The plaintiff is required to give security under Rule E(7)(a) when the United States or its corporate instrumentality counterclaims and would have been required to give security to respond in damages if a private party but is relieved by law from giving security.	

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MEMORANDUM

DATE: March 28, 2012

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 11-AP-B

At its fall 2011 meeting, the Committee considered the possibility of amending Rule 28 to mention introductions to briefs. I enclose my September 2011 memo, which discusses that possibility.

Members of the Committee did not reach consensus, at the fall meeting, concerning the desirability of such an amendment. Some participants in the discussion argued that it would be good to amend the Rule to reflect the permissibility of including an introduction. Experienced lawyers already do so, but young lawyers are not always aware that this is an option. Not all of those who favored providing guidance for young lawyers seemed to support revising the text of the Rule; some voiced support for mentioning introductions in the Committee Note to new Rule 28(a)(6). One participant argued that the proposed Rule 28(a)(6), as published for comment, would permit the inclusion of an introduction as part of the statement of the case.

In addition to suggesting that there is no need to amend the Rule to permit introductions, some participants suggested possible disadvantages to doing so. Explicit mention of introductions might cause less-skilled lawyers to include unhelpful material that could extend the overall length of the brief. Participants also noted the challenges of drafting Rule text concerning introductions. It would be difficult to specify in Rule text what the introduction should contain (roughly speaking, the subject of the case and the basic arguments at issue). And it would be challenging to explain the difference between an introduction and the summary of argument. A brief reference to "an optional introduction" would sidestep the difficulties of description, but might not provide much guidance to less-experienced lawyers. Such a locution might also raise a question as to whether other optional sections (not enumerated in Rule 28(a)) are impermissible.

It seems useful to pursue this discussion at the spring 2012 meeting, with a view to reaching consensus on the topic. If the topic is to be addressed in the Committee Note, that should be decided before the Rule 28(a)(6) proposal (if approved) is submitted to the Standing Committee. If the topic is to be addressed in proposed Rule text, it might be advisable to hold the pending Rule 28(a)(6) proposal and bundle it with the new proposal concerning introductions.

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MEMORANDUM

DATE: September 21, 2011

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 11-AP-B

During the course of the Committee's discussions of Item No. 10-AP-B (concerning statements of the case and the facts), members expressed interest in considering other possible amendments to Rule 28. The Committee discussed the possibility of amending Rule 28 to provide for an introduction to the brief. It also discussed the possibility of moving the statement of issues (currently provided for in Rule 28(a)(5)) so that it would follow rather than precede the statement of the case. Rather than fold those questions into its discussion of the statement of the case, the Committee designated them as a new agenda item.

This memo discusses that new item. Part I notes that few existing court rules address the question of introductions, but also that practitioners report that the practice is relatively common. Part II.A discusses possible advantages of addressing introductions in Appellate Rule 28, while Part II.B surveys possible disadvantages. Part III discusses how such a change might be implemented in Rule 28, including the possible effects on other subparts of Rule 28 (such as Rule 28(a)(5)).

I. Existing court rules and current practices

Few rules currently address introductions in briefs. One local circuit rule (in the Eighth Circuit) is on point. There are no Supreme Court rules on point. Three states have relevant provisions. Despite the relative dearth of provisions addressing introductions, experienced appellate litigators appear to use them with some frequency.

A. Local circuit provisions

Marie Leary's 2004 study on local briefing requirements did not mention any local circuit provisions concerning introductions in briefs. *See* Marie Leary, Analysis of Briefing Requirements in the United States Courts of Appeals: Report to the Judicial Conference Advisory Committee on Appellate Rules (FJC 2004). Admittedly, this study targeted local circuit *requirements* that briefs contain matter not required by the Appellate Rules, *see id.* at 3, and thus might not have uncovered provisions that merely *permitted* introductions rather than requiring them. This summer I performed a rough word search of local circuit provisions, and

found no provisions concerning introductions in briefs.[1] I also reviewed all local circuit provisions that are grouped under Rule 28, on the theory that those provisions would be most likely to address the question of introductions. That search disclosed only one relevant provision.[2] Eighth Circuit Rule 28A(i)(1) provides:

> SUMMARY OF THE CASE. Each appellant must file a statement not to exceed 1 page providing a summary of the case, the reasons why oral argument should or should not be heard, and the amount of time (15, 20, or 30 minutes, or in an extraordinary case, more than 30 minutes) necessary to present the argument. The summary must be placed as the first item in the brief. If appellee deems appellant's statement incorrect or incomplete, appellee may include a responsive statement in appellee's brief.

B. Supreme Court rules

The Supreme Court's rule governing merits briefs does not mention introductions. Under the rule, an introduction (as such) cannot be the first item in the brief, because that place is reserved for the Questions Presented. *See* Supreme Court Rule 24.1(a); *see also* Supreme Court Rule 14.1(a) (governing petitions for certiorari). As was noted during earlier Committee discussions, some lawyers include a few sentences in the Questions Presented section that might serve the purpose of an introduction.

C. State provisions

Thanks to the comprehensive research and thoughtful analysis that Holly Sellers performed in advance of the Committee's spring meeting, we know that three states have provisions that address the question of introductions in briefs.[3] One state – Kentucky – requires

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[1] On August 25, 2011, I ran the following search in Westlaw's USC database: pr,ci,ti(circuit & appeals) & brief & (introduc! preface prefatory preamble). I did not count as relevant a "preamble" the sole purpose of which is to discuss whether oral argument is needed. *See* Fifth Circuit Rule 28.2.3 ("Counsel for appellant must include in a preamble to appellant's principal brief a short statement why oral argument would be helpful, or a statement that appellant waives oral argument. Appellee's counsel must likewise include in appellee's brief a statement why oral argument is or is not needed....").

[2] As stated in the preceding footnote, I am not listing provisions that require, early in the brief, a statement of reasons why oral argument should or should not be held. *See, e.g.*, Eleventh Circuit Rule 28-1(c). The Eighth Circuit provision (quoted in the text) is distinctive in that it requires not just a statement concerning oral argument but also a "summary of the case."

[3] *See* Memorandum from Holly Taylor Sellers to Peter G. McCabe, State Court Rules Governing Appellate Court Briefs (March 14, 2011) ("Sellers Memo"), at 14-15. The memo omits from this list the Illinois Supreme Court Rule that requires the appellant's brief to contain

an introduction; the other two states – New Jersey and Washington – permit one.

Kentucky's rules require that the first item in the appellant's brief be

> [a] brief "INTRODUCTION" indicating the nature of the case, and not exceeding two simple sentences, such as, "This is a murder case in which the defendant appeals from a judgment convicting him of 1st -degree manslaughter and sentencing him to 20 years in prison," or "This is a case in which an insurance company appeals from a judgment construing its policy as applicable, and a co-defendant's policy as not applicable, to the plaintiff's accident claim. Plaintiff also appeals against the co-defendant."

Kentucky Rules of Civil Procedure Rule 76.12(c)(i). The rules do not provide for an introduction in the appellee's brief. *See id.* Rule 76.12(d).

New Jersey Rule of Court 2:6-2(a)(6) provides: "[E]ach brief may include an optional preliminary statement for the purpose of providing a concise overview of the case. The preliminary statement shall not exceed three pages and may not include footnotes or, to the extent practicable, citations." Washington's appellate rules provide that the appellant's brief may contain "[a] concise introduction. This section is optional. The introduction need not contain citations to the record of [*sic*] authority." Washington Rules of Appellate Procedure 10.3(a)(3). The Washington rule does not explicitly address whether the appellee's brief can also contain an introduction, but it seems reasonable to read the rule to permit one. *See id.* Rule 10.3(b) ("The brief of respondent should conform to section (a) and answer the brief of appellant or petitioner....").

D. Current practice

Notwithstanding the absence of national and local provisions addressing introductions in briefs, experienced appellate lawyers appear to include introductions with some frequency.[4] The

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– between the statement of points and authorities and the statement of issues – "[a]n introductory paragraph stating (i) the nature of the action and of the judgment appealed from and whether the judgment is based upon the verdict of a jury, and (ii) whether any question is raised on the pleadings and, if so, the nature of the question." Illinois Supreme Court Rule 341(h)(2). I agree that this provision seems to require something closer to a statement of the case than to the type of introduction that is the focus of this memo. *See* Sellers Memo at 6.

[4] Two of the comments submitted by members of the ABA Council of Appellate Lawyers (in response to Judge Sutton's inquiry about the statement of the case) touched upon the question of introductions. One member wrote in part: "Personally, I have used the brief statement of the case in lieu of an introduction, and have never had more than one page." Appendix to ABA Council of Appellate Lawyers, Report Concerning Advisory Committee on

practice is common, for example, in the office of the United States Attorney for the Southern District of New York and in United States Attorneys' offices within the Ninth Circuit.

II. Arguments for and against addressing the topic of introductions in Appellate Rule 28

The Committee's discussions have revealed both advantages and disadvantages to revising Appellate Rule 28 to address the topic of introductions. Overarching themes include the importance of considering what judges would find useful; the need to preserve flexibility for lawyers; and the difficulty of crafting a rule that provides appropriate guidance for both skilled and unskilled advocates.

A. Possible advantages

To the extent that skilled practitioners already employ introductions, a national rule addressing introductions in briefs might simply codify existing practice (as Appellate Rule 12.1 and the cognate district-court rules have done for the practice of indicative rulings). By making clear that introductions are permitted, the rule would simplify practice for those who wish to use them. Introductions drafted by experienced lawyers can frame the issues. They can report the posture of the case, identify the issues on appeal, and cast those issues in the most favorable light for the party writing the brief. A participant in the Committee discussions described briefs by public interest groups such as Public Citizen and the ACLU that make very effective use of introductions. One commentator has suggested that "[a]n introduction can be an important and helpful part of a brief – as a prelude to a long brief, or to caution that certain arguments are conditioned on others, or to explain that different arguments lead to different relief."[5]

B. Possible disadvantages

Codifying existing practice would not only simplify things for practitioners who already use introductions – it could also broaden the use of introductions by alerting less experienced practitioners to the possibility of using them. Introductions drafted by unskilled lawyers might be unhelpful. Indeed, to the extent that such introductions veer into argument untethered to the appellate record, they could be undesirable. If the use of introductions becomes standard, brief drafters might have a difficult time boiling their argument down to the single point – or handful

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Appellate Rules Agenda Item No. 10-AP-B: Statement of the Case (April 2011), at 14. Another member wrote in part: "I also like that the statement of the case is an opportunity for counsel to present a thematic statement of what the case is about, an opportunity that doesn't exist in other pre-argument sections. (Of course, many lawyers alternatively insert an introduction before the jurisdictional statement.)" Appendix to ABA Council of Appellate Lawyers Report at 16.

[5] Letter from Peder K. Batalden to Peter G. McCabe (Jan. 27, 2011) ("Batalden Letter"), at 2.

of points – that really ought to go into an introduction, and might instead try to cover too many issues "up front."

Those questioning the need for a national rule concerning introductions have also wondered whether a local rule might be preferable. If the goal is to provide judges with the items that are helpful to them, and if only one circuit currently requires (and no other circuit explicitly permits) anything resembling an introduction,[6] perhaps a national rule is not needed.

III. Implementing a change to Appellate Rule 28

The Committee's discussions have pointed out several practical questions that would need to be addressed if Appellate Rule 28 were to be amended to address the topic of introductions. Those questions include the following:

- Permissive vs. mandatory.
  - No participants in the Committee's discussions thus far have voiced support for making introductions mandatory. Thus, the proposed rule presumably would permit, but not require, the inclusion of an introduction.
- Length.
  - Some concerns about the possible disadvantages of introductions might be addressed by imposing a length limit (say, one page) on the introduction. But some participants have described complex cases in which the introduction was as long as four pages. In any event, the introduction presumably would count toward the overall length limits set by Rule 32(a)(7).
- Contents.
  - In the light of the concerns expressed about the downsides of introductions drafted by inexperienced lawyers, either the rule text or the Note might address the contents of the introduction.
  - Peder Batalden has suggested "that the Committee revise Rule 28(a) to include a new subrule allowing a brief to include an introduction, and that the language from Rule 28(a)(6) concerning 'the nature of the case' be relocated to that new subrule." Batalden Letter, *supra* note 5, at 2.

[6] As of this writing, the Eighth Circuit is the only one to require something resembling an introduction. At the spring 2011 meeting, Douglas Letter noted the possibility that the Ninth Circuit might consider revising its local rules to permit (though not require) an introduction.

- Placement.

  - Because Rule 28(a) requires the listed items to appear "in the order indicated," in adding a provision concerning introductions it would be necessary to specify precisely where the introduction should go. One suggestion has been that the introduction could go directly before the statement of the case or could be part of the statement of the case. For a discussion of the related question of the placement of the statement of issues, see below.

  - Peder Batalden has suggested that "an introduction ought to be the first, not the third, substantive component of a brief (after statements of jurisdiction and the issues)." Batalden Letter, *supra* note 5, at 2. Similarly, Douglas Letter reported at the Spring 2011 meeting that the proposed local rule currently being considered by the Ninth Circuit contemplates that if the brief is to have an introduction, the introduction should be the first substantive item in the brief

- Effect on other provisions.

  - Statement of issues. Some participants have suggested that if the introduction were to be placed just before the statement of the case, then the statement of issues – currently required by Rule 28(a)(5) – should be placed after the statement of the case. The effect would be that the newly-authorized introduction would be the first substantial item in the brief (assuming that the jurisdictional statement required by Rule 28(a)(4) will generally be short).

    - Holly Sellers' survey of the approaches taken in state-court briefing rules demonstrates that the ordering adopted in current Appellate Rule 28(a) is not inevitable.[7]

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[7] The study summed up the state-court approaches as follows, using "I" to indicate the statement of the issues, "C" to indicate the statement of the case, and "F" to indicate the statement of facts:

• thirty-one states follow the same order as FRAP 28 [I-C-F];
• nine require the statement of the case, then the statement of facts, followed by the statement of the issues [C-F-I];
• seven require the statement of the case, then the statement of issues, followed by the statement of facts [C-I-F];
• one state requires a statement of facts followed by the statement of issues, with no mention of a statement of the case [F-I]; and
• the remaining two states contain provisions that cannot be analogized to FRAP for purposes of this categorization.

- Summary of argument. It has been suggested that permitting an introduction might prompt a re-evaluation of the necessity of a summary of argument (currently required by Rule 28(a)(8)). Rule 28(a)(8) requires "a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings." It is possible that some introductions might largely duplicate this summary. But not all introductions will do so.

Sellers Memo, *supra* note 3, at 10.

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MEMORANDUM

DATE: March 28, 2012

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 11-AP-E

Roger I. Roots has suggested that Appellate Rule 4(b) be amended to accord criminal defendants the same 30-day appeal period that applies to government appeals in criminal cases.[1] In his suggestion, in proposed testimony that he forwarded to the Administrative Office, and in the article cited in his suggestion,[2] Dr. Roots makes several arguments in support of this proposal. Dr. Roots asserts that the current disparity in criminal appeal times gives the government an unfair advantage that contributes to the high rates of incarceration in the United States. He points out that the government possesses the advantages of a repeat player and that criminal defendants and their lawyers need time to confer concerning litigation strategy. He contends that the appeal-time disparity violates Equal Protection and Due Process principles and that it contravenes a long common-law tradition of treating all litigants equally.

If the Committee were persuaded by Dr. Roots' suggestion, the implications of his proposal would extend well beyond Appellate Rule 4(b). However, as I discuss below, Dr. Roots' constitutional argument lacks doctrinal support and his tradition-based argument is belied by history. Moreover, Dr. Roots' policy arguments are somewhat incomplete. He fails to adduce empirical support for the proposition that the current 14-day deadline impairs criminal defendants' ability to take appeals, and he does not account for the many other aspects of criminal practice that are asymmetrical (including a number of asymmetries that favor the defendant).

I. Constitutionality

In his article, Dr. Roots contends that the disparity in filing deadlines violates both equal

[1] I enclose a copy of the suggestion and a copy of the proposed testimony that Dr. Roots provided to the Administrative Office.

[2] *See* Roger Roots, *Unfair Federal Rules of Procedure: Why Does the Government Get More Time?*, 33 Am. J. Trial Advoc. 493 (2010).

protection and due process.[3] For the reasons detailed in the enclosed memorandum (authored by one of my research assistants, Arianna Scavetti), these contentions fail. Admittedly, the standard view that there is no constitutional right to an appeal[4] does not settle the question; once the decision is made to provide an appeal, the procedures for taking it must comply with due process principles.[5] But as Ms. Scavetti explains, the reasons for according the government additional time to file its notice of appeal easily meet the applicable standard (rational basis review).

To Ms. Scavetti's analysis I would only add that the two U.S. Supreme Court cases upon which Dr. Roots's article relies are both distinguishable. Each involved a cost barrier to court access for indigent litigants, not a deadline for taking advantage of an opportunity for court

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[3] *See id.* at 497 (arguing that the procedural disparities that he identifies "almost certainly violate understood norms of constitutional law").

[4] *See, e.g.*, *Halbert v. Michigan*, 545 U.S. 605, 610 (2005) ("The Federal Constitution imposes on the States no obligation to provide appellate review of criminal convictions."); *McKane v. Durston*, 153 U.S. 684, 687 (1894) ("A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law, and is not now, a necessary element of due process of law.").

It is possible to argue that this conventional view should give way if the defendant is sentenced to death. As Judge Ebel has noted,

> [T]he Supreme Court has stated that a criminal defendant has no constitutional right to appeal a conviction …. However, the Court has never so stated in the context of the death penalty. To the contrary, it has underscored that meaningful appellate review is an important safeguard in a state's death penalty scheme that helps prevent the random or arbitrary imposition of the death sentence in violation of the Eighth and Fourteenth Amendments. *See, e.g.*, *Pulley v. Harris*, 465 U.S. 37, 45 ... (1984); *Zant v. Stephens*, 462 U.S. 862, 890 ... (1983); *Gregg v. Georgia*, 428 U.S. 153, 195, 206 ... (1976) (opinion of Stewart, Powell, and Stevens, JJ.). Thus, although the Court has not explicitly held that the right to appeal a death sentence is constitutionally required, I expect that if a state ever tried to deny a right of appeal to a defendant sentenced to death that the Supreme Court would conclude that the Constitution requires some form of meaningful appellate review of such cases.

Hatch v. Oklahoma, 58 F.3d 1447, 1472-73 (10th Cir. 1995) (Ebel, J., dissenting).

[5] *Cf., e.g.*, *M.L.B. v. S.L.J.*, 519 U.S. 102, 110 (1996) ("Although the Federal Constitution guarantees no right to appellate review …, once a State affords that right …, the State may not 'bolt the door to equal justice.'" (quoting *Griffin v. Illinois*, 351 U.S. 12, 24 (1956) (Frankfurter, J., concurring in judgment))).

access.[6] Dr. Roots has not provided a reason to think that the 14-day appeal deadline poses a disproportionate barrier for indigent defendants.

II. Tradition

Dr. Roots asserts that "[t]he idea that fair courts require equal rights of procedure has been a component of Anglo-American common law for centuries."[7] This argument, as applied to Appellate Rule 4(b), overlooks the fact that the very *existence* of federal criminal appeals is a relatively modern development;[8] it was 1879 when Congress provided for discretionary circuit court review (by writ of error) of some criminal district-court judgments,[9] and it was in 1889 and 1891 that Congress authorized appeals as of right directly to the Supreme Court in capital cases (the 1889 statute) or cases that involved "a capital or otherwise infamous crime" (the 1891 statute).[10] (In 1897 Congress redirected appeals in cases involving infamous but non-capital

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[6] In *Boddie v. Connecticut*, 401 U.S. 371 (1971), the Court held fee requirements for divorce proceedings unconstitutional as applied to indigent litigants. *See id.* at 374. The Court reasoned that the importance of marriage and the state's monopoly on divorce gave a person seeking a divorce an interest in due process similar to that of a defendant. *See id.* at 376-77. The fee requirements, the Court held, were unconstitutional as applied to indigent litigants because those requirements denied the litigants "a meaningful opportunity to be heard" and thus, "in the absence of a sufficient countervailing justification for the State's action," violated due process. *Id.* at 377, 380-81.

In *Griffin v. Illinois*, 351 U.S. 12 (1956), the plurality held that it was unconstitutional for a state to provide a criminal appeal as of right but condition its exercise on the purchase of a transcript that indigent defendants could not afford. *See id.* at 17-18. Justice Frankfurter, concurring in the judgment, agreed with this basic premise. *See id.* at 21-22 (Frankfurter, J., concurring in the judgment).

[7] Roots, *Unfair Federal Rules*, 33 A. J. Trial Advoc. at 503.

[8] *See* Francis A. Allen, Griffin v. Illinois: *Antecedents and Aftermath*, 25 U. Chi. L. Rev. 151, 154 (1957) ("In relation to the whole history of Anglo-American legal development, the criminal appeal can be regarded as almost a modern innovation. It is sometimes forgotten that the system of criminal appeals as we know it today is very largely a product of the nineteenth century.").

[9] *See* Act of March 3, 1879, ch. 176, § 1, 20 Stat. 354. The Act, which limited this review to cases in which the sentence included imprisonment or a large fine, did provide a very generous time for seeking review: the petition for a writ of error was to be presented "[w]ithin one year next after the end of the term at which such sentence shall be pronounced." *Id.* § 2.

[10] *See* Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. 655, 656; Act of Mar. 3, 1891, ch. 517, § 5, 26 Stat. 826, 827. The 1889 Act required the petition to be filed with the trial court within the

crimes to the circuit courts of appeals (rather than the Supreme Court)[11] and in 1911 Congress redirected all criminal appeals as of right to the circuit courts of appeals.[12]) Admittedly, it is possible to argue that other mechanisms served some of the functions of an appeal before the time that Congress provided for appeals in criminal cases.[13] But this history nonetheless would seem to complicate Dr. Roots' claim that a long tradition supports his prescription for Appellate Rule 4(b).

III. The question of hardship

In support of his argument that private litigants should have the same deadlines as government litigants, Dr. Roots details challenges faced by criminal defense attorneys:

> In many situations, attorneys for criminal defendants must scramble to meet with clients (who may be in prison or otherwise of restricted mobility), relatives of clients who might hold the purse strings for payment, and defense witnesses. Unlike government lawyers – who are generally supported by investigative teams of FBI, DEA or BATF[] agents – private lawyers often moonlight as their own investigators, engaging in time-consuming detective work in addition to their legal advocacy. A dozen or more in-person or telephone conversations may be necessary before a private attorney can properly complete a legal filing.[14]

Dr. Roots does not, however, focus on the degree to which these challenges apply to the filing of a notice of appeal in particular.

The notice of appeal is a simple document that must merely specify the appellant, designate the judgment being appealed, and name the court to which the appeal is taken. *See* Appellate Rule 3(c)(1). Criminal Rule 32(j)(1) requires the district court, after sentencing the defendant, to advise the defendant of the right to take an appeal, and also requires the district court to advise indigent defendants of their right to ask to appeal in forma pauperis. Moreover, Criminal Rule 32(j)(2) provides that "[i]f the defendant so requests, the clerk must immediately prepare and file a notice of appeal on the defendant's behalf."

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same term in which the trial occurred (though the court could extend this filing period for no more than 60 days "for cause"). 25 Stat. 655, 656.

[11] *See* Act of Jan. 20, 1897, ch. 68, 29 Stat. 492.

[12] *See* Act of Mar. 3, 1911, ch. 231, § 128, 36 Stat. 1087, 1133-34.

[13] *See* Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. Rev. 503, 532-33 (1992) (arguing that in nineteenth-century federal criminal procedure new trial motions served a number of functions akin to modern appeals).

[14] Roots, *Unfair Federal Rules*, 33 Am. J. Trial Advoc. at 516.

Thus, ordinarily, the only challenge that a defendant will face before taking a criminal appeal will be to decide whether to take the appeal at all. And in most instances this decision should not be difficult. Admittedly, counsel needs to satisfy himself or herself that there is some colorable basis for appealing.[15] And if a notice of appeal has not already been filed on the defendant's behalf by the clerk, then counsel must ascertain whether the defendant wishes to appeal. But in most cases the latter choice will be straightforward.[16] If logistical difficulties of the sort described by Dr. Roots arise in this context, the defendant could seek an extension of the time to appeal under Appellate Rule 4(b)(4).[17] In instances where an incarcerated defendant files the notice of appeal himself or herself, Appellate Rule 4(c)'s inmate-filing provision allows the inmate to meet the appeal deadline by "deposit[ing the notice of appeal] in the institution's internal mail system on or before the last day for filing." And in instances where the defendant has directed the lawyer to file the notice of appeal and the lawyer fails to do so within the appeal time, this failure would constitute ineffective assistance and, thus, establish cause for purposes of surmounting the procedural-default hurdle to a later Section 2255 petition.[18]

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[15] "A criminal-defense lawyer may take any step required or permitted by the constitutional guarantee of the effective assistance of counsel. With respect to propositions of law, a criminal-defense lawyer may make any nonfrivolous argument. Under decisions of the United States Supreme Court, a lawyer representing a convicted person on appeal may be required to file a so-called *Anders* brief in the event the lawyer concludes that there is no nonfrivolous ground on which the appeal can be maintained." Restatement (Third) of Law Governing Lawyers § 110 cmt. f (2000). *See also, e.g.*, *United States v. Gomez*, 24 F.3d 924, 926 (7th Cir. 1994) ("If this were a civil case, we would award sanctions under Fed.R.App.P. 38 for the taking of a frivolous appeal. We have generally refrained from using this measure in criminal cases (although there are exceptions ...)....").

[16] One can think of exceptions, such as the "grisly choice" faced by a defendant who escaped a death sentence but believes that constitutional error produced his or her conviction. *See Fay v. Noia*, 372 U.S. 391, 440 (1963) ("His [Noia's] was the grisly choice whether to sit content with life imprisonment or to travel the uncertain avenue of appeal which, if successful, might well have led to a retrial and death sentence."), *overruled as to "deliberate bypass" test by Wainwright v. Sykes*, 433 U.S. 72 (1977).

[17] *See, e.g.*, *United States v. Smith*, 60 F.3d 595, 596 (9th Cir. 1995) (finding no abuse of discretion in district court's grant of extension where "[t]he district court found that Smith and his attorney had attempted to contact each other regarding whether to file a notice of appeal, but that it was difficult for Smith's attorney to locate Smith because Smith was moved to prisons in different states three times during the period immediately following entry of the judgment").

[18] *See Wainwright v. Sykes*, 433 U.S. 72, 87 (1977) (requiring showing of cause and prejudice in order to excuse state prisoner's state-court procedural default); *Murray v. Carrier*, 477 U.S. 478, 488-89 (1986) (applying in the context of a federal prisoner's Section 2255 petition the same cause-and-prejudice test applied in the context of state prisoners' habeas petitions, and stating that constitutionally ineffective assistance of counsel constitutes "cause");

It therefore seems to me that Dr. Roots has not established that criminal defendants' appeal deadlines should be lengthened due to hardship caused by the current 14-day deadline. It is interesting to note that the Committee reached the same conclusion a decade ago, when it last considered a proposal to amend Rule 4(b) to give criminal defendants 30 days to appeal. After a discussion in which members expressed doubt that criminal defendants were having difficulty meeting the existing deadline, the Committee voted 8-1 to remove the proposal from the Committee's agenda.[19]

That prior discussion did include one consideration, not raised by Dr. Roots, that is worth noting. During the Committee's 2002 discussion, a Committee member raised a concern "about the difficulty that courts are having distinguishing 'civil' motions from 'criminal' motions when trying to decide whether the time limitations of Rule 4(a) or 4(b) apply to an appeal of an order disposing of a motion," and argued that extending criminal defendants' appeal deadline to 30 days would eliminate the possibility that a party would lose appeal rights by wrongly guessing that Rule 4(a), rather than Rule 4(b), governed the appeal.[20] This concern strikes me as worth examining. Usually appeals will be easy to categorize, but at the margins, "[d]rawing the line between criminal and civil for purposes of Rule 4(b) is difficult because many appealable orders technically 'in' criminal cases look more civil than criminal."[21] As Judge Hartz has explained, "it is the essential nature of the action, not the underlying proceeding it arose from, that determines whether it is civil or criminal."[22] Merely for illustrative purposes, here is a chart showing how the state of the law is summarized in the Federal Practice and Procedure treatise:[23]

Strickland v. Washington, 466 U.S. 668, 687, 684 (1984) (ineffective-assistance test requires both that the attorney's performance fell below the standard of "reasonably effective assistance" and "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"); *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000) (holding in a state-prisoner habeas case that the *Strickland* test "applies to claims ... that counsel was constitutionally ineffective for failing to file a notice of appeal"); *id.* at 477, 486 (stating that "a lawyer who disregards specific instructions from the defendant to file a notice of appeal" plainly meets *Strickland*'s first prong and that *Strickland*'s second prong is met by showing that "but for counsel's deficient conduct, [the petitioner] would have appealed").

[19] *See* Minutes of Spring 2002 Meeting of Advisory Committee on Appellate Rule, April 22, 2002, at 28-29.

[20] *Id.* at 29.

[21] *United States v. Taylor*, 975 F.2d 402, 403 (7th Cir. 1992).

[22] *In re Special Grand Jury 89-2*, 450 F.3d 1159, 1167 (10th Cir. 2006).

[23] See Federal Practice & Procedure § 3950.8. My goal in including this chart is merely to sketch the general outline of the distinction; hence, I quote the treatise as an expedient source. If the Committee is interested in investigating this issue further, I can prepare a more detailed

Civil	Criminal
• "An appeal from an order granting or denying an application for a writ of error coram nobis." Rule 4(a)(1)(C).[24]	• An appeal from an order denying a Criminal Rule 33 motion for a new trial. • An appeal from an order denying a Criminal Rule 35 motion to correct a sentence.
• Appeals relating to forfeiture of criminal bail bonds.	• A defendant's appeal from a preliminary order of forfeiture.
• An appeal from a proceeding to amend a criminal forfeiture order under 21 U.S.C. § 853(n) with respect to a third party's rights in the property.	• An appeal from a forfeiture that forms part of the punishment imposed on the defendant in a criminal prosecution.
• Non-governmental appeals relating to grand jury subpoenas [courts divided].	• Non-governmental appeals relating to grand jury subpoenas [courts divided].
• An appeal from denial of a request for disclosure of grand jury transcripts, for use in petitioner's habeas proceeding.	• An appeal from an order denying a criminal defendant's discovery requests, addressed to third parties, under circumstances where there were no pending civil suits of which the discovery requests could form a part.
• An appeal from an order denying grand jury members' petition for the release of material associated with the investigation of possible environmental crimes by a government contractor at a nuclear weapons plant.	

memo on the topic.

[24] The 2002 Committee Note to Rule 4 warns: "Rule 4(a)(1)(C) applies only to motions that are in substance, and not merely in form, applications for writs of error coram nobis." Thus, if "[l]itigants … bring and label as applications for a writ of error coram nobis what are in reality motions for a new trial under Fed. R. Crim. P. 33 or motions for correction or reduction of a sentence under Fed. R. Crim. P. 35 …, the time limitations of Rule 4(b), and not those of Rule 4(a), should be enforced."

Civil	Criminal
• An appeal from an order in a Section 2255 proceeding.[25]	• An appeal from an order denying a motion (made shortly after sentencing) to withdraw a guilty plea.
• An appeal from an order concerning a motion for return of property under Criminal Rule 41(g), at least if the motion is filed after the termination of the criminal proceeding.	
• Most courts have held that appeals regarding Hyde Amendment motions for attorney fees and other litigation expenses are civil ...	... but one court has held that they are criminal.
	• An appeal concerning a motion to modify a term of imprisonment under 18 U.S.C. § 3582(c).
• An appeal from the denial of a request under 28 U.S.C. § 2513 for a certificate of innocence (a statutory prerequisite to a civil suit for wrongful imprisonment).	

[25] The treatise notes further complications in this area:

> In cases decided prior to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), where an appellant (1) denominated the request in the district court under a title (such as a Criminal Rule 33 motion) to which the appeal times of Rule 4(b) applied, but (2) the ensuing appeal was untimely under Rule 4(b), and (3) the relief sought by appellant would be cognizable under Section 2255, courts had been willing—especially in the case of pro se appellants—to view the appeal as one from the denial of a Section 2255 petition to which the appeal times of Rule 4(a) applied. Post-AEDPA, the practice of deeming motions (not styled as Section 2255 applications) to be brought under Section 2255 may advantage an appellant by invoking Rule 4(a)'s longer appeal times but, on the other hand, might disadvantage the appellant by triggering certain statutory constraints; in a related context, the Supreme Court has imposed limitations on such recharacterization.

Federal Practice & Procedure § 3950.8 (footnotes omitted).

Civil	Criminal
• An appeal from an order granting or denying relief from the firearms prohibitions imposed on convicted felons by the Gun Control Act of 1968.	
• An appeal from an order vacating (in favor of other crime victims) a judgment lien that had been obtained by one crime victim under the Mandatory Victims Restitution Act (18 U.S.C.A. § 3664(m)(1)(B)).	• An appeal from an order refusing to declare that a defendant had satisfied his restitution obligation was held to be criminal based on the district court's jurisdiction to supervise compliance with the terms of the defendant's supervised release.

This chart provides a sense of the types of questions that may arise at the borderline, where categorizing an appeal might give a litigant pause. But before concluding that such conceptual challenges create a need to lengthen Rule 4(b)(1)(A)'s appeal deadlines, one should consider whether a litigant would be likely to assume that Rule 4(a)'s appeal deadlines would apply in the contexts described in the right-hand column of the chart, and also whether – if a litigant did make such an erroneous assumption – an extension under Rule 4(b)(4) might be available.

IV. The question of symmetry

It is plausible to argue that symmetry is an important value in litigation; thus, other things being equal, it makes sense for opposing parties to be subject to the same procedural requirements. But in both civil[26] and criminal litigation involving the United States, the principle of symmetry has always been tempered by other values. In the context of criminal litigation, some asymmetries benefit the government and others benefit the defendant.

As Dr. Roots points out, the government is a repeat player in criminal litigation, and a repeat player can make strategic decisions that, over time, affect the development of legal doctrine in ways that benefit the repeat player. He also is correct to note that the government has extensive investigative resources at its disposal and that certain features of substantive and procedural criminal law give the government a great deal of bargaining power.

However, other features of criminal procedure are asymmetrical to the benefit of the defendant. For example,

[26] For example, civil suits against the federal government occur against a doctrinal backdrop in which the starting point was federal sovereign immunity. It is well established that the United States can impose both substantive and procedural conditions on its waiver of sovereign immunity.

> the prosecution's discovery rights in criminal cases are limited, both by rules of court and constitutional privileges; it is prohibited from being granted a directed verdict or from obtaining a judgment notwithstanding the verdict no matter how clear the evidence in support of guilt, cf. Fed. Rule Civ. Proc. 50; it cannot secure a new trial on the ground that an acquittal was plainly contrary to the weight of the evidence, cf. Fed. Rule Civ. Proc. 59; and it cannot secure appellate review where a defendant has been acquitted [by the jury].[27]

It is also interesting to note that, in the wake of the Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007), a number of courts have held the criminal defendant's appeal time to be non-jurisdictional (because it is set only by rule and not also by statute) while at least one circuit has concluded that the government's appeal time is jurisdictional (at least in instances where the government's appeal deadline is also set by statute).[28]

It seems difficult to argue that, in this landscape, Appellate Rule 4(b) presents an unacceptable asymmetry. The considerations adduced in support of the government's need for the 30-day appeal period – i.e., the need for consultation up the chain of responsibility within the Department of Justice – are plausible. Admittedly, it would be possible to address those considerations without adopting asymmetric appeal deadlines, by according the longer period to both sides. As the Committee knows, this is the approach taken for civil cases by Appellate Rule 4(a)(1) and 28 U.S.C. § 2107, which accord the longer (60-day) appeal time to *all* parties in cases where one of the relevant federal entities is a party. But the fact that the symmetric approach is possible does not mean that it is mandatory. And the asymmetry of Rule 4(b)'s appeal times is partly moderated by the provision that permits the defendant to file a notice of appeal within 14 days after the government files a notice of appeal.

V. Relevance to other Rules

If the Committee were to find Dr. Roots's suggestion concerning Appellate Rule 4(b) persuasive, then it would be important to consult other Advisory Committees concerning the proposal's possible implications for provisions in the other sets of national Rules. The Criminal Rules Committee would have an obvious interest in the question concerning Appellate Rule 4(b). And the Civil Rules Committee would have an interest in the possible implications for Civil Rule 12(a) (which gives federal government parties extra time to respond to the complaint).

VI. Conclusion

Dr. Roots argues that by adopting and maintaining rules that treat the government

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[27] *Standefer v. United States*, 447 U.S. 10, 22 (1980).

[28] This feature of the doctrine is discussed in the memo concerning *Gonzalez v. Thaler*, 132 S. Ct. 641 (2012), that appears elsewhere in the agenda materials.

differently than other litigants, participants in the rulemaking process "have rigged the federal courts in favor of the state over the citizenry for more than half a century."[29] He asserts that Rule 4(b)'s treatment of appeal deadlines (and the other disparities in the Rules that he identifies) "ha[ve] almost certainly helped transform the United States from a beacon of freedom into a land of expanding federal jurisdiction over national affairs, exploding prison populations, and federal conviction rates as high as ninety-five percent in recent years."[30] However, I am aware of no constitutional requirement or feature of the American legal tradition that requires identical appeal times for the prosecution and the defense in a criminal case, and in my view Dr. Roots has not at this time adduced persuasive evidence of a need to lengthen the period for appeals by criminal defendants.

In my view, the most plausible reason for considering such an amendment to Rule 4(b) would arise from the possibility that, at the margins, it may sometimes be unclear whether a particular appeal counts as civil or criminal (and thus it may be unclear whether Rule 4(a) or Rule 4(b) governs the time to appeal). This concern, however, is not invoked by Dr. Roots. And a defendant facing uncertainty on this score could avoid problems by assuming that the shorter (criminal) appeal time applies.

Encls.

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[29] Roots, *Unfair Federal Rules*, 33 Am. J. Trial Advoc. at 501.

[30] *Id.* at 504.

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TAB 9B

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11-AP-E

suggestion for a proposed rule change
ROGER ROOTS
to:
rules_support
11/14/2011 05:23 PM
Hide Details
From: ROGER ROOTS <rogerroots@msn.com>

To: <rules_support@ao.uscourts.gov>

Roger I. Roots, J.D., Ph.D.

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November 14, 2011

Advisory Committee

Federal Rules of Appellate Procedure

c/o Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

SUGGESTION FOR PROPOSED AMENDMENT TO THE FEDERAL RULES OF APPELLATE

PROCEDURE

Dear Advisory Committee:

My name is Roger Roots and I am an attorney in private practice, a member of the bars of the State of Rhode Island and the U.S. 1st, 8th, 9th and 10th Circuit Courts of Appeals. Over the past couple of years, I have been conducting some research regarding the fairness of the various Federal Rules of Procedure. I have authored a law review article entitled, "Unfair Rules of Procedure: Why Does the Government Get More Time?, *American Journal of Trial Advocacy*, Vol. 33, pp. 493-520 (2010) (available at http://www.constitution.org/lrev/roots/unfair_rules_procedure2.pdf).

SUGGESTION FOR RULE CHANGE:

At present, *Federal Rule of Appellate Procedure* 4(b) provides that the United States has 30 days to appeal from criminal judgments, compared with only 14 days for criminal defendants.

I would like to suggest that this Rule be amended to read:

(b) Appeal in a Criminal Case.

(1) Time for Filing a Notice of Appeal.

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 30 days after the later of:

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

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

(B) When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of:

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

(ii) the filing of a notice of appeal by any defendant.

I believe this rule change is necessary to eliminate an unfair advantage that the government has in federal criminal litigation. I believe the current filing disparity in Rule 4 also violates the common law rule that parties before the courts are to litigate on a level playing field. *See, e.g., State v. Bowers*, 9 A. 125, 126 (Md. 1886) (indicating that although criminal appeals should be resolved as quickly as reasonably possible, the law of notice periods should make "no distinction between an appeal or writ of error taken by the state and one taken by the accused." *See also* Roots, *supra*, 33 Am. J. Trial Adv. 493, 503-09 (2010) (discussing common law and constitutional basis for a requirement of equal procedures).

Sincere thanks,

/s/ Roger Roots

Dr. Roger Roots

TAB 9C

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Before the Advisory Committee on Appellate Rules

April 12-13, 2012 meeting in Washington, DC

TESTIMONY OF ROGER I. ROOTS, J.D., PH.D.

IN SUPPORT OF 11-AP-D

My name is Roger Roots and I am an attorney in private practice, a member of the bars of the State of Rhode Island and the U.S. 1st, 8th, 9th and 10th Circuit Courts of Appeals. Over the past several years, I have been conducting some research regarding the unfairness of the various Federal Rules of Procedure. I have authored a law review article entitled, *"Unfair Rules of Procedure: Why Does the Government Get More Time?,"* American Journal of Trial Advocacy, Vol. 33, pp. 493-520 (2010).

I strongly urge the Committee to adopt proposed amendment 11-AP-D, which will amend the filing time periods for filing notices of appeal in criminal cases.

The suggested rule change will equalize the filing time periods for both the Government and a criminal defendant in all criminal cases. At present, Federal Rule of Appellate Procedure 4(b) provides that the United States has 30 days to appeal from criminal judgments, compared with only 14 days for criminal defendants. Proposal 11-AP-D will provide each side with 30 days to file a notice of appeal.

Rule 4(b) will be amended to read:

(b) Appeal in a Criminal Case.
(1) Time for Filing a Notice of Appeal.
(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 30 days after the later of:
(i) the entry of either the judgment or the order being appealed; or
(ii) the filing of the government's notice of appeal.
(B) When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of:
(i) the entry of the judgment or order being appealed; or
(ii) the filing of a notice of appeal by any defendant.

I believe this rule change is necessary to eliminate an unfair advantage that the government has in federal criminal litigation, which is compounded over time and with repetition. The current disparity is pointless and not necessary to counteract any burdens faced by the government. The government's additional time for filing notices of appeal translates into more drafting time, more research time, and more time for government lawyers to think about and confer over litigation strategy.

Upon its plain face, the current Rule 4(b) violates the basic principle that parties before the courts are to be equals in an adversarial system. Constitutional standards grounded in the Equal Protection Clause, the Due Process Clauses of the Fifth and Fourteenth Amendments, and Article III itself all provide support for the mandate of symmetry and equality in court procedures. Under the current Rule 4(b), litigants who face the United States government in criminal cases are playing against a stacked deck, with an opponent who enjoys more than a two-fold time advantage when deciding whether to appeal.

THE CONCEPT OF EQUAL PROCEDURES IN ANGLO-AMERICAN LAW

The idea that fair courts require equal rights of procedure has been a component of Anglo-American common law for centuries. James Wilson, one of only six people who signed both the Declaration of Independence and the U.S. Constitution (and a member of the first panel of the U.S. Supreme Court), wrote in the 1790s that the concept of common law itself is grounded in equality of procedure. "[T]he same equal right, law, or justice," wrote Wilson, is "due to persons of all degrees."[1] Several American colonies required equal treatment for all parties before courts, regardless of wealth.[2] For example, the Pennsylvania Charter of Privileges (October 28, 1701) stated in Section IV that "all Criminals shall have the same Privileges of Witnesses and Council as their Prosecutors"). Stephen Hopkins, Rhode Island's eminent signer of the Declaration of the Independence, wrote in 1764 that "just and equal laws" were among the fundamental rights of the American colonists.[3]

According to Yale Law Professor Akhil Amar, the Framers who debated the criminal procedure provisions of the Bill of Rights were obsessed with procedural fairness. "Notions of basic fairness and symmetry" were the mainstay of the Sixth Amendment.[4] "In formulating the precise wording of the compulsory process clause," according to Amar, "Madison seems to have borrowed from Blackstone's *Commentaries*, which also explicitly embraced the symmetry principle."[5] The First Congress drafted a statute defining the rights of capital defendants in 1790,[6] again emphasizing what Amar calls "the symmetry principle."[7]

Significantly, the Constitution's Framers firmly rejected the lopsided inquisitorial court procedures that accompanied the notorious British Star Chamber court of the seventeenth century.[8] In THE FEDERALIST No. 78, widely regarded as a primary source of illumination regarding the original intent behind the Constitution's judiciary provisions, Alexander Hamilton

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[1] James Wilson, 2 Collected Works of James Wilson 749 (Kermit L. Hall and Mark D. Hall, editors (2007) (quoting Richard Woodeson, Elements of Jurisprudence (1783) (referencing the code of King Edward the Elder).

[2] *See* Paul S. Reinsch, The English Common Law in the Early American Colonies, in 1 Selected Essays on Anglo-American Legal History 367, 404-05 (1907).

[3] Stephen Hopkins, The Rights of Colonies Examined, pp. 45-61 (1764) in American Political Writing During the Founding Era 1760-1805, Vol. 1, 45 (Charles S. Hyneman and Donald S. Lutz 1983).

[4] Akhil R. Amar, The Bill of Rights: Creation and Reconstruction 116 (1998).

[5] Amar at 116.

[6] Federal Crimes Act of 1790, ch. 9, 1 Stat. 112, 118-19.

[7] Amar at 116.

[8] Amanda Beltz, *Prosecuting Rape in International Criminal Tribunals: The Need to Balance Victim's Rights With the Due Process Rights of the Accused*, 23 St. John's J.L. Comm. 167 (2008) (discussing the Framers' fear of one-sided procedures associated with the British Star Chamber); Thomas Y. Davies, *Crawford and Beyond: Exploring the Future of the Confrontation Clause in Light of Its Past: What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 Brooklyn L. Rev. 105, 206-17 (2005) (discussing the Framers' antagonism against inquisitorial justice systems).

noted the toxicity of "unjust and partial laws." As Justice Stephen J. Field wrote in 1887, "[b]etween [the accused] and the state the scales are to be evenly held."[9]

EQUAL RIGHTS OF PROCEDURE UNDER AMERICA'S ADVERSARIAL SYSTEM

Equal court procedures are not simply an end; they are a means to creating accurate and sound court outcomes.[10] "Our adversary system is premised upon the idea that the most accurate and acceptable outcomes are produced by a real battle between equally-armed contestants; thus the adversary system requires, if it is to achieve these goals, some measure of equality in the litigants' capacities to produce their proofs and arguments."[11]

The current Rule 4(b)'s additional 16 days provided to the Government translates into 16 additional days for Justice Department lawyers to consider and strategize regarding the chances, effectiveness or propriety of an appeal. The proposed rule change—from 14 days for defendants to file notices of appeal to 30 days—will create more accurate findings in the federal justice system.

"[O]ur adversary system presupposes," wrote Justice Potter Stewart, that "accurate and just results are most likely to be obtained through the equal contest of opposed interests."[12] Thus, he continued, the State's interest in child's welfare may be best served by even-handed hearings in which both parents and the State are represented by counsel, without whom the contest of interests may become unwholesomely unequal.[13] The Supreme Court also recognized this important benefit of impartial adversarial procedures in *Little v. Streater*,[14] in which the Court held that procedures that denied DNA testing to an indigent father denied due process in part because they increased the likelihood of inaccurate paternity findings.[15]

But for an adversarial system to function properly, the parties must be somewhat equally capable of producing their cases.[16] If one party has more time and resources to develop its cases than others, the law is subverted by the accumulation of inaccurate or even deceptive court findings.[17]

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[9] Hayes v. Missouri, 120 U.S. 68, 70 (1887). I believe the current filing disparity in Rule 4 also violates the common law rule that parties before the courts are to litigate on a level playing field. *See also State v. Bowers*, 9 A. 125, 126 (Md. 1886) (indicating that although criminal appeals should be resolved as quickly as reasonably possible, the law of notice periods should make "no distinction between an appeal or writ of error taken by the state and one taken by the accused").

[10] *Id*. at 1874.

[11] William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 Cardozo L. Rev. 1865, 1867-68 (2002).

[12] Lassiter v. Dep't of Soc. Srvcs., 452 U.S. 18, 28 (1981).

[13] Lassiter v. Dep't of Soc. Srvcs., 452 U.S. 18, 28-30 (1981) (stating that inaccurate findings are a likely consequence of unequal procedural rules).

[14] Little v. Streater, 452 U.S. 1, 14 (1981).

[15] *See id*. For another Supreme Court decision recognizing the importance of symmetrical procedures in the generation of accurate court rulings, *see Lindsey v. Normet*, 405 U.S. 56 (1972) (striking down an Oregon statute requiring tenants seeking to appeal evictions to post a double bond).

[16] *Id.*

[17] Pankratz at 1097 ("All citizens have a right to "neutral access" to the courts—that is, access sufficient to provide citizens a reasonable opportunity to have the law neutrally applied to them in fact").

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TAB 9D

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MEMORANDUM

TO: Professor Struve
FROM: Arianna Scavetti
DATE: March 21, 2012
RE: Disparity in Appellate Filing Deadlines; F.R.A.P. 4(b)

ISSUE

In response to the suggestion submitted by Dr. Roger Roots that the Advisory Committee amend Federal Rule of Appellate Procedure 4(b) to allow defendants 30 days in which to file an notice of appeal, you asked me to review the constitutionality of the disparity in appellate filing deadlines as well as some policy implications of the disparity.

BRIEF ANSWER

The disparity in appellate filing deadlines under Rule 4(b) does not violate Due Process or Equal Protection principles because a) it does not implicate a fundamental right and b) it does not disadvantage a suspect class, and therefore, the disparity must be analyzed under a rational basis review. Because of the size and caseload of the federal government, the additional time granted to the government in which to file a notice of appeal serves a legitimate government purpose and passes rational basis review. From a policy perspective, the disparity in deadlines is not unreasonable because the interest in creating symmetrical rules for the government and private parties is outweighed by the practical necessity of granting the government additional time to file its notice.

SUGGESTION

On November 14, 2011, Dr. Roger Roots submitted to the Advisory Committee a suggestion for a proposed amendment to Federal Rule of Appellate Procedure 4(b). Dr. Roots proposed amending Rule 4(b)(1)(A) to read,

> **(A)** In a criminal case, a defendant's notice of appeal must be filed in the District Court within 30 days after the later of:
>
> **(i)** the entry of either the judgment or the order being appealed; or
>
> **(ii)** the filing of the government's notice of appeal.

This amendment would grant criminal defendants the same amount of time in which to file their notice of appeal as the government is granted under 4(b)(1)(B). Under the current formulation of 4(b)(1)(A), defendants have only 14 days in which to file notice of appeal.

Dr. Roots argues that the disparity in time period for filing notice of appeal gives the government an unfair advantage in criminal litigation. He argues that it prevents parties from litigating on an equal playing field, in violation of a common law rule. Dr. Roots also cites an article discussing the same issue published in the American Journal of Trial Advocacy in which he argues that the disparity in filing periods violates Due Process and Equal Protection principles. Roger Roots, Unfair Federal Rules of Procedure: Why Does the Government Get More Time?, 33 Am. J. Trial Advoc. 493, 507 (2010). This memo explores these constitutional claims and briefly examines the policy implications of the existing disparity in filing period.

HISTORY OF APPELLATE FILING PERIODS

Appeal deadlines in federal criminal cases have long featured a difference between the deadlines applicable to the government and those applicable to the defendant. Prior to the adoption of the original Criminal Rules in 1946, defendants had five days to file a notice of appeal pursuant to the Criminal Appeals Rules of 1933, though appeals from the disposition of

certain postjudgment motions apparently were subject to a longer, three-month, appeal time. 16A Charles Alan Wright et al., Federal Practice and Procedure § 3950.8 (4th ed. 2011). The government, by contrast, had 30 days (from the date the decision or judgment was rendered) in which to take an appeal pursuant to 18 U.S.C. § 682. Id.

When the original Criminal Rules were adopted, the filing period for defendants was extended to 10 days under Criminal Rule 37(a)(2), and the limited number of three month filing periods were eliminated. Id. The same rule retained the 30 day filing period for the government, though it provided that the period would begin upon the entry of the judgment or decision as opposed to the day it was rendered. Id. These time periods did not change upon the adoption of the Federal Rules of Appellate Procedure in 1968 when Rule 4(b) entered into force. Id.

Rule 4(b) was amended in 1988 to alter the timing applicable to cross appeals by a defendant. Id. Prior to the amendment, the government would be able to file notice of appeal before the end of its 30 day filing period, but after the defendant's 10 day period had concluded. Id. The amendment allowed the defendant to file a notice of appeal within 10 days of the later of the entry of judgment or the government's notice of appeal. Id. Rule 4(b) was again amended in 2009 to extend the filing period for defendants to 14 days (in light of the simultaneous alteration in Rule 26's method for computing time). Id. Currently, Rule 4(b)(1) reads in its entirety,

> **(b) Appeal in a Criminal Case.**
>
> **(1) Time for Filing a Notice of Appeal.**
>
> **(A)** In a criminal case, a defendant's notice of appeal must be filed in the district court within 14 days after the later of:
>
> **(i)** the entry of either the judgment or the order being appealed; or
>
> **(ii)** the filing of the government's notice of appeal.
>
> **(B)** When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of:
>
> **(i)** the entry of the judgment or order being appealed; or
>
> **(ii)** the filing of a notice of appeal by any defendant.

Fed. R. App. P. 4.

CONSTITUTIONAL ANALYSIS

THE DISPARITY IN TIME TO FILE APPEALS DOES NOT VIOLATE DUE PROCESS OR EQUAL PROTECTION.

The disparity in filing periods for notices of appeal under Rule 4(b) does not, as Dr. Roots asserts, violate Due Process or Equal Protection. Due Process and Equal Protection claims are subject to different levels of scrutiny based on the rights asserted and the parties targeted by distinctions imposed by law. Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307, 312 (1976). Where no fundamental right is in dispute and no suspect class has been targeted, the policy is subject to rational basis review. Id. at 312-13. The disparity in filing periods under Rule 4(b) is subject to rational basis review under the Due Process Clause because the right to appeal is not a fundamental right. The disparity in filing periods is also subject to rational basis review under the Equal Protection component of the Due Process Clause because the classification in question – being a private party in a criminal case – does not target a suspect class. Because the disparity in filing periods responds to the large size and bureaucratic structure of the United States government, it serves a legitimate government purpose and passes rational basis review.

A. Due Process: The Right to Appeal is Not a Fundamental Right and Must Therefore Be Analyzed Under a Rational Basis Review.

The disparity in filing periods for notice of appeal is subject to rational basis review under the Due Process Clause because the right to appeal is not a fundamental right. Where a fundamental right is not in question, the Court must apply rational basis review. Bell v. Hongisto, 501 F.2d 346, 353 (9th Cir. 1974). A fundamental right is not merely a right that has social value. See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33 (1973). Instead, a fundamental right is one either explicitly or implicitly guaranteed by the Constitution. Id.

In Bell, the Ninth Circuit considered whether the right to an appeal could be classified as a fundamental right under this test. 501 F.2d at 354. The court noted that the Constitution guarantees a number of specific protections to criminal defendants. Id. However, the court found that the Constitution does not guarantee any right to appeal. Id. The Ninth Circuit's decision drew on the Supreme Court's earlier finding in Griffin v. Illinois that, "It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all." Griffin v. Illinois, 351 U.S. 12, 18 (1956). Because, as these courts found, the Constitution does not guarantee criminal defendants the right to an appeal, that right cannot be considered a fundamental right.

Dr. Roots contends that the disparity in filing periods for notices of appeal undermines a defendant's right to appeal; however, because the right to appeal is not a fundamental right, under the Due Process clause, the disparity in filing periods is subject to rational basis review.

B. Equal Protection: Private Parties in Criminal Cases Are Not Members of a Suspect Class, and the Disparity in Filing Periods is Therefore Subject to Rational Basis Review.

Under the Equal Protection component of the Fifth Amendment Due Process Clause, the disparity in filing periods is subject to rational basis review because the distinction between the filing period granted to the government and that granted to defendants does not target a suspect class. Most equal protection claims are subject to rational basis review. Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307, 312 (1976). Rational basis review should only be rejected in favor of heightened scrutiny when the classification in question operates to the peculiar disadvantage of a suspect class. Id. A suspect class is defined as a group, "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political

process." Id. at 313. Because this definition is so limited, most classifications examined under the Equal Protection clause are subject to rational basis review. This includes classifications based on age, id. at 313-14, mental retardation, City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 442 (1985), and status as an undocumented alien, Plyler v. Doe, 457 U.S. 202, 223 (1982).

Likewise, criminal defendants cannot be considered members of a suspect class. In Bell, the Ninth Circuit concluded that no serious contention could be made that individuals convicted of contempt under state law could be considered members of a suspect class. Bell v. Hongisto, 501 F.2d at 353. Multiple circuits have held that prisoners are not members of a suspect class. See e.g., Johnson v. Daley, 339 F.3d 582, 585-86 (7th Cir. 2003); Abdul-Akbar v. McKelvie, 239 F.3d 307, 317 (3d Cir. 2001). As in these cases, the criminal defendants seeking to appeal their conviction who are disadvantaged by Rule 4(b) have not been relegated to a position of political powerlessness or historically been subjected to purposeful unequal treatment. Instead, many Federal Rules of Criminal Procedure actually benefit criminal defendants, such as the burden of proof carried by the government or the requirement of a unanimous jury verdict. Because the party disadvantaged by Rule 4(b) is not a member of a suspect class, an Equal Protection challenge to the disparity in filing periods in Rule 4(b) must be evaluated under rational basis review.

C. The Disparity in Filing Periods Passes Rational Basis Review Because It Serves a Legitimate Government Purpose.

The disparity in filing periods for notices of appeal under Rule 4(b) serves a legitimate government purpose and therefore passes rational basis review. Dr. Roots asserts that Due Process and Equal Protection principles mandate equal, or identical, rules for the government and defendants. Roots, supra at 507-08. However, under rational basis review, a law does not

violate Due Process or Equal Protection when there is a rational relationship between the disparity of treatment and some legitimate government purpose. Bd. of Trustees of Univ. of Alabama v. Garrett, 531 U.S. 356, 367 (2001). The disparity in filing periods is rationally related to a legitimate government purpose because it responds to characteristics unique to the government as it litigates criminal cases. United States v. Avendano-Camacho, 786 F.2d 1392, 1394 (9th Cir. 1986). Applying rational basis review to the filing disparity, the Ninth Circuit rejected the claim that Rule 4(b) denies equal protection to criminal defendants, saying,

> It is reasonable to presume that it takes a large, bureaucratic organization such as the government, responsible for prosecuting thousands of cases across the country, a greater time to assess the merits of an appeal than it does an individual defendant. In reaching its decision whether or not to appeal, the government must be concerned, moreover, with the consistency of its positions and the future impact of the case, considerations that do not weigh as heavily, if at all, in the decision of the defendant.

Id. Because, as the court recognized, Rule 4(b) responds to the size, bureaucratic structure, and larger policy goals of the government, it is rationally related to the achievement of a legitimate government purpose, and it passes rational basis review.

Dr. Roots contests the claim that the size and bureaucratic structure of the government justifies the additional time to file notice of appeal. Roots, supra at 512-13. He argues that the government, as a repeat litigant, should be more efficient as a function of its experience with criminal trials and appeals, making the additional time to consider whether to appeal unnecessary. Id. at 513-16. Instead, he counters, the necessity of meeting with clients, conducting independent investigation, and developing expertise on particular matters of law places greater structural burdens on defendants' private attorneys. Id. at 516. However, the concerns raised by Dr. Roots do not prevent the filing disparity from passing rational basis review. Under rational basis review, a law that promotes a legitimate government interest will be upheld even when "the rationale for it seems tenuous." Romer v. Evans, 517 U.S. 620, 632

(1996). A sufficient factual basis for finding some relationship between the legitimate purpose and the differential treatment enables the law to pass rational basis review. Id. at 632-33.

The government's criminal caseload provides the sufficient factual basis to meet the requirements of rational basis review. From April 1, 2010 to March 31, 2011, the federal government commenced over 78,000 criminal cases, of which more than 67,000 were felonies. Administrative Office of the United States Courts, Federal Judicial Caseload Statistics D-1 (2011). As of March 31, 2011, over 11,000 appeals of criminal cases were pending in the U.S. Courts of Appeals. Id. at B-1. The significant size of this caseload, referenced by the court in Avendano-Camacho, provides sufficient factual basis to conclude that the additional time granted to the government to file its notice of appeal under Rule 4(b) is reasonably related to a legitimate government purpose. Because Rule 4(b) and the disparity in the filing period pass rational basis review, there is no violation of Due Process or Equal Protection.

POLICY ANALYSIS

THE POLICY INTEREST IN RESPONDING TO STRUCTURAL CHARACTERISTICS OF THE GOVERNMENT OUTWEIGHS THE INTEREST IN CREATING SYMMETRICAL RULES AND PROCEDURES.

The practical necessity of allowing the government to consider whether to appeal in each of the almost 80,000 cases it deals with outweighs any claim that the disparity in filing periods undermines the policy objective of symmetry between the parties litigating criminal cases before the court. In his suggestion, Dr. Roots cites State v. Bowers as standing for the proposition that laws regarding time periods for giving notice of appeal should make no distinction between the government and the defendant. However, in Bowers, the court held that the state appellate rule in question *did not* create a distinction between the parties. 65 Md. 363 (1886). The court did not hold that the appellate rules *could not* or *should not* create a distinction between the

government and the defendant. Id. The court in Bowers was describing the existing state of the law in Maryland as opposed to offering a normative suggestion about the symmetry in filing periods.

Other courts have considered the importance of symmetry in criminal proceedings and have found it to be outweighed by other policy interests. In Desai v. Booker, the Sixth Circuit, considering the application of Supreme Court precedent in federal habeas proceedings, noted that symmetry does not figure prominently in criminal law. 538 F.3d 424, 431 (6th Cir. 2008). The court pointed out that criminal law is generally one-sided in favor of the individual over the government, which would run afoul of the symmetry principle. Id. The Second Circuit similarly noted, in regard to habeas petitions, that the "aesthetically pleasing" principle of symmetry should not be substituted for legal reasoning and is not appropriate in all cases. Pinkney v. Keane, 920 F.2d 1090, 1094 (2d Cir. 1990).

There is thus no requirement that the filing periods for the government and criminal defendants be equal under Rule 4(b) in order to comply with notions of symmetry. The policy interest in allowing the government the necessary time to consider each of the many cases it deals with in order to choose where to wisely allocate its appellate resources outweighs any interest in establishing symmetrical rules of procedure. The government does not acquire any unfair advantage under Rule 4(b) because the additional time it receives is necessary given its unique structural characteristics that are not shared by private parties litigating in federal courts. Because the balance of interests weighs in favor of allowing the government additional time to consider whether to appeal, the symmetry principle can properly be rejected and the disparity in filing periods under Rule 4(b) upheld.

CONCLUSION

The disparity in filing periods for notice of appeal established under Rule 4(b) of the Federal Rules of Appellate Behavior does not violate Due Process or Equal Protection principles, and its policy justification is sufficient to outweigh any interest in creating symmetrical rules between parties. The disparity in filing periods concerns the right to appeal, which is not a fundamental right subject to heightened scrutiny under the Due Process clause. The disparity likewise does not disadvantage a suspect class and is thus subject to rational basis review under the Equal Protection component of the Due Process Clause. Because the disparity is necessary to respond to the structure of the government that slows the process of deciding whether to appeal, it is reasonably related to a legitimate government purpose, and therefore passes rational basis review. While there may be some policy interest in creating identical rules and procedures for the government and criminal defendants, that policy objective does not prevail over other considerations, such as the size of the government's caseload relative to that of a private party. As a result, the existing disparity in filing periods for notice of appeal under Rule 4(b) is not constitutionally problematic and has a sufficient policy basis to be maintained.