Minutes of Spring 2015 Meeting of
Advisory Committee on Appellate Rules
April 23-24, 2015
Philadelphia, PA

I. Introductions

Judge Steven M. Colloton called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, April 23, 2015, at 9:00 a.m. at the James A. Byrne United States Courthouse in Philadelphia, Pennsylvania. The following Advisory Committee members were present: Judge Michael A. Chagares, Judge Peter T. Fay, Judge Richard G. Taranto, Professor Amy Coney Barrett, Mr. Gregory G. Katsas, Professor Neal K. Katyal, and Mr. Kevin C. Newsom. Justice Allison H. Eid participated by telephone for all but a brief portion of the meeting during which no action items were discussed and no votes were taken. Mr. Douglas Letter, Director of the Appellate Staff of the Civil Division, U.S. Department of Justice ("DOJ"), and Mr. H. Thomas Byron III, also of the Civil Division, were present representing the Solicitor General.[1] Judge Jeffrey S. Sutton, Chair of the Standing Committee; Ms. Rebecca A. Womeldorf, the Standing Committee's Secretary and Rules Committee officer; Mr. Gregory G. Garre, liaison from the Standing Committee; Mr. Michael Ellis Gans, liaison from the appellate clerks; and Ms. Frances F. Skillman, Paralegal Specialist in the Rules Committee Support Office of the Administrative Office ("AO") were also present. Chief Judge Theodore A. McKee; Judge Anthony J. Scirica; Professor Daniel J. Capra, associate reporter to the Committee; Ms. Marie Leary from the Federal Judicial Center ("FJC"); Mr. Frederick Liu of Hogan Lovells; Mr. Robert A. Zauzmer, Chief of Appeals, U.S. Attorney's Office for the Eastern District of Pennsylvania; Mr. Howard J. Bashman; and Ms. Saranac Hale Spencer of The Legal Intelligencer attended portions of the meeting.

Judge Colloton welcomed Ms. Womeldorf as the new head of the Rules Office. Judge Colloton noted Ms. Womeldorf's impressive background, including her long experience as a litigator in Washington, D.C. Judge Colloton also noted that the Committee was fortunate to have, as its new associate reporter, Professor Daniel J. Capra, and he stated that Professor Capra would be joining the meeting later that day. Professor Struve observed that Professor Capra had taught her much of what she knew about serving as a reporter, and she expressed her appreciation to Professor Capra for agreeing to join her as a fellow reporter to the Committee.

[1] Mr. Letter was unable to attend the second day of the meeting.

On the afternoon of the first day of the meeting, Chief Judge McKee joined the meeting for a time. Judge Colloton welcomed Chief Judge McKee and thanked him for extending the Third Circuit's hospitality to the Appellate Rules Committee. Judge Colloton also expressed appreciation for the excellent logistical support provided by the Court's staff. Chief Judge McKee welcomed the Committee members to Philadelphia and encouraged their efforts.

II. Approval of Minutes of October 2014 Meeting

A motion was made and seconded to approve the minutes of the Committee's October 2014 meeting. The motion passed by voice vote without dissent.

III. Report on January 2015 Meeting of Standing Committee

Judge Colloton noted that the Appellate Rules Committee had had no action items to present to the Standing Committee at its January 2015 meeting. However, Judge Colloton had described to the Standing Committee a number of the Appellate Rules Committee's ongoing projects, and he had obtained the Standing Committee's input on those projects.

IV. Other Information Items

Professor Struve reminded the Committee members that on December 1, 2014, the amendments to Rule 6 (concerning bankruptcy appeals) had taken effect.

Later in the meeting, Professor Struve provided the Committee with updates on two recent Supreme Court decisions, *Jennings v. Stephens*, 135 S. Ct. 793 (2015), and *Gelboim v. Bank of America Corp.*, 135 S. Ct. 897 (2015). *Jennings* concerned the operation of the cross-appeal rule and the certificate-of-appealability requirement in habeas cases. Jennings, who had been sentenced to death, sought federal habeas relief on three theories of ineffective assistance of counsel. Two of those theories – based on a case called *Wiggins* – were accepted by the district court as a basis for habeas relief. The third theory – based on a case called *Spisak* – was rejected by the district court. The district court ordered the State to release Jennings unless, within a set period, it gave him a new sentencing hearing or changed his sentence from death to imprisonment. The State appealed the judgment. Jennings neither filed a cross-appeal nor sought a certificate of appealability. On appeal, the Fifth Circuit rejected Jennings' attempt to use the *Spisak* theory in defense of the judgment below. The Supreme Court, over a dissent, held that this was error, and that Jennings could argue the *Spisak* theory on appeal without either cross-appealing or seeking a certificate of appealability. The Supreme Court relied on its precedent stating that an appellee (without cross-appealing) can defend the judgment below on any ground appearing in the record, even if the ground in question was rejected by the district court. Here, the Court reasoned, upholding Jennings' *Spisak* claim would yield the same relief that he obtained by means of his *Wiggins* claims. Thus, neither a cross-appeal nor a certificate of appealability was needed. In the course of its discussion the Court noted that it is unclear

whether the certificate-of-appealability requirement applies to a habeas petitioner who is the cross-appellant (rather than the appellant).

In *Gelboim*, the Court addressed the question of a judgment's finality in the context of multidistrict litigation – a question that required the Court to discuss the interaction of 28 U.S.C. § 1291 (appeals from final decisions), 28 U.S.C. § 1407 (multidistrict litigation), and Civil Rule 54(b) (certification for immediate appeal of an order addressing fewer than all claims or parties). In this case, the Court held, the petitioners' complaint kept its independent status despite its inclusion in the MDL. Accordingly, the petitioners could appeal the dismissal of their complaint without awaiting the disposition of all the other cases involved in the MDL. The Court noted that it was not addressing how finality would work in an instance where multiple cases are consolidated for *all* purposes rather than (as here) for *limited* purposes.

V. Action Items – For Consideration After Publication

A. Item No. 07-AP-E (FRAP 4(a)(4) and "timely")

Judge Colloton invited Professor Struve to summarize the public comments on the proposal to amend Rule 4(a)(4). The amendment addresses the circuit split concerning whether a motion filed within a purported extension of a non-extendable deadline under Civil Rules 50, 52, or 59 counts as "timely" under Rule 4(a)(4). A number of circuits have ruled that the Civil Rules' deadlines for post-judgment motions are nonjurisdictional claim-processing rules. In this view, when a district court purports to extend the time for making such a motion, and no party objects to that extension, the district court has authority to decide the motion on its merits. But does the motion count as a "timely" one that, under Rule 4(a)(4), tolls the time to appeal? In the Third, Seventh, Ninth, and Eleventh Circuits, the answer is no. However, the Sixth Circuit has held to the contrary. The proposed amendment would implement the majority view.

Of the six commentators who submitted comments on this proposal, five supported it. The sole opponent disagreed with the Committee's decision to adopt the majority view; this commentator argued that it is anomalous that the district court can decide an untimely motion on its merits (absent an objection to the motion's untimeliness) but that such an untimely, unobjected-to motion does not extend the time to appeal under Rule 4(a)(4). This commentator also argued that the proposed rule sets a trap for unwary litigants – i.e., that the rule does not make clear to litigants the fact that such motions lack tolling effect. Professor Struve noted that the Committee had previously discussed whether to include in the text of the Rule an explicit statement that an untimely motion is not rendered timely (for purposes of Rule 4(a)(4)) by "a court order that sets a due date that is later than permitted by the Federal Rules of Civil Procedure, another party's consent or failure to object, or the court's disposition of the motion." The Committee had decided, instead, to place that explanation in the Committee Note. The commentator's concern about the clarity of the published Rule, Professor Struve suggested, might provide a reason to revisit that choice.

An appellate judge member responded that placing the explanatory language in the Rule text would distend what is already a very long rule. On the other hand, this member noted, the additional language is not that long compared to the existing rule. Another member asked whether the Rule text, as published, would alert pro se litigants to the issue; there is no guarantee, this member noted, that such litigants will read the Committee Note. An attorney member stated, however, that the list of situations noted above (a court order erroneously extending a deadline, a lack of party objection to untimeliness, or a court's disposition of an untimely motion on its merits) might not be a complete list of the situations that a litigant might think render an untimely motion a timely one. If the list is incomplete, this member suggested, it may be misleading to place it in the text of the Rule. Another appellate judge member expressed agreement with the approach taken in the Rule as published.

A motion was made and seconded to approve the Rule and Committee Note as published. The motion passed by voice vote without dissent.

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

Judge Colloton invited Professor Struve to summarize the public comments on the proposed amendments to Rules 4(c)(1) and 25(a)(2)(C) and Forms 1 and 5, and new Form 7. As published, the amendments would make clear that prepayment of postage is required for an inmate to benefit from the inmate-filing provisions, but that the use of an institution's legal mail system is not. The amendments would clarify that a document is timely filed if it is accompanied by a declaration, notarized statement, or other evidence showing that the document was deposited by the due date and that postage was prepaid. Forms 1 and 5 would be revised to mention new Form 7, which shows a declaration meeting the Rule's requirements. The amendments would also clarify that if sufficient evidence does not accompany the initial filing, then the court of appeals has discretion to permit the later filing of the declaration or notarized statement.

The Committee commenced by discussing the aspect of the published Rule amendments that would delete the requirement that the inmate use a "system designed for legal mail" if one is available. Based on initial inquiries that disclosed no purpose for this requirement, the Committee had thought that its deletion would streamline the Rule and avoid possible confusion over what qualifies as a system designed for legal mail. One commentator expressed support for the deletion of this requirement. Another commentator, however, opposed its deletion, and pointed out that the State of Florida logs the date of legal mail but does not do the same with non-legal mail. Date-logging, this commentator argued, provides important evidence of the date of deposit in the institution's mail system. To investigate whether other states make a similar distinction in treatment of legal and non-legal mail, Professor Struve enlisted the assistance of the Director and Chief Counsel of the National Association of Attorneys General Center for Supreme Court Advocacy. The resulting inquiry generated responses from 21 states and the District of Columbia, and disclosed that a number of other States take an approach similar to Florida's (i.e., they record the date of legal mail but not non-legal mail). Some other states to not

date-log any inmate mail, and still other states have systems in which the criteria for date-logging inmate mail are more difficult to categorize.

Mr. Letter reported that in facilities run by the U.S. Bureau of Prisons, it is up to the inmate whether to use the legal mail system or the regular mail system. Legal mail is always date-logged, and regular mail is not. Asked whether this fact leads the DOJ to oppose the deletion of the legal mail system requirement, Mr. Letter responded that, to the contrary, the DOJ supports deletion of that requirement. Deletion of the requirement would permit the inmate to choose which system to use, and would bring the Appellate Rules into closer parallel with Supreme Court Rule 29.2, which does not include such a requirement. But, he added, the DOJ does not feel strongly about this.

An appellate judge member observed that, before publishing the proposed amendments for comment, the Committee did not see a purpose for the legal mail system requirement. The comment period, he observed, had disclosed that the requirement actually does have a function. Mr. Letter noted, as well, that there may be significant delays in processing mail in an institution's regular (non-legal) mail system.

Responding to the argument that date-logging can provide important evidence of the date of deposit, an attorney member asked whether there is evidence concerning how often inmates mis-state the date of deposit. Professor Struve responded that there is no such evidence, other than an anecdotal account in the comment submitted by the opponent of the requirement's deletion.

Discussion turned to the question of how the Rule should describe the requirement if the requirement were retained. Professor Struve observed that it might not always be obvious to an inmate whether a particular system counts as a "system designed for legal mail." Indeed, Professor Struve noted, a few of the states who had responded to the survey had systems in which the presence or absence of date-logging did not correlate neatly with a distinction between legal and non-legal mail. Perhaps one could adopt, instead, a functional definition, referring, for example, to "a mail system that will document the date of a mailing." That formulation, however, had generated style objections from Professor Kimble.

An appellate judge member asked whether, as a practical matter, an inmate can make sure to use the legal mail system (where one exists) by simply writing "Legal Mail" on the outside of the envelope. Mr. Gans confirmed that envelopes containing inmates' filings often bear such a legend. The appellate judge member noted that, if the reference to a system designed for legal mail were to be retained, a state that wished to ensure that inmates use a special mail system could clearly label that system a "Legal Mail System."

Another member, though, suggested that a functional definition might be more accessible for inmates, because an inmate who is unsure which system to use could ask a corrections officer which system (if any) logs the date of inmate mail. An appellate judge member agreed that the

functional definition would be preferable. This member emphasized that the requirement should be retained because many states, including Colorado, rely upon the use of a system that will log the date.

An appellate judge member suggested that one course of action would be to retain the requirement as it stands in the existing Rule. Professor Struve asked whether the existing language (referring to a system designed for legal mail) could be a source of confusion. She noted a Tenth Circuit opinion in which the court had warned of possible confusion. In that instance, though, the court was concerned that an inmate might think something counted as a system designed for legal mail when it actually did not. (That particular type of confusion would be problematic in circuits where certain requirements currently apply only if the inmate uses a regular (non-legal) mail system.) The converse sort of confusion (thinking that a system is not designed for legal mail when it really is) may be less likely to occur.

An appellate judge member asked what would happen if an inmate guessed wrong – i.e., if an inmate thought that there was no system designed for legal mail, but there actually was. Mr. Letter stated that the DOJ did not think this was an issue. An attorney member stated that during his three years as Alabama's Solicitor General, the issue never arose. Another appellate judge member observed that the inmate filing rules are designed for pro se inmate litigants, and he argued that it is important to make those rules user-friendly, even if it takes some extra language. Mr. Letter observed that the new Form 7 would be helpful to inmates.

An appellate judge participant observed that Chief Judge Diane Wood has commenced a project focusing on inmate litigation. The appellate judge member who favored the functional definition suggested that the rule might refer to a system that "documents the date of a mailing" or might direct the inmate to "use the system that logs the date" of a mailing. Professor Struve noted that she had had difficulty formulating a functional definition that would encompass the existing variety of institutional practices. Different institutions may log the date at different points in the process – for example, when the inmate hands the mailing to a corrections officer, or when the mailing enters the institution's mail room, or when the mailing leaves the mail room. By consensus, the Committee determined that it should retain the requirement that an inmate use a system designed for legal mail (where such a system exists). Professor Struve agreed to revise the Rule text and Committee Notes for the Committee's review later in the meeting.

Professor Struve next highlighted a commentator's suggestion that the proposed Rules be revised to authorize the inmate to file the declaration either contemporaneously with the underlying filing or later. The commentator recognized that the published proposal gives the court discretion to permit the declaration's later filing, but argued that the timing of the declaration's submission should be up to the inmate, not the court. Inmates, this commentator worried, may have trouble understanding and complying with procedural requirements. An appellate judge member recalled that the Committee had considered this point, and had structured the published proposal with the intention of giving inmates an incentive to file the declaration contemporaneously with the underlying filing. Contemporaneous submission of the

declaration helps to ensure its accuracy. By consensus, the Committee decided not to adopt the commentator's suggestion.

Professor Struve noted that two commentators had proposed authorizing courts to excuse a failure to prepay postage. Committee members had previously concluded that, in an appropriate case, an institution's failure to provide postage to an indigent inmate could be addressed by an as-applied constitutional challenge. As to the possibility of authorizing the court to excuse nonpayment of postage for good cause, participants in the Committee's prior discussions were concerned that such a provision would encourage satellite litigation. By consensus, the Committee decided not to adopt the commentators' suggestions.

Professor Struve observed that the need to ensure that pro se inmate litigants understand the inmate-filing rules – a need highlighted in one of the comments discussed above – helps to underscore reasons to retain the extra verbiage in the provisions' last phrase ("the court exercises its discretion to permit the later filing ...."). As noted in the "style" document that Professor Struve had circulated to Committee members prior to the meeting, Professor Kimble had objected to the draft's use of the phrase "exercises its discretion to permit," on the ground that the phrase was both unnecessary and inconsistent with the Committees' style conventions. (Professor Kimble feels that similar language in restyled Civil Rule 72(b)(1) is distinguishable.) A member of the Standing Committee had expressed a similar view. Professor Struve asked whether members felt that the rule should instead say simply "the court permits the later filing ...." One reason for retaining the longer phrase, Professor Struve suggested, is that an unskilled reader might read the shorter phrase as a declarative statement (i.e., as a statement that the court *does* permit the later filing) rather than a conditional phrase (i.e., referring to *situations in which the court chooses to* permit the later filing). As the commentator pointed out, Rules 4(c)(1) and 25(a)(2)(C) are distinctive in that their intended users are pro se litigants. Three attorney members stated that the Committee should retain the longer phrase. Professor Struve proposed that, as shown in the "style" document, language could be added to the Committee Note to explain the choice of the longer phrase. By consensus, the Committee agreed to this change.

The Committee next turned to the Rules' references to notarized statements. Prior to publication, a participant in the Standing Committee's discussion of the proposed amendments had asked whether those references should be deleted. Declarations, it was suggested, would be more convenient for inmates and inmates might lack access to notaries. However, none of the public comments had suggested deleting the references to notarized statements. Professor Struve's research had disclosed that notaries are available in at least some correctional institutions. In addition, Professor Struve noted, the inmate-filing rules applicable to habeas and Section 2255 proceedings and to filings in the U.S. Supreme Court all refer in the alternative to declarations and notarized statements. By consensus, the Committee decided to retain the references to notarized statements.

The Committee then discussed the proposed changes to Form 7 as shown in the "style" document. The Committee approved the change to the present tense ("Today, [insert date], I am depositing ...."). The Committee adopted Professor Kimble's style changes with one exception: In the inmate's declaration (at the end of the form) "that the foregoing is true and correct," Professor Kimble had suggested substituting "this" for "the foregoing." Mr. Byron expressed concern that the re-styled sentence might be taken as a tautology – namely, it might be taken as a mere declaration that the particular sentence itself (rather than the preceding text) was true and correct. By consensus, the Committee decided not to change "the foregoing" to "this." The Committee decided not to adopt a commentator's suggestion that, in the "notes to inmate filers" that are added to Forms 1 and 5, an explanatory parenthetical should follow the citation to Rule 4(c)(1). Instead, a Committee member proposed (and the Committee later approved) the insertion of the word "timing," so that these notes would refer to the "timing benefit" of Rule 4(c)(1).

The Committee asked Professor Struve to revise the proposed Rule and Form amendments and Committee Notes to implement the choices noted above. She prepared a new draft overnight, and the Committee reviewed the draft the next morning.

Professor Struve pointed out that Professor Kimble had observed that the numbered subdivisions of Appellate Rules 4(a) and 4(b) have headings, and he had suggested that the numbered subdivisions in Rule 4(c) should too. He acknowledged that the Appellate Rules, overall, follow no uniform practice in this regard, but he argued that any given Rule should be internally consistent. Professor Struve predicted that it would be difficult to draft headings for Rules 4(c)(1), (2), and (3) that were informative, accurate, and not misleading. An appellate judge member stated that he saw no reason to add headings to those rules. An attorney member pointed out that amended Rule 4(c)(1) would be only two sentences long; a two-sentence rule, he suggested, did not require a heading. By consensus, the Committee decided not to add headings to Rules 4(c)(1), (2), and (3).

Professor Struve highlighted certain features of the proposed Rule and Form amendments as set out in the newly-circulated draft. The requirement that the inmate use the institution's legal mail system was reinstated. However, due to the structure of the amended rule, that requirement was now stated in a new sentence at the start of the rule. Following style guidance from Professor Kimble, the new first sentence referred to "an institution" and "an inmate confined there"; in what would now become the second sentence, "an inmate confined in an institution" became, simply, "an inmate." Conforming amendments were made to the Committee Note, and language was added to the Note to explain the Rule's use of the phrase "exercises its discretion to permit." (The draft showed the changes to Rule 4(c)(1); the same changes would be made to Rule 25(a)(2)(C).)

Professor Struve also pointed out the forms included in the newly-circulated draft. To clarify references to Rule 4(c)(1) in the "Note to inmate filers" in Forms 1 and 5, references to the "benefit" of that Rule had become references to its "timing benefit." A new "Note to inmate

filers" was added to Form 7 to point out the legal-mail-system requirement. Other changes implemented the choices made by the Committee the previous day.

A motion was made to approve the amendments to Rules 4(c)(1) and 25(a)(2)(C) and Forms 1 and 5, and new Form 7, as set out in the newly-circulated draft. The motion passed by voice vote without dissent.

C. Item No. 08-AP-C (the "three-day rule")

Judge Colloton invited Professor Struve to summarize the public comments and inter-committee deliberations on this item, which concerns the proposal to eliminate electronic service from the "three-day rules" in the Appellate, Civil, Criminal, and Bankruptcy Rules. Under Appellate Rule 26(c), "[w]hen a party may or must act within a specified time after service, 3 days are added after the period would otherwise expire ... , unless the paper is delivered on the date of service stated in the proof of service." The Rule currently provides that the three additional days apply not only to service by commercial carrier (when delivery is not same-day) and service by mail, but also to electronic service. In light of the now-standard use and smooth functioning of electronic service, the Advisory Committees (under the guidance of the Standing Committee's CM/ECF Subcommittee) decided that the time has come to eliminate the three extra days in instances where service is made electronically.

The public comments on the proposal spanned a range of views. Some commentators supported the proposal. Others, while acknowledging reasons for excluding electronic service from the three-day rule, sought other changes to offset the effect of that amendment. And still other commentators opposed the proposal entirely. Opponents worried that elimination of the three-day rule for electronic service would leave litigants vulnerable to unfair behavior by opponents (such as electronic service late at night before a holiday weekend). Motions for extensions of time, they warned, may not provide an adequate remedy and, in any event, are inefficient. Opponents stressed that reply briefs and motion papers may be complex and that the loss of the three days will cause hardship in preparing those filings. Focusing in particular on Rule 31(a)(1)'s deadline for reply briefs, a number of commentators stated that the prevalence of electronic service has made the nominal 14-day deadline a "de facto" 17-day deadline. If electronic service is to be excluded from the three-day rule, they argued, then Rule 31(a)(1)'s deadline should become 17 days (or perhaps more than 17 days). Other commentators proposed that one or two (instead of three) days be added for deadlines that are computed from the date of electronic service. One commentator proposed that the Committee adopt a rule that would address the computation of a time period when a party must act within a set time after service and the document served is submitted with a motion for leave to file or is not accepted for filing.

The DOJ proposed that concerns over the hardships that might ensue from the deletion of electronic service from the three-day rule should be addressed in a Committee Note recognizing the need for extensions of time in appropriate cases. The other advisory committees had already met and discussed this proposal. The Criminal Rules Committee strongly favored adding such

language to the Committee Note, but the Bankruptcy and Civil Rules Committees favored not adding the language.

An attorney member stated that the commentators voiced persuasive concerns about the deadline for reply briefs. Fourteen days, this member reported, is a very short time frame. And it can be difficult, as a practical matter, for a litigant to seek an extension of time. For instance, in order to take advantage of the safe harbor in the Eleventh Circuit's rule, the litigant must make the motion at least 14 days in advance of the due date.[2] Another attorney member agreed with this concern, but also noted that he would not wish to slow the progress of the Rule 26(c) proposal. An appellate judge participant observed that the Committee could add to its agenda a new item concerning a possible extension of Rule 31(a)(1)'s 14-day deadline for reply briefs.

An attorney member asked whether it would be possible to send the proposed amendment forward along with the three-day-rule proposals for the other sets of rules, but to delay the effective date of the amendment to Appellate Rule 26(c). Professor Struve observed that it would, technically, be possible to do so: 28 U.S.C. § 2074 provides that a rule amendment transmitted by the Court to Congress by May 1 of a given year "shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law." Mr. Letter, however, cautioned that it would be disruptive to have an interval during which the three-day rule in the Appellate Rules worked differently from the three-day rules in the Civil, Criminal, and Bankruptcy Rules.

An attorney member observed that the concern about the deadline for reply briefs may be unique to the Appellate Rules; there may not be an analogously tight deadline (measured from an opponent's service of a document) in the rules that govern practice in the lower courts. An appellate judge member observed, as well, that the effective decrease from 17 days to 14 days is a proportionally large reduction.

The Committee members then discussed the possibility that these concerns could be addressed by means of a letter that Judge Colloton would write to the Chief Judges of the courts of appeals. The letter could highlight the issue in case the courts of appeals might wish to consider adopting an interim local provision that could address such concerns pending consideration of a possible national rule amendment on the deadline for reply briefs. An attorney member asked whether such a letter would be made publicly available; litigants, he suggested, might wish to be able to cite it to the court when making requests for extensions.

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[2] Eleventh Circuit Rule 31-2(b) provides: "When a party's first request for an extension of time to file the brief or appendix is filed 14 or more days in advance of the due date for filing the brief or appendix, and the requested extension of time is denied in full on a date that is seven or fewer days before the due date, or is after the due date has passed, the time for filing the party's brief or appendix will be extended an additional seven days beyond the initial due date or the date the court order is issued, whichever is later, unless the court orders otherwise."

Judge Colloton asked the judge members of the Committee for their reactions. An appellate judge member stated that he was unsure whether a similar issue would be likely to come up in connection with the Civil, Criminal, or Bankruptcy Rules. Another appellate judge member stated that he had not been attuned to the issue. A third appellate judge member expressed support for the idea of a letter to the Chief Judges. This member also suggested that a 21-day deadline for reply briefs would be desirable. Mr. Letter asked whether measures to address concerns about the reply-brief deadline should also address concerns about deadlines for motion papers. An attorney member responded that concerns over deadlines for motion papers could be handled through extensions of time.

Professor Struve asked what the Committee wished to do about the DOJ's proposal for adding language to the Committee Note to recognize the need for extensions in appropriate cases. An appellate judge participant observed that there are concerns about adding such language to the Committee Note every time that the Committee amends a rule concerning a length or time limit. Mr. Byron responded that the shift to electronic service, and the ensuing proposal to amend the three-day rule, has raised a unique problem. An appellate judge member stated that he agreed with the view – expressed by participants in the Civil Rules Committee's discussions – that it is undesirable to distend the Committee Notes with this kind of language. An attorney member, though, noted that the reality is that, with the availability of electronic service, most briefs are served between the hours of 6:00 p.m. and midnight.

A motion was made to approve the proposed amendment to Rule 26(c) as published, without the DOJ's proposed addition to the Committee Note. An attorney member expressed doubt that any lawyers actually move for extensions of time. The Committee returned to the topic of a letter that Judge Colloton could send to the Chief Judges of the courts of appeals. The letter would focus on the issue of reply brief deadlines during the transitional period when the amendment to the three-day rule has taken effect and a possible amendment to Rule 31(a)(1) is under consideration. Judge Colloton will draft a letter to facilitate further discussion at the Committee's fall 2015 meeting. Amendments to the three-day rule would not take effect until December 1, 2016.

Turning back to the motion, Judge Colloton asked whether the motion contemplated giving him discretion to accede to the addition of the DOJ's proposed Committee Note language if warranted in light of later discussions among the advisory committees and the Standing Committee. It was agreed that the motion did include that grant of discretion. An attorney member asked how quickly an amendment to Rule 31(a)(1)'s reply brief deadline could take effect. Professor Struve stated that – because such an amendment would be published for comment, at the earliest, in summer 2016 – a Rule 31(a)(1) amendment would take effect at least two years later than the pending amendments to Rule 26(c) and the other three-day rules. The motion was seconded and passed by voice vote without dissent.

By consensus, the Committee added to its study agenda a new item concerning a possible extension to Rule 31(a)(1)'s deadline for reply briefs.

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

Judge Colloton introduced this item, which concerns amendments to the length limits for briefs and other documents. The first issue for the Committee's consideration, he suggested, is whether to adopt word limits for documents other than briefs. Such a change seems to make sense, but then the question becomes the page-to-word conversion ratio. Employing the 280 words per page conversion ratio that had been used in adopting the 1998 amendments to Rule 32 would effectively increase the length permitted under the existing page limits in Rules 5, 21, 27, 35, and 40. The 280 words per page conversion ratio, Judge Colloton noted, was derived from a 1990s study of commercially printed Supreme Court briefs. The Committee's published proposal instead employed a 250 words per page conversion ratio, which was supported by the findings in a 1993 D.C. Circuit Advisory Committee study. During the comment period, one commentator stated that briefs filed under the current Appellate Rules average 240 words per page. A recent study by Mr. Gans of rehearing petitions filed in the Eighth Circuit suggested that those filings average 255 words per page. Thus, it seems that something in the neighborhood of the 250 words per page ratio used in formulating the published proposals was a good measure.

The second issue, Judge Colloton stated, is what to do about the length limits for briefs. The published proposal would reduce the length limit for principal briefs from 14,000 words to 12,500 words. If the Committee instead used a conversion ratio of 260 words per page, that would generate a 13,000-word limit. Rule 32(e), as amended, would make clear that any circuit that wished to accept longer briefs could do so.

Underpinning the published proposal was a concern that the 280 words per page conversion ratio was not the best measure of equivalence. Judge Easterbrook's comment explained that the ratio was derived from a study of the number of words in commercially printed Supreme Court briefs. Other evidence, such as the 1993 D.C. Circuit Advisory Committee study and Mr. Gans's 2013 study of briefs filed in 1995-1998, indicated that briefs filed in the courts of appeals were different in length from commercially printed Supreme Court briefs. And the mid-1990s were a time when, as the Standing Committee observed, computer software enabled lawyers to file briefs that were technically compliant with the existing page limit but were as much as 40 percent longer than a normal brief. Judge Easterbrook's comment also reported a 1990s study finding that law firm briefs produced without printing averaged about 13,000 words.

A substantial number of judges, Judge Colloton observed, believe that briefs are too long. The judges of the D.C. Circuit unanimously favor the proposal. All of the active judges of the Tenth Circuit likewise support the proposal. Judge Chagares has reported that a majority of judges on the Third Circuit support it.

Judge Colloton turned next to the idea of adjusting the published length limit for principal briefs from 12,500 to 13,000 words. 12,500 words may be the best estimate of the length of traditional briefs filed in the courts of appeals, and that measure may best address judges' concerns. Moreover, there is no evidence that there were problems with the rule in effect in the

D.C. Circuit (prior to the 1998 amendments) that limited briefs to 12,500 words. On the other hand, a 13,000-word limit may best approximate the length of briefs filed in the courts of appeals just prior to the 1998 amendments. And revising the limit from the published 12,500 words to 13,000 words would accommodate to some extent the objections that appellate lawyers have registered about the proposal while still recognizing the validity of the concerns that judges and others have expressed about the current rule.

Alternatively, Judge Colloton noted, the Committee could decide to withdraw the proposal, as urged by many distinguished appellate lawyers. The principal argument here is that some complex cases require 14,000 words. No judge likely believes that there are no cases that warrant 14,000 words, but the question is how many?

Judge Colloton pointed out that Mr. Gans's most recent study had looked at data concerning briefs recently filed in the Eighth and D.C. Circuits. The study found that approximately 20% of briefs in Eighth Circuit argued cases contain between 12,500 and 14,000 words; in the D.C. Circuit, the number is closer to 25%. As the Solicitor General suggests, in the small number of cases that are complex enough to warrant 14,000 words, the litigant can move for permission to file an overlength brief. And an advisory committee note like that suggested by DOJ could address this potential need.

Commentators have argued that the burden on courts of adjudicating such motions will outweigh the work that courts will be spared by shortening the length limits; but that is a question for the courts to decide. An advantage of the pending proposal is that it allows individual circuits to choose whether to accept longer briefs than permitted by the national Rules. By contrast, the framework put in place by the 1998 amendments forced circuits to accept 14,000-word briefs even if they preferred a shorter limit.

In considering whether to withdraw the proposal, Judge Colloton suggested, the Committee should consider why the Rules should require circuits to accept 14,000-word briefs that some courts say they do not need and do not want. The Committee could show deference to the commentators who opposed the proposal by adjusting the proposed word limit upwards from 12,500 to a larger number of words. But Judge Colloton expressed confidence in the judges of the circuits who say that 12,500 or 13,000 words is a sufficient length limit under which to resolve cases. Judges want the information that they need in order to decide cases correctly. But many judges in their collective experience are saying that briefs are too long, and that judgment warrants some deference from the Committee.

Judge Colloton acknowledged that members of the Committee may have varying views on the subject, and he recognized that each member would try to do what he or she believes is best for the system. The chair then solicited views from the Committee about the pending proposal.

An attorney member stated that, as far as his own practice is concerned, he does not much care whether the length limits are reduced. When he was clerking for Justice Souter, this attorney recalled, the Justice required two-page bench memos, and the law clerks found a way to comply with that requirement. This member stated that he was taken somewhat by surprise by the bar's near-uniform adverse reaction to the published proposal. Especially persuasive, in his view, were commentators' concerns about the shrinking opportunities for oral argument and about the need for length in multi-party cases. Less compelling, he suggested, were the arguments suggesting that there are many cases in which 14,000 words are truly necessary in order to make the right arguments. Most of the commentators' concerns would be equally applicable to practice in the trial court. In district court, he noted, lawyers have less than 14,000 words in which to brief summary judgment motions. When the limit is 25 pages, this member noted, he simply files the best 25-page brief that he can. The member expressed an expectation that, where more length is needed, the courts of appeals would grant permission for additional length. The member stated that he would strongly prefer a consensus judgment by the Committee – for example, a decision to change the limit to 13,000 words and to include other "softeners" to mitigate the impact of the change. He stated that he would prefer such a resolution to *either* rejecting the views of top lawyers *or* abandoning the proposal. He would like to give deference to the concerns of both judges and lawyers.

Another attorney member stated that, with trepidation, he opposed reducing the length limits for briefs, whether to 12,500 words or to 13,000 words. There is, he stated, an informational problem. Judges and lawyers have been talking past one another. Judges perceive that briefs are too long. But it is hard for judges to know what they would be missing if briefs were shorter. Lawyers do not know in advance which arguments will persuade the judges. In the *Hamdan* case, for example, he and his colleagues did not predict that an argument concerning Hamdan's exclusion from the courtroom would prove dispositive;[3] facing a shorter length limit, he stated, they would have omitted that argument. Time and time again, he has been surprised by the arguments that a judge seizes on. This member stated that he was not moved by arguments about the history of the 1998 amendments. He was moved, however, by the practitioners' reaction to the published proposal. He was concerned, as well, that the proposal would effect a drastic reduction in the length of reply briefs. Judge Silberman's comment, this member stated, convinced him that judges face a problem from unduly long briefs. But the key is to find the appropriate solution. Practitioners will be the ones who implement the solution. Briefing in the district court, he argued, is different from briefing on appeal. District court decisions do not create precedent. In the trial court, one is concerned with making a record and preserving issues for appeal. The Committee, this member argued, should be Burkean in its approach.

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[3] *See Hamdan v. Rumsfeld*, 548 U.S. 557, 614 (2006) (stating that the rights of the accused under the order governing military commission procedure were "subject ... to one glaring condition: The accused and his civilian counsel may be excluded from, and precluded from ever learning what evidence was presented during, any part of the proceeding that either the Appointing Authority or the presiding officer decides to 'close'").

An appellate judge member expressed great respect for those who had submitted comments and those who had testified at the Committee's April 1, 2015, hearing. The Committee had before it the views of lawyers who are the cream of the crop and who argue complex and serious cases. But those sorts of cases are not representative of the bulk of the docket. The Eleventh Circuit has twelve authorized judgeships, and in some recent years three or four of those judgeships have been vacant. Suppose that the Eleventh Circuit decides roughly 6,200 cases in a year, and suppose that 200 of those cases are complex. The other 6,000 are not. Lawyers need not repeat an argument multiple times in a brief. The courts are inundated with pages that lack meaning. A typical case has one or two issues and does not require a 14,000-word brief. Shorter briefs would enable judges to do their jobs better. Five or six years ago, the Eleventh Circuit shortened oral argument time from 20 minutes to 15 minutes. Lawyers opposed that change, but they adjusted.

Mr. Letter stated that the DOJ deferred to the sense of the Committee concerning the conversion of existing page limits to word limits. As for the selection of a word limit, that is a judgment that circuit judges are best able to make. The comments submitted by the judges of the Tenth Circuit and the D.C. Circuit support a decrease in the word limits for briefs. Informal comments by judges also support such a decrease. The DOJ supports such a decrease, but with the proviso stated in the DOJ's comment. Some cases will require additional brief length. For instance, when multiple criminal defendants are involved in an appeal, the Government often must draft a single consolidated brief responding to the briefs filed by all the defendants. The DOJ urged the addition, in either Rule text or Committee Note, of language recognizing the need for extra length when appropriate.

An attorney participant expressed support for the reduction in brief length to either 12,500 words or 13,000 words. Based both on the data and on his own experience, this attorney concluded that briefs had become longer as a result of the 1998 amendments. Prior to 1998, there had been no outcry that the 50-page length limit was too short; this fact, the attorney stated, provided an important benchmark. He greatly respected the commentators, and he acknowledged that concerns could arise in marginal cases. However, he suggested, cases have not become more complex since 1998. Lawyers would encounter difficulty deciding which arguments to cut even if the limit were 16,000 words. Methods exist for shortening briefs. There is a gulf between the views of lawyers and judges. Lawyers should give weight to judges' views, including the experiences that judges recount with run-of-the-mill cases that are not handled by the elite bar. Rather than abandon the proposal, this participant suggested, the Committee could send it on to the Standing Committee. The proposal would benefit from debate in the Standing Committee.

An attorney member stated that he opposed the proposal with trepidation. He had not been particularly moved by the arguments concerning the history of the 1998 amendments. However, based on his own experience, he felt that a limit of 12,500 words would harm his ability to advocate for his client – not in every case, but in a not unusual number of cases. The rules, this member argued, should account for those hard cases. Judges see only the final product; they do not see the initial draft that contained every argument that the lawyer wanted to

make. The member acknowledged the size of judges' caseload and the volume of briefs that they receive. He believed that a 14,000-word limit was better than a 13,000-word limit, which in turn was preferable to a 12,500-word limit.

An appellate judge member stated that he understood where the lawyers were coming from. The judges and the lawyers, he observed, share a common goal – namely, ensuring that justice is served. He believed that the ends of justice could be served with shorter briefs, even though additional length would be necessary in some cases. This member expressed support for the DOJ's proposed addition to the Committee Note. And he expressed an expectation that courts would take seriously a lawyer's request for additional length where additional length is warranted. If a court wished to have more detail on a particular issue, it could request supplemental briefing. The member suggested that the Committee consider adopting a word limit of 13,000 for principal briefs and a conversion ratio of 260 words per page for documents other than briefs.

Another appellate judge member expressed support for the proposal – with a word limit of either 12,500 or 13,000 – so long as the proposal included confirmation that overlength briefs can be permitted, including by local rule. He stated that he was not persuaded by arguments about the history of the 1998 amendments. The choice of a word limit, he stated, is not precise; it is a judgment call. Higher limits invite briefs containing more issues and more words. There are pluses and minuses as to each. Higher limits permit raising of some valid issues that otherwise may be omitted or waived through inadequate briefing, and different aspects of a decision on review may necessarily raise different issues, which may implicate radically different consequences. But higher limits invite less party/attorney sifting of good issues from bad. The number of issues aside, higher limits permit more words, and sometimes additional words are very important to judges – as when they are used to clarify the record or (more rarely) to clarify a legal question. But other times more words are not helpful – for example, when they are used for repetition of thematic-level information in multiple locations in the brief (introduction, statement of facts, summary of argument, argument). A shorter limit would provide an incentive to present each point crisply and once and would discourage repetition of thematic points. This member stated that, although he had some doubts about the increased burden of considering motions to file overlength briefs that would seem to follow from lowering the default length limits, the process does not seem unmanageable. It was important, in this member's view, that the proposal, while decreasing the length limit, would allow a circuit to adopt a local rule providing for a higher limit.

Responding to Mr. Letter's expression of concern about multiple-defendant criminal appeals, an appellate judge member reported that the Eleventh Circuit gets many such cases and routinely gives the Government additional briefing length in those instances. Another appellate judge member reported that the Eighth Circuit likewise accords extra length to the Government when it must respond to briefing by multiple defendants. Mr. Letter stated, however, that a not insignificant number of DOJ lawyers around the country strongly feared that their motions for

extra length would be denied. These concerns, he noted, were founded on anecdotal reports by highly experienced DOJ lawyers concerning the practices followed in some circuits.

An attorney member stated that the worries expressed by those experienced DOJ lawyers validated the concerns of the private bar. He also predicted that repetition would continue to be a problem in briefs no matter what the length limit was. Other approaches, he suggested, could better address the judges' concerns with poor briefing. Efforts could be undertaken to educate the bar in methods of good writing, and courts could even require attorneys to revise and re-file briefs that are unduly repetitive. As to the circuits' ability to adopt local rules setting longer limits, this member noted that such a measure would only provide a realistic safety valve if the bar were represented on the committee that drafted a circuit's local rules. Even within the Committee, he stated, it is uncomfortable, as a practitioner, to voice the bar's concerns. The Committee should not assume that circuits will be willing to adopt local rules increasing the length limits. And the Committee should not change the rules unless it is sure that the amended rule would be better than the status quo.

Judge Sutton observed that the Committee had received input from expert members of the appellate bar. But, he observed, it was hard to know the reaction of other segments of the bar. Judges and lawyers tend to disagree on the issue of length limits. The Rules Committees, he noted, are designed to incorporate differing perspectives. While the issue of brief length limits is important, that issue paled in comparison to the significance of recent Civil Rules amendments. And the latter amendments had been unanimously adopted by the Civil Rules Committee because both sides had ceded ground. Whatever one's views on whether the 1998 amendments had changed the length of briefs, the pre-1998 50-page limit itself had resulted from an arbitrary choice at a prior point in time. The DOJ's proposed Committee Note language and the availability of local rulemaking provided important ways to address commentators' concerns. It was, he suggested, worthwhile for the Committee members to try to work toward a consensus and find common ground.

The attorney member who had spoken initially in support of a reduction to 13,000 words raised a question about the length of reply briefs. Might the Committee wish, he asked, to set the limit for principal briefs at 13,000 words but leave the limit for reply briefs at 7,000 words? An appellate judge member, however, responded that reply briefs tend to be significantly longer than necessary; two other appellate judge members agreed. Mr. Letter added that he would be concerned about lowering the limit for principal briefs without a corresponding reduction in the length of reply briefs. In criminal cases the Government is often the appellee. If anything, Mr. Letter suggested, reply briefs should be one-third the length of principal briefs (rather than one-half).

The Committee arrived at a consensus in favor of a 13,000-word limit for principal briefs. Language would be added to the Committee Notes of Rules 28.1 and 32 to address the need for additional length in appropriate cases. The language sketched at page 404 of the agenda book would provide a working draft of the addition to those Notes. Rule 32(e) would be amended as

shown on page 12 of the previously-circulated "style" document to make clear the ability of a circuit, by local rule or order, to increase any of the length limits stated in the Appellate Rules. A motion was made to adopt the 13,000-word limit for principal briefs; to add appropriate language to the Committee Notes for Rules 28.1 and 32; and to amend Rule 32(e) as stated. The motion was made subject to the Committee's later approval of the Note language. The motion was seconded and passed by voice vote without dissent. Judge Sutton promised the Committee that he would make sure that the concerns of the private bar were aired in the Standing Committee's discussion of the proposal. An appellate judge member noted that the Committee would monitor the effect of the changes.

A motion was made to adopt word limits for documents other than briefs, using a conversion ratio of 260 words per page. The motion was seconded and passed by voice vote without dissent. By consensus, the Committee members decided not to add the DOJ's proposed Committee Note language to the Committee Notes for Rules 5, 21, 27, 29, 35, or 40. Also, the Committee agreed that the published proposal's line limits for documents other than briefs should be deleted.

Professor Struve drew the Committee's attention to a commentator's suggestion that proposed Rule 32(f)'s list (of items than can be excluded when computing length) should be augmented to include "any required statement of related cases in a brief." Mr. Letter observed that local rules set varying requirements. He queried whether Rule 32(f) should permit the exclusion of any item that is required by local rule. (Rule 32(f) would incorporate by reference any local rule that excluded a particular item from the length calculation, so the question was whether Rule 32(f) should also exclude items that were required by local rule but that were not excluded, by local rule, from the length calculation.) Professor Struve noted that some items required by local rule may involve matters that go to the substance of the appeal. An appellate judge member observed that it would be difficult to draft language, for Rule 32(f), that would encompass only the items (required by local rule) that should be excluded from the length calculation.

Professor Struve asked the Committee about the commentator's suggestion that the statement required by Rule 35(b) (concerning the reasons for granting en banc review) should be excluded from the length limit for petitions for hearing or rehearing en banc. Professor Struve recalled that the Committee had discussed this question at its spring 2014 meeting and had decided that the statement should not be excluded. By consensus, the Committee decided to adhere to that prior determination.

The Committee approved of deleting Rule 32(a)(7)(A)'s reference to Rule 32(a)(7)(C) in the light of the proposed deletion of the latter provision. Professor Struve observed that a commentator had noted that the Rules do not define "monospaced face," and had suggested that the term should be defined, "now that it will be used in several places." Professor Struve suggested that the Committee's decision to delete the proposed line limits from

Rules 5, 21, 27, 35, and 40 had removed the impetus for this suggestion. By consensus, the Committee decided not to define "monospaced face."

The Committee approved style suggestions by Professor Kimble that would change "comply with Rule 32(g)" to "include a certificate under Rule 32(g)" and that would flip the order in which Rules 5, 21, 27, 35, and 40 referred to word limits and page limits. The Committee approved Professor Kimble's style changes to Form 6 as shown in the "style" document. The Committee adjourned at 3:53 p.m. on the 23rd, with the understanding that Professor Struve would prepare a revised draft of the proposed length-limits amendments for the Committee's consideration the next day.

The Committee reconvened on the morning of Friday March 24th and commenced by discussing the revised length-limits draft. Judge Colloton directed the Committee's attention to the revised Committee Notes. The Committee members focused on the second paragraph of the proposed Committee Note to Rule 32 as shown on page 8 of the newly-circulated draft. That paragraph contained a variant of the DOJ's proposed language concerning the need for additional length in some instances.

An attorney member highlighted a concern about Fifth Circuit Rule 32.4 (which was reproduced at page 397 of the agenda book). Not only does that Rule require that a motion for leave to file an overlength brief be submitted at least 10 days in advance of the brief's due date, but also the Rule requires that a draft of the brief accompany the motion. The attorney member stated that it is hard to imagine anyone moving for extra length in a circuit that has such a rule. Not only would it be difficult to comply with the Rule's timing, but also it is hard to imagine a lawyer being willing to share an advance copy of the brief with the other side. Although the attorney member hesitated to say that the Committee should interfere with a circuit's local rules, it would make sense, he suggested, that there be a streamlined procedure for a motion that merely seeks an extra 1,000 words (for a total of 14,000 words).

An appellate judge member questioned whether it would be appropriate for a Committee Note to a national Rule to include an instruction directed toward one Circuit's local rules. The attorney member responded that, during the previous day's discussions, he had not realized the problem that such a local rule might present for motions for extra length. He could not imagine his clients agreeing to give their opponent a draft brief in advance. Perhaps, he suggested, there was a way for the Committee to address this concern informally – i.e., to encourage the Fifth Circuit to adopt a streamlined procedure for motions that merely seek leave to employ the old 14,000-word limit. Another attorney member agreed that the Fifth Circuit's rule set a strong disincentive to motions for extra length. Judge Colloton observed that it was unknown whether the Fifth Circuit would apply a new length limit of 13,000 words or vary by local rule. In any event, he thought it likely that the chief judge of the Fifth Circuit, a former Chair of the Appellate Rules Committee, would be sensitive to the concerns expressed, and that the Committee chair could notify the chief judge informally of concerns raised about the local rule. The bar also could advise the court of its views on the local rule.

The Committee returned its attention to the proposed Committee Note to Rule 32. An appellate judge member questioned the draft's reference to the need for a brief to include information "explaining relevant background or legal provisions governing a particular case." Mr. Byron explained that judges sometimes look to the DOJ to explain a complex statutory framework. The appellate judge member suggested that the Note might instead refer to the need "to include unusually voluminous information explaining relevant background or legal provisions."

Turning to proposed Rule 32(f)'s list of items that can be excluded when computing a document's length, an appellate judge member asked whether it would be clear that Rule 32(f)'s reference to "any item specifically excluded by rule" encompassed items excluded by a local rule. Professor Struve promised to ask Professor Kimble whether the rule should say "excluded by rule" or "excluded by these rules or a local rule."

Mr. Gans asked whether the Committee members were comfortable with the numerical limits stated in the newly-circulated draft. Professor Struve had raised a question concerning Rule 28.1(e)'s length limits for briefs on cross-appeals. Current Rule 28.1(e)(2)(B)(i) sets a limit of 16,500 words for the appellee's principal and response brief. Dividing 16,500 words by 280 words and multiplying by 260 words, one arrives at a limit of roughly 15,320 words. An attorney member suggested that the limit for the appellee's principal and response brief should be 15,300, and that the limits for rehearing petitions should be 4,000 words instead of 3,900. Another attorney participant suggested that it could be useful to include a table (akin to that in Supreme Court Rule 33.1(g)) setting out the various length limits stated in the Appellate Rules.

At this point, the Committee temporarily halted its discussion of the length-limits proposals so that revised Committee Note language could be printed and circulated to the Committee members.

When the Committee returned to its consideration of the length-limits proposal, it had before it the following proposed addition to the Committee Notes to Rules 28.1 and 32: "In a complex case, a party may need to file a brief that exceeds the type-volume limitations specified in these rules, such as when necessary to include unusually voluminous information explaining relevant background or legal provisions, or to respond to multiple briefs by opposing parties or amici."

An appellate judge member stated that the Note language should stress the unusual nature of the cases in which additional length will be necessary. An appellate judge participant asked whether attorneys would prefer the statement to be even more brief – perhaps omitting "such as" and the language that followed. Mr. Byron stated, however, that he was bound to press, on behalf of the Solicitor General, for inclusion of the examples that followed "such as." After further discussion, the Committee settled on the language quoted in the preceding paragraph, but with "when necessary" (and the last comma) deleted.

The Committee then turned back to its discussion of word limits. Mr. Gans expressed concern that the variety of the word limits at which the Committee had arrived (by using the conversion ratio of 260 words per page) might burden the clerk's offices when they had to check certificates of compliance with the length limits or when they had to run a word count on suspiciously-long filings. An attorney member suggested, however, that 14,000 words is itself an unusual number, and that any word limit numbers will require attorneys and court staff to memorize the limits or refer to a source. He proposed that the Committee could address this concern by adding the length-limit table that had been discussed earlier that morning. The Chair advised that he and Professor Struve would circulate to the Committee, after the meeting, a draft of the proposed table.

A motion was made to approve the amendments to Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6, as shown in the draft that had been circulated that morning, subject to the following revisions: (1) Rule 28.1(e)(2)(B)'s word limit for the appellee's principal and response brief in a cross-appeal would be 15,300 words; the language drafted that morning would be added to the Committee Notes to Rules 28.1 and 32; and a table or chart of the length limits in the Appellate Rules would be circulated to the Committee for its review and approval after the meeting. The motion was seconded and passed by voice vote without opposition.

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

Judge Colloton reminded the Committee that this item arose from a suggestion that the Committee adopt a national rule addressing amicus filings during a court's consideration of whether to grant panel or en banc rehearing. Not all circuits have local provisions addressing such filings, and practitioners understandably would like to know the rules on basic issues such as length and timing. The published proposal would add a new Rule 29(b) that would set default rules governing amicus filings during a court's consideration of whether to grant rehearing. A circuit could adopt local rules that differed from the national default rules. The adoption of new Rule 29(b) would ensure that practitioners in any circuit would be able to find the governing rules – whether in the national rule or in a local circuit rule.

Professor Struve noted that Rule 29(b)(4), as published, would set a length limit of 2,000 words. The Committee had arrived at that proposal by taking the length limit for the party's petition (15 pages), cutting it in half, rounding up (to eight pages), and multiplying by 250 words per page. The commentators who addressed this feature of the published proposal advocated a longer limit; specific suggestions ranged from 2,240 words to 4,200 words. Commentators pointed out that rehearing petitions may be filed in difficult cases; that the party's petition may not be well-written and may neglect the decision's larger implications; and that the Rules require amici to include various components such as the statement of the amicus's identity, interest, and authority and (usually) the authorship-and-funding disclosure.

The Chair asked whether the Committee might wish to consider revising the proposal to set a limit of 2,600 words (i.e., 10 pages multiplied by 260 words per page). An attorney

member agreed that the limit should be longer than 2,000 words. This member suggested that amicus briefs are not a big burden on the courts, though he also queried how useful they are. An appellate judge member responded that he finds amicus briefs at the rehearing petition stage much less helpful; such briefs, he reported, tend not to do much more than register a vote. For that reason, this member stated, he would be inclined to accord amici more length. The attorney member then suggested a limit of 3,000 words. An attorney participant responded that the limit for the party's rehearing petition would be 3,900 words; given that fact, he suggested, 3,000 words seemed like a lot to give to the amicus. Another attorney member stated that he assumed that judges would prefer a relatively focused amicus brief – not one that regurgitates the party's discussion of the merits. The attorney member who had suggested 3,000 words responded that – in light of the compressed time frame for amicus filings at the rehearing stage – amici tend to be sophisticated entities with sophisticated counsel; such amici, he argued, would make good use of the length permitted to them. The appellate judge member observed that when a party seeks rehearing en banc, its petition typically must compress into the allotted length both its arguments for panel rehearing and its arguments for rehearing en banc; and the party must also give adequate treatment of the facts. In light of those constraints on the party, an amicus filing in connection with a petition for rehearing en banc can be more helpful. By consensus, the Committee decided to increase Rule 29(b)(4)'s length limit to 2,600 words.

The Chair observed that Rule 29(b)(5), as published, would set the due date for amicus filings in support of a rehearing petition at three days after the petition is filed. Members had noted that a time lag longer than three days could cause inefficiency in instances where a judge calls for a response immediately after a petition is filed. In such an instance, the party opposing rehearing might have to revise its already-drafted response after belatedly receiving an amicus filing in support of the petition. Commentators, however, had argued that the published three-day time lag was too short, especially in instances where there is no coordination between the party and the amicus. Commentators had proposed longer periods (ranging from five to ten days). One commentator had proposed a two-step process in which the would-be amicus would have three days within which to file a notice of intent to file an amicus brief, but an additional seven to ten days in which to file the actual brief (along with a motion for leave to file).

An attorney member stated that he was intrigued by the two-step proposal. The mechanism was more complex than the published proposal, but complexity would not be a problem because the relevant actors are sophisticated. An appellate judge participant observed that one of the goals of the proposal was to nudge the circuits to specify the basic rules for amicus filings during consideration of a petition for rehearing. He asked whether Rule 29(b), as drafted, would permit a circuit to set a deadline shorter than the one in the national Rule. Professor Struve stated that the Rule would permit this. An appellate judge member suggested that, in the light of circuits' ability to "vary down," perhaps the national Rule should set a deadline of seven days instead of three. By consensus, the Committee agreed to change Rule 29(b)(5)'s deadline (for amicus filings in support of the petition or in support of neither party) to seven days after the filing of the petition.

Professor Struve directed the Committee's attention to a commentator's suggestion that the Rule should address amicus filings after the grant of rehearing en banc or after a remand from the Supreme Court. An attorney member stated that the Committee should not pursue that suggestion. By consensus, the Committee decided not to place that suggestion on its study agenda. Professor Struve asked whether the line limit should be deleted from proposed Rule 29(b)(4); the Committee agreed that it should be deleted. Professor Struve asked whether proposed Rule 29(b)(5)'s due date for amicus filings in opposition to a rehearing petition should be revised; the Committee decided that it should not.

A motion was made to approve the proposed amendments to Rule 29, subject to (1) the revision of Rule 29(b)(4)'s length limit to 2,600 words and (2) the revision of Rule 29(b)(5)'s deadline for amicus filings in support of the petition (or in support of neither party) to seven days after the petition's filing. The motion was seconded and passed by voice vote without opposition.

VI. Item No. 15-AP-B (update cross-reference to Rule 13 in FRAP 26(a)(4)(C))

Judge Colloton invited Professor Struve to introduce this item, which concerns a technical amendment presented for final approval without publication. Professor Struve reminded the Committee that, in 2013, Rule 13 (governing appeals as of right from the United States Tax Court) was revised and became Rule 13(a), and a new Rule 13(b) (addressing permissive appeals from the Tax Court) was added. At that time, Professor Struve noted, the Committee did not pursue a conforming amendment to Rule 26(a)(4)(C); that Rule's reference to "filing by mail under Rule 13(b)" should have become a reference to "filing by mail under Rule 13(a)(2)." Professor Struve now sought to remedy that oversight by requesting that the Committee approve the amendment to Rule 26(a)(4)(C) to update that cross-reference.

A motion was made and seconded to give final approval to the proposed amendment to Rule 26(a)(4)(C). The motion passed by voice vote without dissent.

VII. Discussion Items

A. Item No. 11-AP-D (changes to FRAP in light of CM/ECF)

Judge Colloton invited Professor Struve to introduce this item, which encompasses possible amendments to Rule 25 that would address electronic filing, electronic service, and proof of electronic service. Professor Struve noted that the sketch of possible amendments set out at pages 835-41 of the agenda book had been superseded by the April 18, 2015 sketch that she had circulated to the Committee members by email. The latter sketch accounted for certain changes that had been adopted in the draft amendments to Civil Rule 5.

Professor Struve noted that the proposed amendments to Appellate Rule 25 would require electronic filing (subject to exceptions for good cause and by local rule) and would authorize

electronic service through the court's transmission facilities on a registered user of those facilities. The proposal would also provide that the notice of electronic filing generated by CM/ECF serves as proof of service on anyone served by means of the court's electronic transmission facilities. The proposal includes special provisions for pro se litigants. Rather than being required to file electronically, pro se litigants would need permission by court order or local rule in order to file electronically. By tying the authorization for electronic service to the recipient's status as a registered user of the court's transmission facilities, the provision on service would in effect incorporate the good-cause and local-rule exceptions (and the special treatment of pro se litigants). Other sorts of electronic service would still require consent.

An attorney member noted that it is customary for a paralegal to file papers in CM/ECF on a lawyer's behalf using the lawyer's login information. This member, focusing on the draft provision relating to proof of service, observed that Supreme Court Rule 29.5 requires the proof of service to "contain, or be accompanied by, a statement that all parties required to be served have been served ...." Mr. Gans responded that the proof of service should include information on any parties served non-electronically. Mr. Byron asked whether it would be possible for CM/ECF to be modified to include a requirement that the filer check a box stating that all parties required to be served have been served. Professor Struve suggested that a question of that nature would fall within the jurisdiction of the Committee on Court Administration and Case Management.

Mr. Byron asked whether the proposed rule's reference to "the court's transmission facilities" should be revised to read "the court's electronic transmission facilities."

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

B. Item No. 13-AP-H (*Ryan v. Schad* and *Bell v. Thompson* / FRAP 41)

Judge Colloton invited Professor Struve to introduce this item, which addresses the timing of the issuance of the mandate under Rule 41. Rule 41(b) states that "[t]he court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later," and also provides that "[t]he court may shorten or extend the time." Under Rule 41(d), a party can seek a stay pending the filing of a certiorari petition; if the stay is granted and the petition is filed, the stay continues until the Supreme Court's final disposition of the petition. Rule 41(d)(2)(D) directs that the mandate must issue "immediately when a copy of the Supreme Court order denying the petition ... is filed."

Professor Struve noted that a subcommittee composed of Justice Eid, Judge Taranto, and Professor Barrett had been studying questions relating to Rule 41. One question is whether stays of the mandate require an order or whether a court can accomplish such a stay merely by omitting to issue the mandate. The Supreme Court has noted but not decided this question. The original Rule 41 had set a deadline for issuance of the mandate "unless the time is shortened or enlarged

by order." The words "by order" were deleted as part of the 1998 restyling of the Appellate Rules. The Subcommittee felt that it would make sense for the Rule to require that stays be accomplished by order.

Another question is whether the court of appeals has discretion to extend the stay of its mandate after the denial of certiorari. Judge Colloton noted that in both *Bell v. Thompson*, 545 U.S. 794 (2005), and *Ryan v. Schad*, 133 S. Ct. 2548 (2013) (per curiam), the Court assumed (without deciding) that Rule 41 authorizes a further stay of the mandate following the denial of certiorari, but held that the circumstances of those cases did not justify such a stay. The Court ruled that such a further stay was proper, if at all, only in "extraordinary circumstances." The Subcommittee had been considering whether Rule 41 should be amended to address this point – either by incorporating the extraordinary-circumstances test or by barring such further stays even in extraordinary circumstances. Judge Colloton noted that a court of appeals has authority to recall its mandate in extraordinary circumstances; one might ask whether it would serve any purpose to require a court of appeals to issue and recall its mandate instead of simply staying it.

Professor Struve observed that the salience of the topic had been illustrated by recent events in *Henry v. Ryan*, 748 F.3d 940, 941 (9th Cir.), *reh'g en banc granted*, 766 F.3d 1059 (9th Cir.), *and on reh'g en banc*, 775 F.3d 1112 (9th Cir. 2014) (en banc). Mr. Henry, under sentence of death, appealed the federal district court's denial of habeas relief. Henry relied in part on a case called *Eddings*. The Court of Appeals affirmed, ruling that even if there had been an *Eddings* error, Henry had failed to show a substantial and injurious effect on his sentence. In November 2013 the Court of Appeals denied panel rehearing and rehearing en banc. Henry did not request a stay of the mandate at that point, but nonetheless, the mandate did not issue. In March 2014, the Court of Appeals granted en banc review in a different case in order to address whether *Eddings* error is structural. In April 2014, Henry asked the panel to reconsider its November 2013 denial of rehearing in light of the grant of en banc review in the other case; this filing appears to have been the first in which Henry mentioned a stay. The panel denied Henry's motion, but a judge of the court requested a vote on whether to take that denial en banc. Next, the Supreme Court denied Henry's certiorari petition; that same day, Henry moved in the Court of Appeals for a stay of the mandate pending the outcome of the en banc call. Subsequently, a majority of the nonrecused active judges voted to rehear en banc the denial of Henry's April 2014 motion. Judge Fletcher, concurring in the grant of rehearing en banc, argued that the "extraordinary circumstances" test applies only when the mandate was stayed solely for the purpose of allowing time for a party to petition for certiorari. The State then sought a writ of mandamus from the Supreme Court, and the Supreme Court asked the Court of Appeals to file a response to the mandamus petition. However, before the due date for the response, the Court of Appeals concluded its en banc proceedings in Henry's case, denied Henry's request for a stay, and directed issuance of the mandate.

Judge Tallman, who had dissented from the grant of rehearing en banc in *Henry*, subsequently wrote to the Committee to propose that Rule 41 be amended to "permit a court of appeals to stay issuance of its mandate only by order and only in exceptional circumstances."

Judge Tallman noted the issue was of particular concern in criminal cases, in light of the interest in the finality of convictions. In the sketch that Judge Tallman initially provided to the Committee, he proposed amending the last sentence of Rule 41(b) to read: "The court may shorten or extend the time only by order and only in exceptional circumstances." Judge Tallman later reviewed the draft language that the Committee had considered at its fall 2014 meeting, and he stated that he would not object to adding a reference to stays based on "extraordinary circumstances" in Rule 41(d)(2)(D). However, he emphasized the importance of including the extraordinary-circumstances requirement in Rule 41(b) as well. Otherwise, he stated, the courts of appeals will use Rule 41(b) to stay mandates in cases that do not fall under Rule 41(d)(2).

The Subcommittee discussed Judge Tallman's suggestions and concluded that Judge Tallman had identified a gap in Rule 41. In the Subcommittee's view, it would be worthwhile to add an extraordinary-circumstances requirement to Rule 41(b). The language would be drafted so as to avoid a clash with Rule 41(d)(2)(A), which authorizes stays of the mandate pending the filing of a certiorari petition and which sets a test for such stays ("good cause" and a "substantial question") that is distinct from the extraordinary-circumstances test. The draft prepared by the Subcommittee would, accordingly, list the extraordinary-circumstances test and the Rule 41(d)(2)(A) test as alternative bases for a further stay of the mandate. The Subcommittee had considered whether adding this language to Rule 41(b) would bar stays in other circumstances where a stay might be desirable, but had concluded that compelling cases could be handled under the extraordinary-circumstances test.

Judge Colloton solicited Committee members' views on the idea of adding an extraordinary-circumstances test to Rule 41(b). An attorney member stated that his only concern related to the possibility that the court of appeals might not detail its findings concerning the existence of extraordinary circumstances. The rule, he suggested, should require such findings, because a further stay of the mandate should occur only in rare circumstances. Professor Struve observed that a list of the Appellate Rules that currently refer to findings was set out on page 880 of the agenda book. The attorney member also pointed out the language in the draft Committee Note, on page 15 of the "style" document, which included a sentence stating that "[t]he court of appeals must set out its findings concerning the facts that constitute the extraordinary circumstances."

An appellate judge member objected, however, that the courts of appeals do not make findings. Another attorney member stated that he preferred the language set out in footnote 36 on page 14 of the "style" document. That footnote suggested that the Rule could say "unless the court expressly identifies the extraordinary circumstances that justify ordering a further stay" or "unless the court issues an order identifying the extraordinary circumstances that justify a further stay." Another member agreed that the "expressly identifies" language would be a good choice. Another appellate judge member suggested that the Rule might direct that any stay be "based on extraordinary circumstances set forth in the order." A third appellate judge member stated the view that either of those formulations would work. A consensus developed that one of these

formulations should be used in both Rule 41(b) and (as re-numbered) Rule 41(d)(4), and that the extraordinary-circumstances test should be added to Rule 41(b).

Professor Struve drew the Committee's attention to another feature of the proposed draft. A Subcommittee member had suggested that current Rule 41(d)(1) is redundant: Given that Rule 41(b) sets the mandate's presumptive issuance date (in a case where there is a timely rehearing petition or stay motion) at seven days after entry of the order denying the petition or stay motion, it seems unnecessary for Rule 41(d)(1) to specify that the mandate is stayed until disposition of that petition or motion. The existence of these parallel provisions in Rules 41(b) and (d)(1) appears to be an artifact of the way in which the Rule developed over time. An appellate judge member suggested revising the proposed Committee Note to Rule 41(d) (shown at page 15 of the "style" document) by adding "former" and "new," where appropriate, to more clearly distinguish the proposed subdivisions from the existing ones.

Judge Sutton asked the Committee whether it might wish to hold the proposed amendment to Rule 41 for later presentation to the Standing Committee. The Rules Committees, he noted, have a practice of "bundling" proposed amendments so as to publish several proposals during the same cycle. If the Committee took this approach, it could also send forward, along with the Rule 41 proposal, any proposal concerning Rule 31(a)(1) and the timing of reply briefs. An appellate judge member asked whether the Committee might vote to approve the Rule 41 proposal at the current meeting and forward it to the Standing Committee, which might approve it in May 2015 but hold it for publication in a later cycle. Judge Sutton suggested, however, that the Standing Committee might be better able to focus its attention on the Rule 41 proposal if it were presented at the Standing Committee's January 2016 meeting. The dockets for the January meetings, he observed, tend to be lighter. By consensus, the Committee resolved to consider the Rule 41 proposal for potential approval at its October 2015 meeting.

C. Item No. 08-AP-R (disclosure requirements)

Judge Colloton invited Professor Capra to present this item, which focuses on disclosures required by local circuit provisions but not required by the Appellate Rules' disclosure provisions (contained in Rules 26.1 and 29(c)). Previously, a subcommittee composed of Judge Chagares, Professor Katyal, and Mr. Newsom had researched these issues. More recently, Professor Capra analyzed the issues and prepared sketches of possible Rule amendments.

Professor Capra explained that he had focused on identifying local rule requirements, not in the current Appellate Rules, that the Committee might be interested in discussing. His memo took a "building block" approach, discussing each requirement in turn and showing its addition to a consolidated sketch of possible Rule amendments. Some of the possible amendments, Professor Capra noted, seemed more viable than others.

Professor Capra first directed the Committee's attention to the topic, discussed at page 923 of the agenda book, that concerned a judge's connection with a prior or current participant in

the litigation. The sketch on page 923 illustrated a rule that would elicit information about a judge's prior participation in the case. The sketch on page 924 showed a rule that would also elicit information about lawyers who had previously appeared in the case. That information, Professor Capra suggested, could be compiled fairly easily.

Professor Capra turned next to the question of disclosures in criminal appeals. The key issue here, he suggested, was whether the Appellate Rules should be amended to include a provision paralleling Criminal Rule 12.4(a)(2). That Rule requires the Government to file a statement identifying an organizational victim and – if that victim is a corporation – also requires the Government to disclose the ownership information referred to in Criminal Rule 12.4(a)(1) (the cognate provision to Appellate Rule 26.1(a)) "to the extent that it can be obtained through due diligence." The sketch set out at page 926 of the materials illustrates an amendment that would add to Appellate Rule 26.1 a provision paralleling Criminal Rule 12.4(a)(2). Such an amendment, Professor Capra predicted, would not affect many appeals; but it would have the virtue of increasing uniformity across the Appellate and Criminal Rules. The Committee would coordinate with the Criminal Rules Committee on these issues.

Turning to the question of disclosures in bankruptcy cases, Professor Capra observed that the Code of Conduct Committee's Advisory Opinion No. 100 provided guidance concerning the participants (in a bankruptcy proceeding) that should be considered parties for purposes of the disclosure rules. The guidance from that Advisory Opinion is not currently reflected in the disclosure provisions in either the Appellate Rules or the Bankruptcy Rules. But the Bankruptcy Rules Committee has indicated a lack of interest in proceeding with an amendment on the topic of disclosures – a reluctance that weighs against proceeding with a bankruptcy-disclosure amendment to the Appellate Rules. For illustrational purposes, Professor Capra set out on page 927 of the agenda book a sketch showing an amendment that would incorporate into Appellate Rule 26.1 additional disclosure requirements for appeals in bankruptcy proceedings.

Next, Professor Capra observed that the Appellate Rules direct a corporate party or amicus to disclose "any parent corporation and any publicly held corporation that owns 10% or more of its stock." Some local rules, Professor Capra noted, require disclosure of ownership interests other than stock. This makes sense; because recusal rules focus on financial interest, it should make no difference whether the ownership interest is in stock or in some other unit. The sketch at page 928 of the agenda book illustrated an amendment that would require disclosure of ownership interests other than stock. At page 929, the sketch would extend the disclosure obligation to encompass ownership interests held by publicly held entities other than corporations. Page 930 of the agenda book showed an amendment that would extend Rule 26.1's disclosure obligations to non-governmental entity litigants other than corporations.

Professor Capra noted that he had sketched, at page 931 of the agenda materials, an amendment that would require disclosure concerning corporate affiliates. However, guidance from the Codes of Conduct Committee indicates that recusal is not automatically required when the judge has an ownership interest in a party's corporate affiliate. Accordingly, it does not seem

worthwhile to amend Rule 26.1 to require disclosures concerning a party or amicus's corporate affiliates (beyond entities that have an ownership interest in the party or amicus).

Professor Capra next turned to the question of disclosure requirements applicable to intervenors. Intervention on appeal, he noted, is sufficiently rare that the Committee had previously decided not to pursue amendments that would govern the general topic. (Appellate Rule 15(d) addresses intervention in the specific context of proceedings for review or enforcement of an agency order.) Morever, Professor Capra pointed out, once intervention has been granted, the intervenor should be viewed as having the status of a party and should thus be seen as subject to Rule 26.1's existing disclosure requirements for parties generally.

Professor Capra pointed out that, depending on the Committee's decisions with respect to the disclosure obligations for parties, changes to Rule 29(c)(1)'s disclosure requirement for amici might become necessary in order to ensure a proper fit between that Rule and Rule 26.1. Some disclosures, he noted, need not be required of amici because a party would already have disclosed the relevant information.

Responding to a suggestion by a member of the Standing Committee, the sketch on page 937 illustrated an amendment that would elicit the names of witnesses who had testified in a case. Professor Capra observed that, on the one hand, instances where a judge's relation to a witness causes recusal are likely to be relatively rare. But on the other hand, it should not be very burdensome for a party to disclose any relevant witness list.

Professor Capra pointed out that the Committee would also need to consider whether any additional disclosure requirements should apply to individuals as well as entities. If the Committee decided to apply some disclosure requirements to individual litigants, it would likely be necessary to restructure the Rule 26.1 sketches shown in his memo.

An attorney member thanked Professor Capra for his work on this topic and stated that he generally agreed with Professor Capra's assessments. This member suggested that the provision sketched on page 923 of the agenda book – designed to elicit information concerning a judge's prior participation in the litigation – should not be limited to participation as a trial judge. Thus, the member suggested deleting the word "trial."

Turning to the sketch on page 924 of the agenda book, which focused on appearances by law firms and lawyers, the attorney member suggested that it would be better to refer to "attorneys" rather than "partners and associates." Some firms, he noted, create positions other than partner and associate, such as "counsel." An appellate judge member asked about that sketch's reference to firms and lawyers who "are expected to appear" for the party. Another attorney member noted that it could be difficult for a firm to predict in advance which associates it might staff on a matter. An appellate judge member noted that the sketch on page 924 was based on Federal Circuit Rule 47.4(a)(4), which requires disclosure of "[t]he names of all law firms and the partners and associates that have appeared for the party in the lower tribunal or are

expected to appear for the party in this court." The Federal Circuit, he reported, has discerned no difficulties with this provision. It is important, this member stressed, to get a lot of information early on. If the information is not provided until later, the court will deny an entry of appearance by a new attorney if that attorney's appearance would cause a recusal.

An attorney member stated that the sketch shown on page 936 – which would require amici to disclose whether "a lawyer or law firm contributed to the preparation of the brief, and, if so, [to] identif[y] each such lawyer or firm" – would require disclosures beyond those required by the Supreme Court's rules. If the Supreme Court's rule does not require such information, the member suggested, neither should the Appellate Rules. Supreme Court Rule 37.6 requires that amici (other than specified governmental amici) must "indicate whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and shall identify every person other than the amicus curiae, its members, or its counsel, who made such a monetary contribution." Professor Capra queried whether the Supreme Court's rule would elicit the information necessary to discern situations in which a Justice's family member worked on the amicus brief. The member responded that the Stern and Gressman treatise takes the view that such work would count as a monetary contribution.[4] An appellate judge member expressed doubt about the merit of the treatise's view, because the ordinary meaning of "monetary contribution" does not include an attorney's labor on a brief.

An attorney member, turning to the question of disclosures by intervenors, stated that he agreed with Professor Capra that, once intervention is granted, the intervenor is subject to the same disclosure obligations as any other party. But, this member asked, what about disclosures *before* the grant of intervention? Mr. Byron reported that, in proceedings for review of agency rulemaking, he very frequently sees intervenors seeking to come in on both sides. Most such instances occur in proceedings in the D.C. Circuit, but some also occur in the regional circuits. Professor Capra noted the possibility of adding a rule provision to address such instances.

An appellate judge member expressed skepticism about the desirability of requiring disclosure of witness lists. Another appellate judge member stated that information relevant to recusal is very important to judges; however, he asked whether the disclosures being discussed would be onerous for lawyers.

An attorney member suggested that some of the information – concerning participation by attorneys and judges – could be compiled relatively readily. Another attorney member, however,

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[4] *See* Stern et al., Supreme Court Practice § 13.14 at 756 n. 62 ("Some nonparty organizations, desirous of helping an impecunious amicus present its views to the Court, may assist in writing the amicus brief. The nonparty organization, by paying its own lawyers, would thereby seem to be making a 'monetary contribution to the preparation' of the amicus brief. Unless and until the Clerk's Office advises otherwise, prudence dictates that such a 'monetary contribution' be revealed to the Court.").

warned that a list of lawyers who had participated in a case could end up being 15 pages long. One of the appellate judge members noted that, in the Eighth Circuit, the Circuit Clerk's office runs the recusal check based on the list (available in CM/ECF) of the lawyers who appeared in the district court. Another appellate judge member asked whether that sort of check would suffice to determine the names of the lawyers who had appeared before an agency. Mr. Gans responded that his office adds that information in manually. An attorney member suggested that it would be useful for judges to have this information. An appellate judge member noted that it is important to limit any required disclosures to the names of those who have actually appeared in a proceeding. The attorney member suggested that a provision could be tailored so that it only requires disclosure of the names of firms and lawyers who appeared in an agency proceeding. An appellate judge member asked whether the rule might state that there is no need to disclose any names of lawyers whose participation is already listed in the CM/ECF system. Mr. Gans noted that the Clerk's Offices should already be checking for lawyers' prior participation, because Judicial Conference policy requires such checks. Professor Capra noted that a rule on this topic should also account for any related state proceedings; the rule could do so by requiring the disclosure of any firms or lawyers not already listed in CM/ECF. Mr. Gans suggested that the Clerk's Office could send the lawyers the list his office generated from CM/ECF, and the lawyers could then disclose only the names not already on the list. An attorney member suggested that, alternatively, the rule might target particular types of prior proceedings (agency proceedings and state-court proceedings). An appellate judge member responded that it would be better to have a single source for all of the information. This member questioned whether lists generated using CM/ECF would always be complete; and he suggested that if the information is submitted by the attorneys, then the court can apply a kind of estoppel based on the disclosures. An attorney member noted, however, that creating this sort of list would be costly for litigants.

An appellate judge participant, commenting on the disclosures project as a whole, expressed concern that some might question why a disclosure would be required unless the information elicited by that disclosure required recusal. That is to say, the addition of a particular disclosure requirement might generate a perception that information responsive to that requirement necessitates recusal. And problems sometimes arise when a litigant takes certain steps in an effort to generate a recusal. Proceeding with this project, he suggested, would entail consultation with the Codes of Conduct Committee and the Committee on Court Administration and Case Management. Judge Colloton noted that the subcommittee was attuned to the concern that new disclosure requirements should be connected to recusal obligations and that the Committee would engage in appropriate consultation.

An appellate judge member noted that some disclosures (such as those concerning attorneys' prior participation) were relevant to individual litigants, not only to entities. He asked whether the rule should be adjusted to account for that. On the other hand, he noted, perhaps compliance would be more burdensome for individual litigants.

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

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

Judge Colloton observed that the Civil / Appellate Subcommittee had resumed its discussions of this item, which concerns a litigant's efforts to "manufacture" a final judgment – in order to secure appellate review of the disposition of fewer than all claims within an action – by dismissing all other claims with respect to all parties. The Committee had previously discussed the circuits' varying approaches to this topic. For example, the Second Circuit recognizes a concept of "conditional prejudice," whereby a litigant can achieve a final judgment by dismissing its remaining claims with the understanding that the dismissal of those claims is with prejudice unless there is a reversal on appeal. A number of other circuits have ruled, to the contrary, that dismissals with conditional prejudice do not produce an appealable final judgment.

Professor Struve stated that the Civil / Appellate Subcommittee had formulated four options for consideration by the advisory committees. First, the rulemakers might decide not to take any action on this item, leaving it for further development in the caselaw. Second, the rulemakers might adopt a "simple" rule stating that a dismissal, with prejudice, of all remaining claims achieves finality. Third, the rulemakers could adopt a rule stating that *only* such a dismissal with prejudice achieves finality. Or fourth, the rulemakers could try to draft a rule that explicitly addresses the topic of dismissals with "conditional prejudice." The Civil Rules Committee, which met first, had discussed these four options, and had voted thirteen to one in favor of the first option.

Judge Colloton asked the Committee members whether they felt that the rulemakers should draft a rule on this topic. Mr. Letter stated that it would be worthwhile to adopt a rule, even if it were the minimalist rule described in the Subcommittee's second option. There is value, Mr. Letter suggested, in promoting nationwide uniformity and assisting less-skilled practitioners in understanding the rules of appellate jurisdiction. Mr. Letter stated that, in his view, it would be a good idea to address the issue of conditional prejudice. The Second Circuit, he suggested, takes the correct approach to this issue. Recognizing the finality of a judgment that results from a conditional dismissal with prejudice will prevent hardship to litigants. Moreover, such dismissals are likely to be relatively rare, and the resulting appeals will not unduly burden courts.

An attorney member asked whether Mr. Letter would propose that the district courts should serve any gate-keeping role in such a conditional-prejudice framework. Mr. Letter responded that he did not think so. Such appeals, he suggested, should be available at the litigant's option. If it sufficed to rely upon gate-keeping by the district court, then one could simply employ the existing avenues of Civil Rule 54(b) certification and of appeals under 28 U.S.C. § 1292(b). Some district judges, Mr. Letter suggested, may wish – for perfectly worthy reasons – to keep cases from going up to the courts of appeals. A discussion ensued concerning the policy reasons behind the Civil Rule 54(b) mechanism.

An appellate judge participant observed that the topic of manufactured finality has been on the Committee's agenda for a long time. It is always useful, he noted, for the Committee to pay attention to circuit splits relating to the Appellate Rules. The Civil Rules Committee did not, however, think that there is enough of a circuit split to justify rulemaking efforts, given the difficulties that such rulemaking would entail. Some issues, he suggested, are better dealt with by caselaw. And even the "simple" second option noted above, he cautioned, could prove tricky – for instance, it might be interpreted to supplant the Second Circuit's approach to conditional-prejudice dismissals.

An appellate judge member suggested that the best idea is for the Committee to do nothing. Though he understood why attorneys might like a rule that approves the conditional-prejudice concept, such a provision would weaken the final judgment rule.

By consensus, the Committee decided to take no action on the topic of manufactured finality. The chair noted, however, that if the division in authority warrants a uniform national rule, the rulemakers have an important role to play in making policy decisions about finality – as the Supreme Court made clear in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), and *Swint v. Chambers County Commission*, 514 U.S. 35 (1995).

E. Item No. 12-AP-D (Civil Rule 62 / appeal bonds)

Judge Colloton invited Mr. Newsom to introduce this item, which arises from Mr. Newsom's proposal that the Committee consider possible changes to Civil Rule 62's treatment of appeal bonds. Mr. Newsom explained that he had made this proposal because the appeal-bond process can be quite mysterious, even for experienced appellate practitioners. Mr. Newsom reported that the Civil / Appellate Subcommittee was still in the process of studying the proposal, so his remarks were in the nature of a progress report.

Amendments to the Rule, Mr. Newsom noted, could address a number of issues. First, there is the structure of the current Rule 62: it is hard, he suggested, to understand how subdivisions (a), (b), and (d) fit together. Second, there is a potential gap between Civil Rule 62(a)'s 14-day automatic stay and the stays available under Civil Rule 62(b) (pending disposition of a post-judgment motion) and Civil Rule 62(d) (pending appeal). The deadline for motions under Civil Rules 50, 52, and 59 is now 28 days after entry of judgment, while the deadline for most civil appeals is 30 days after entry of judgment. Third, rule amendments could address the form of the security. It is not always necessary to provide a bond. In some instances there may be better options, such as a letter of credit, or the deposit of a check in escrow. Rule 62(b) allows for flexibility in the form of the security, whereas Rule 62(d) requires a supersedeas bond. Fourth, and relatedly, lawyers would prefer to obtain a single form of security that will see them through the whole sequence (from postjudgment motions through the appeal), but Rule 62(d)'s comparative lack of flexibility may make that goal harder to achieve. Fifth, rule amendments could address the amount of the security. And the rule could address whether courts have

discretion to grant a stay without a full bond, on one hand, or to modify or dissolve a stay, on the other hand.

An appellate judge member observed that rule amendments designed to address these issues would take the form of amendments to a Civil (not an Appellate) Rule. Mr. Newsom agreed, but observed that the topic is one that may be of concern primarily to appellate lawyers. Obtaining a stay of the judgment, he noted, is often the first thing that the appellate lawyer must take care of. Professor Struve mentioned that, during the Civil Rules Committee's discussion of this topic at its recent meeting, the judge members of that Committee had reported that they had not seen any problems in the functioning of the current Rule. To this report, an attorney member of the Appellate Rules Committee responded that although the topic is treated in a Civil Rule, it is an *appellate* lawyers' problem. Judge Colloton noted that Mr. Newsom will continue to work with the Civil / Appellate Subcommittee on this item. An appellate judge member stated that he has been very impressed with the work on this topic by Mr. Newsom and Professor Cooper. An attorney participant expressed support for the idea of proceeding with the project.

VIII. Adjournment

The Committee adjourned at 11:50 a.m. on April 24, 2015.

Respectfully submitted,

Catherine T. Struve
Reporter