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

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MEMORANDUM

DATE: May 8, 2012

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

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

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on April 12, 2012, in Washington, DC. The Committee gave final approval to proposed amendments to Appellate Rules 13, 14, 24, 28, and 28.1 and to Form 4. The Committee approved for publication proposed amendments to Appellate Rule 6. The Committee removed one item (concerning introductions in briefs) from its study agenda; reached consensus on an approach to another item (concerning amicus filings by Indian tribes); and discussed various other agenda items.

Part II of this Report discusses the proposed amendments for which the Committee seeks final approval. Part II.A discusses the proposed amendments to Rules 13, 14, and 24, which relate to appeals from the United States Tax Court. Part II.B covers the proposed amendments to Rules 28 and 28.1, concerning the required contents of briefs. Part II.C summarizes the proposed amendments to Form 4, concerning appeals in forma pauperis ("IFP"). Part III of this Report discusses the proposed amendments to Rule 6 (concerning bankruptcy appeals), which the Committee seeks approval to publish for comment. Part IV discusses other matters.

The Committee has scheduled its next meeting for September 27 and 28, 2012, in Philadelphia.

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

II. Action items for final approval

The Committee presents the following proposals for final approval.

A. Proposed amendments to Rules 13, 14, and 24

The proposed amendments to Rules 13, 14, and 24 concern appeals from the United States Tax Court. The proposed amendments to Rules 13 and 14 revise those rules to address permissive interlocutory appeals from the Tax Court under 26 U.S.C. § 7482(a)(2). The Committee developed these proposals in consultation with the Tax Court and with the Tax Division of the Department of Justice. The proposed amendment to Rule 24 grows out of a suggestion by the Tax Court that Rule 24(b)'s reference to the Tax Court be revised to remove a possible source of confusion concerning the Tax Court's legal status.

1. Text of proposed amendments and Committee Notes

The Committee recommends final approval of the proposed amendments to Rules 13, 14, and 24, as set out in the enclosure to this report.

2. Changes made after publication and comment

The Committee did not make any changes to the proposed amendments to Rules 13, 14, and 24 after publication. (It received no comments on these proposed amendments.)

B. Proposed amendments to Rules 28 and 28.1

The proposed amendment to Rule 28 revises Rule 28(a)'s list of the contents of the appellant's brief by removing the requirement of separate statements of the case and of the facts, and makes conforming changes to Rule 28(b) (concerning the appellee's brief). The proposed amendment to Rule 28.1 makes conforming changes to Rule 28.1 (concerning cross-appeals).

Current Rule 28(a)(6) requires "a statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below." Current Rule 28(a)(7) requires that the brief include "a statement of facts." Rule 28(a) requires these items to appear "in the order indicated." These dual requirements have confused practitioners. It seems intuitively more sensible to permit the appellant to weave those two statements together and present the relevant

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

events in chronological order. As a point of comparison, Supreme Court Rule 24 does not separate the two requirements; rather, Supreme Court Rule 24.1(g) requires "[a] concise statement of the case, setting out the facts material to the consideration of the questions presented, with appropriate references to the joint appendix, e.g., App. 12, or to the record, e.g., Record 12."

The proposed amendment to Rule 28(a) consolidates subdivisions (a)(6) and (a)(7) into a new subdivision (a)(6) that provides for one "statement." The proposed new Rule 28(a)(6) allows the lawyer to present the factual and procedural history chronologically, but also provides flexibility to depart from chronological ordering. Conforming changes renumber Rules 28(a)(8) through (11) as Rules 28(a)(7) through (10), revise Rule 28(b)'s discussion of the appellee's brief, and revise Rule 28.1's discussion of briefing on cross-appeals.

1. Text of proposed amendments and Committee Notes

The Committee recommends final approval of the proposed amendments to Rules 28 and 28.1 as set out in the enclosure to this report.

2. Changes made after publication and comment

The comments that the Committee received on the proposed amendments to Rules 28 and 28.1 are described in the enclosure to this report. Four of the six sets of comments supported the proposed amendments' goal. Among those supportive comments, two sets of comments proposed drafting changes; a number of those proposals sprang from a concern that deletion of some of the current language of Rule 28(a)(6) could be problematic. At its spring meeting, the Committee carefully reviewed both the concerns expressed by the two commenters who argued against the proposed amendments and also the suggestions submitted by the two commenters who proffered alternative language for the amendments. A detailed account of the Committee's discussions can be found in the draft minutes of the Committee meeting. To address the concerns expressed by the commenters, the Committee revised the text of proposed Rule 28(a)(6) and added a new paragraph to the Committee Note.

As published, proposed Rule 28(a)(6) referred to "a concise statement of the case setting out the facts relevant to the issues submitted for review and identifying the rulings presented for review, with appropriate references to the record (see Rule 28(e))." In response to commenters' concerns that this language omitted to mention procedural history, the Committee revised the proposed Rule to refer to "a concise statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record (see Rule 28(e))." The Committee hopes that the amended Rule's reference to "the relevant procedural history" – rather than to "the course of proceedings" – will discourage the unnecessary detail with which some briefs currently describe the procedural history of the case. The Committee added a second paragraph to the Committee Note to Rule 28(a) that describes the contents of the statement of the case and that notes the permissibility of including subheadings. The latter point responds to one commenter's concern that judges and clerks need a way to locate quickly, in the brief, a description of the rulings presented for review. The Committee also added, in the Committee

Note, a reference to Supreme Court Rule 24.1(g), on which the amended Rule text is loosely modeled.

C. Proposed amendments to Form 4

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

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

The proposed amendments would also make certain technical amendments to Form 4, to bring the official Form into conformity with changes that were approved by the Judicial Conference in fall 1997 but were not subsequently transmitted to Congress. The proposed technical amendments would add columns in Question 1 to permit the applicant to list the applicant's spouse's income; would limit the requests for employment history in Questions 2 and 3 to the past two years; and would specify that the requirement for inmate account statements applies to civil appeals.

1. Text of proposed amendments

The Committee recommends final approval of the proposed amendments to Form 4 as set out in the enclosure to this report.

2. Changes made after publication and comment

The single comment received on the proposed amendments to Form 4 is summarized in the enclosure to this report. The comment – from the National Association of Criminal Defense Lawyers ("NACDL") – suggests a revision to the Form's discussion of inmate account statements. The Committee decided not to incorporate this comment into the current proposed amendments, but has added it to the Committee's study agenda as a new item. Further detail on this matter can be found in the draft minutes of the Committee's spring meeting.

III. Action item for publication (proposed amendments to Rule 6)

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

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

The Appellate Rules do not currently address in explicit terms the topic of permissive direct appeals from a bankruptcy court to a court of appeals under 28 U.S.C. § 158(d)(2). At the time that Section 158(d)(2) came into being as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), the Appellate Rules Committee decided that no immediate action was necessary with respect to the Appellate Rules, because BAPCPA put in place interim procedures for administering the new direct appeals mechanism. Some of those interim procedures were subsequently displaced by the 2008 addition of subdivision (f) in Bankruptcy Rule 8001. The Committee now considers it worthwhile to specify in more detail the way in which the Appellate Rules apply to direct appeals under Section 158(d)(2), and the Bankruptcy Rules Committee's Part VIII project provides an opportune context in which to obtain input and guidance on this question.

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

Both the Bankruptcy Rules Part VIII project and the project to revise Appellate Rule 6 have highlighted changes in the treatment of the record. The Appellate Rules as they currently exist were drafted on the assumption that the record on appeal would be available only in paper form. Reflecting the fact that the bankruptcy courts are ahead of other federal courts in making the transition to electronic filing, the proposed Part VIII Rules are drafted with a contrary presumption in mind: The default principle under those Rules is that the record will be made available in electronic form. In revising Rule 6(b) and in drafting new Rule 6(c), the Appellate Rules Committee's goal is to adopt language that can accommodate the various ways in which the lower-court record could be made available to the court of appeals – e.g., in paper form; or in electronic files that can be sent to the court of appeals; or by means of electronic links. Adopting such language seems generally advisable in the light of the shift to electronic filing; and such language seems particularly salient in the case of proposed Rule 6(c) because that Rule will incorporate by reference the Part VIII Rules that deal with the record on appeal.

The Committee considered a number of possible ways to allude to the provision of the record on appeal by the lower court to the court of appeals. Those deliberations are described in the draft minutes of the Committee's spring 2012 meeting. The Committee determined that neither "transmit" nor "furnish" nor "provide" captured the range of methods for making the record available; in particular, none of these terms encompassed the provision of a set of electronic links by which to access the documents in the record. After extensive discussions, the Committee decided to refer to the lower-court clerk's "making the record available to" the court of appeals. This language describes the action in question with the requisite clarity while also leaving room for developments in technology and practice. The Committee welcomes the Standing Committee's thoughts on this choice, as well as the reactions of the Bankruptcy Rules Committee and of the Subcommittee, chaired by Judge Gorsuch, that has been formed to consider this and similar questions of terminology relating to electronic filing.

One other linguistic question bears mention. As noted above, the proposed amendments would revise Rule 6(b)(2)(A)(ii) to remove an ambiguity arising from the 1998 restyling of the Appellate Rules. Specifically, for reasons explained at further length in the Committee Note, the proposed amendment would remove Rule 6(b)(2)(A)(ii)'s reference to challenging "an altered or amended judgment, order, or decree"; the amended Rule would refer instead to challenging "the alteration or amendment of a judgment, order, or decree." The amended Rule would state:

> If a party intends to challenge the order disposing of [a tolling] motion – or the alteration or amendment of a judgment, order, or decree upon the motion – then the party, in compliance with Rules 3(c) and 6(b)(1)(B), must file a notice of appeal or amended notice of appeal. The notice or amended notice must be filed within the time prescribed by Rule 4 – excluding Rules 4(a)(4) and 4(b) – measured from the entry of the order disposing of the motion.

Professor Kimble advised the Committee that, in the second sentence, "It" should replace "The notice or amended notice." The Committee carefully discussed Professor Kimble's advice during both its fall 2011 and spring 2012 meetings, and decided not to adopt this suggestion. Committee members believe that the longer phrase is clearer; that clarity and specificity are particularly key for rules that govern the taking of an appeal; and that this is especially true in

the context of bankruptcy appeals given that so many debtors are pro se. These concerns over access to court for unrepresented debtors led the Committee to conclude that this question is one of substance rather than style.

IV. Information Items

The Committee reached consensus on an approach to the proposal that Appellate Rule 29 be amended to treat federally recognized Native American tribes the same as states for purposes of the provisions that authorize states to make amicus filings as of right and that exempt states from Rule 29's authorship-and-funding disclosure requirement. The Committee reviewed its research concerning this proposal. Based on a report by the Federal Judicial Center ("FJC") showing that most tribal amicus filings occur in the Eighth, Ninth, and Tenth Circuits, the Committee first consulted the Chief Judges of those circuits for their circuits' views on the proposal. The responses varied: The Ninth Circuit supports adoption of a national rule authorizing tribal amicus filings, the Tenth Circuit opposes adoption of such a national rule, and judges in the Eighth Circuit have voiced a variety of views. More recently, the Committee consulted the Chief Judges of the remaining circuits for their circuits' views on a proposal that would treat both tribes and municipalities the same as states for purposes of amicus filings. Among the responses received so far from those circuits, Committee members found it noteworthy that while the First Circuit seemed supportive of the inclusion of tribes on the list of entities that can make amicus filings as of right, that circuit also expressed concern that expanding that list could heighten the risk that amicus filings could give rise to recusal issues (especially if the expanded list included municipalities).

During the Committee's discussions of the tribal-amicus issue, members expressed various points of view. A number of Committee members argued that dignity concerns weighed in favor of adding tribes to the list of entities that can make amicus filings as of right. Other Committee members wondered whether the proposed amendment is needed – because the FJC's study indicated that tribes' requests to make amicus filings are generally granted – and argued that if tribes were added to the list of exempt filers, municipalities should be added as well. Most recently, in the light of the possibility that expanding the list of exempt filers could heighten the risk of recusal issues, concerns were voiced about the wisdom of adopting a national rule amendment at the present time. Instead, the Committee decided to maintain this item on its agenda and to revisit it in five years. In the meantime, the Committee asked me to write to the Chief Judges of each circuit to report on the Committee's discussions of this issue and to explain that the Committee thinks the issue warrants serious consideration. Although the letter will not urge the circuits to consider adopting local rules on the issue, if any circuits do decide to adopt a local rule, a few years of experience under such a local provision could inform the Committee's later discussions.

The Committee removed from its agenda an item relating to introductions in briefs. During the Committee's discussions of the proposed amendment to Rule 28(a) concerning the statement of the case, it had been suggested that Rule 28(a) might usefully be amended to take account of the possibility of including an introduction in the brief. Members noted that – if the currently proposed amendment to Rule 28(a) is adopted – Rule 28(a)(6) will be sufficiently

flexible to permit the inclusion of an introduction as part of the statement of the case, and that experienced lawyers sometimes include an introduction either as the first substantive item in the brief or as part of the statement of the case. Some members argued that mentioning an introduction in the text of the Rule would helpfully alert inexperienced lawyers to the possibility of including an introduction. Others worried that it would be difficult to draft Rule text that would indicate the appropriate contents of an introduction, and that it would not be useful to encourage the proliferation of poorly drafted introductions. A member suggested that it might be useful to wait and see how practice develops under amended Rule 28(a)(6) before giving any further consideration to the question of introductions. Based on this discussion, the Committee decided to remove the item concerning introductions from its agenda for the present.

The Committee discussed a number of new or existing agenda items. Over the summer, further study will be conducted concerning a proposal to amend the Appellate Rules to address redaction and sealing of appellate filings. The issue of sealed filings intersects with past and ongoing discussions in several other Judicial Conference committees. In the light of the varying approaches that circuits currently take to sealed filings on appeal, the Committee intends to consider whether it would be appropriate to try to adopt a national rule on the subject or whether the issue could be addressed through alternative means. The Committee held an initial discussion of a proposal to lengthen Appellate Rule 4(b)'s 14-day deadline for appeals by criminal defendants; participants noted that it would be useful to consult the Criminal Rules Committee for its views on the proposal and to obtain further detail concerning the Appellate Rules Committee's prior discussion of a similar proposal (which it considered and rejected roughly a decade ago). Members suggested two new topics for consideration: first, whether it would be useful to clarify appeal bond practices under Civil Rule 62 and Appellate Rule 8; and second, whether the Committee should revisit the way that length limits are specified in Rule 35's treatment of petitions for rehearing en banc (a topic that would also encompass Rule 40's treatment of petitions for panel rehearing).

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE**

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

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

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

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

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

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

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

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

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

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

~~(1)~~ (A) Except as otherwise provided under Tax Court rules for the transcript of proceedings,

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

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

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

Committee Note

Rules 13 and 14 are amended to address the treatment of permissive interlocutory appeals from the Tax Court under 26 U.S.C. § 7482(a)(2). Rules 13 and 14 do not currently address such appeals; instead, those Rules address only appeals as of right from the Tax Court. The existing Rule 13 – governing appeals as of right – is revised and becomes Rule 13(a). New subdivision (b) provides that Rule 5 governs appeals by permission. The definition of district court and district clerk in current subdivision (d)(1) is deleted; definitions are now addressed in Rule 14. The caption of Title III is amended to reflect the broadened application of this Title.

CHANGES MADE AFTER PUBLICATION AND COMMENT

No changes were made after publication and comment.

SUMMARY OF PUBLIC COMMENTS

No comments were received on the proposed amendment to Rule 13.

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

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

Committee Note

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

CHANGES MADE AFTER PUBLICATION AND COMMENT

No changes were made after publication and comment.

SUMMARY OF PUBLIC COMMENTS

No comments were received on the proposed amendment to Rule 14.

Rule 24. Proceeding in Forma Pauperis

(a) Leave to Proceed in Forma Pauperis.

(1) **Motion in the District Court.** Except as stated in Rule 24(a)(3), a party to a district-court action who desires to appeal in forma pauperis must file a motion in the district court. The party must attach an affidavit that:

(A) shows in the detail prescribed by Form 4 of the Appendix of Forms the party's inability to pay or to give security for fees and costs;

(B) claims an entitlement to redress; and

(C) states the issues that the party intends to present on appeal.

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

(3) **Prior Approval.** A party who was permitted to proceed in forma pauperis in the district-court action, or who was determined to be financially unable to obtain

an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization, unless:

(A) the district court – before or after the notice of appeal is filed – certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis and states in writing its reasons for the certification or finding; or

(B) a statute provides otherwise.

(4) **Notice of District Court's Denial.** The district clerk must immediately notify the parties and the court of appeals when the district court does any of the following:

(A) denies a motion to proceed on appeal in forma pauperis;

(B) certifies that the appeal is not taken in good faith; or

(C) finds that the party is not otherwise entitled to proceed in forma pauperis.

(5) **Motion in the Court of Appeals.** A party may file a motion to proceed on appeal in forma pauperis in the court of appeals within 30 days after service of the

notice prescribed in Rule 24(a)(4). The motion must include a copy of the affidavit filed in the district court and the district court's statement of reasons for its action. If no affidavit was filed in the district court, the party must include the affidavit prescribed by Rule 24(a)(1).

(b) Leave to Proceed in Forma Pauperis <u>on Appeal from the United States Tax Court or</u> on Appeal or Review of an Administrative-Agency Proceeding. ~~When an appeal or review of a proceeding before an administrative agency, board, commission, or officer (including for the purpose of this rule the United States Tax Court) proceeds directly in a court of appeals, a~~ <u>A</u> party may file in the court of appeals a motion for leave to proceed on appeal in forma pauperis with an affidavit prescribed by Rule 24(a)(1)<u>:</u>

<u>(1) in an appeal from the United States Tax Court; and</u>

<u>(2) when an appeal or review of a proceeding before an administrative agency, board, commission, or officer proceeds directly in the court of appeals</u>.

(c) Leave to Use Original Record. A party allowed to proceed on appeal in forma pauperis may request that the

appeal be heard on the original record without reproducing any part.

Committee Note

Rule 24(b) currently refers to review of proceedings "before an administrative agency, board, commission, or officer (including for the purpose of this rule the United States Tax Court)." Experience suggests that Rule 24(b) contributes to confusion by fostering the impression that the Tax Court is an executive branch agency rather than a court. (As a general example of that confusion, appellate courts have returned Tax Court records to the Internal Revenue Service, believing the Tax Court to be part of that agency.) To remove this possible source of confusion, the quoted parenthetical is deleted from subdivision (b) and appeals from the Tax Court are separately listed in subdivision (b)'s heading and in new subdivision (b)(1).

CHANGES MADE AFTER PUBLICATION AND COMMENT

No changes were made after publication and comment.

SUMMARY OF PUBLIC COMMENTS

No comments were received on the proposed amendment to Rule 24.

Rule 28. Briefs

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

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

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

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

(4) a jurisdictional statement, including:

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

(B) the basis for the court of appeals' jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

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

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

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

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

~~(7) a statement of~~ setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record (see Rule 28(e));

~~(8)~~(7) a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings;

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

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

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

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

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

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

(10), except that none of the following need appear unless the appellee is dissatisfied with the appellant's statement:

(1) the jurisdictional statement;

(2) the statement of the issues;

(3) the statement of the case;

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

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

* * * * *

Committee Note

Subdivision (a). Rule 28(a) is amended to remove the requirement of separate statements of the case and of the facts. Currently Rule 28(a)(6) provides that the statement of the case must "indicat[e] the nature of the case, the course of proceedings, and the disposition below," and it precedes Rule 28(a)(7)'s requirement that the brief include "a statement of facts." Experience has shown that these requirements have generated confusion and redundancy. Rule 28(a) is amended to consolidate subdivisions (a)(6) and (a)(7) into a new subdivision (a)(6) that provides for one "statement," much like Supreme Court Rule 24.1(g) (which requires "[a] concise statement of the case, setting out the facts material to the consideration of the questions presented, with appropriate references to the joint appendix...."). This permits but does not require the lawyer to present the factual and procedural history chronologically. Conforming changes are made by renumbering Rules 28(a)(8) through (11) as Rules 28(a)(7) through (10).

The statement of the case should describe the nature of the case, which includes (1) the facts relevant to the issues submitted for review; (2) those aspects of the case's procedural history that are necessary to understand the posture of the appeal or are relevant to the issues submitted for review; and (3) the rulings presented for review. The statement should be concise, and can include subheadings, particularly for the purpose of highlighting the rulings presented for review.

Subdivision (b). Rule 28(b) is amended to accord with the amendment to Rule 28(a). Current Rules 28(b)(3) and (4) are

consolidated into new Rule 28(b)(3), which refers to "the statement of the case." Rule 28(b)(5) becomes Rule 28(b)(4). And Rule 28(b)'s reference to certain subdivisions of Rule 28(a) is updated to reflect the renumbering of those subdivisions.

CHANGES MADE AFTER PUBLICATION AND COMMENT

After publication and comment, the Committee made one change to the text of the proposal and two changes to the Committee Note.

During the comment period, concerns were raised that the deletion of current Rule 28(a)(6)'s reference to "the nature of the case, the course of proceedings, and the disposition below" might lead readers to conclude that those items may no longer be included in the statement of the case. The Committee rejected that concern with respect to the "nature of the case" and the "disposition below," because the Rule as published would naturally be read to permit continued inclusion of those items in the statement of the case. The Committee adhered to its view that the deletion of "course of proceedings" is useful because that phrase tends to elicit unnecessary detail; but to address the commenters' concerns, the Committee added, to the revised Rule text, the phrase "describing the relevant procedural history."

The Committee augmented the Note to Rule 28(a) in two respects. It added a reference to Supreme Court Rule 24.1(g), upon which the proposed revision to Rule 28(a)(6) is modeled. And it added – as a second paragraph in the Note – a discussion of the contents of the statement of the case.

SUMMARY OF PUBLIC COMMENTS

The following comments were received on the jointly published proposals to amend Rules 28 and 28.1.

Judge Jon O. Newman. In an email to Judge Sutton, Judge Newman argued that there is no reason to amend Rule 28. He noted that the Second Circuit's Clerk sought the views of her colleagues in other circuits and learned that they had not noticed any confusion on the part of lawyers concerning the statement of the case. Judge Newman stated that the statements of the case and of the facts should remain separate because "[j]udges should not have to comb through one consolidated statement that sets forth all the facts in great detail, often several pages, to find the key procedural step – what ruling (or

rulings) the lower court made." He urged that if the statements of the case and of the facts were to be consolidated, the rule should "at least allow any circuit to maintain the current separation by a local rule."

11-AP-001: M. Elizabeth Egbers. M. Elizabeth Egbers, of Becker Gallagher Legal Publishing, Inc., in Cincinnati, Ohio, wrote in opposition to the proposed amendments. She stated that the amendments are unneeded, and she predicted that they will inconvenience lawyers, engender confusion, and require changes to local court rules and checklists.

11-AP-002: Jack Schisler. Jack Schisler, the Fayetteville Chief of the Arkansas Federal Defender Organization, wrote to support the proposed amendments, stating that they will "streamline the process."

11-AP-003: The National Association of Criminal Defense Lawyers. Peter Goldberger wrote on behalf of the National Association of Criminal Defense Lawyers ("NACDL") to express general support for the proposed amendments and to suggest two revisions to them.

One such proposed revision concerned the use of the word "relevant." NACDL argued that the term "relevant" in proposed Rule 28(a)(6) might lead lawyers to think that the statement of the case must contain "all the facts pertinent [to] an argument." NACDL suggested revising the Committee Note "to make clear that a brief overview of the facts may be sufficient in the Statement, where additional necessary details are set forth in the Argument portion of the brief, showing how the issues raised and argument ... arise[] out of the factual history of the case."

NACDL's other suggestion concerned the proposal's elimination of the words "briefly indicating the nature of the case, the course of proceedings, and the disposition below." NACDL was concerned that the elimination of this language might be taken to imply "that these basic 'facts' are not appropriate for inclusion in an appellate brief." NACDL's comments suggested that it would prefer that this language not be deleted from the Rule text; failing that, NACDL argued that "at least the Note should be amended" to forestall such an implication. NACDL proposed the following language: "a concise statement setting forth the nature of the case, the essential procedural history (including reference to the rulings presented for review), and the key facts giving rise to the claims or charges as well as those relevant to the issues submitted for review …."

11-AP-004: The ABA Council of Appellate Lawyers. Steven Finell wrote on behalf of the Council of Appellate Lawyers of the Appellate Judges Conference of the American Bar Association's Judicial Division. The Council supported the goals of the proposed amendments, noting that combining the statements of the case and of the facts will reduce confusion and redundancy, and observing that this consolidation is "favored by a substantial majority of experienced appellate lawyers who responded to our survey." However, the Council believed that the amendments as drafted will mislead attorneys, and it submitted a different proposed formulation.

The Council warned against the deletion of current Rule 28(a)(6)'s reference to "the nature of the case." The Council observed that it is useful for the brief to state the nature of the case (e.g., a medical malpractice action), and feared that deleting this wording would "at least arguably" ban lawyers from describing the nature of the case (because "the preamble of Rule 28(a) states that a 'brief must contain' the contents prescribed by the numbered subdivisions 'in the order indicated'").

The Council also warned against deleting the reference to "the course of proceedings." The Council argued that a well-drafted rule would not "banish *all* procedural history" but rather would "make clear that procedural history should be limited to that which is necessary to inform the court of the posture of the case and give context to the issues presented for review."

The Council objected on style grounds to the phrase "a concise statement of the case setting out the facts relevant to the issues submitted for review" because "setting out the facts" is a verb construction that contrasts with noun constructions elsewhere in Rule 28(a).

The Council viewed the phrase "identifying the rulings presented for review" as undesirable because "identifying" could mean providing page cites, docket numbers, or titles and dates of rulings, "*none* of which is what the rule intends."

The Council proposed "amending Rule 28(e) to require a pinpoint citation to the appendix or record to support each statement of fact and procedural history anywhere in every brief," rather than "only in the statement of facts."

Finally, the Council suggested "amending Rule 28 to caution parties against repeating the same material in more than one of the sections of the brief that precede the summary of argument."

11-AP-005: DRI. Henry M. Sneath wrote on behalf of DRI–The Voice of the Defense Bar. DRI supports the proposed amendments because they will "allow[] the brief to present the factual and procedural history chronologically and eliminate[] any overlap or repetition between the two sections."

Rule 28.1. Cross-Appeals

* * * * *

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

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

(2) **Appellee's Principal and Response Brief.** The appellee must file a principal brief in the cross-appeal and must, in the same brief, respond to the principal brief in the appeal. That appellee's brief must comply with Rule 28(a), except that the brief need not include a statement of the case ~~or a statement of the facts~~ unless the appellee is dissatisfied with the appellant's statement.

(3) **Appellant's Response and Reply Brief.** The appellant must file a brief that responds to the principal brief in the cross-appeal and may, in the same brief, reply to the response in the appeal. That brief must comply with Rule 28(a)(2)-~~(9)~~ (8) and ~~(11)~~ (10), except that none of the following need appear unless the

appellant is dissatisfied with the appellee's statement in the cross-appeal:

(A) the jurisdictional statement;

(B) the statement of the issues;

(C) the statement of the case;

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

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

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

* * * * *

Committee Note

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

CHANGES MADE AFTER PUBLICATION AND COMMENT

No changes were made to the text of the proposed amendment to Rule 28.1 after publication and comment. The Committee revised

a quotation in the Committee Note to Rule 28.1(c) to conform to the changes (described above) to the text of proposed Rule 28(a)(6).

SUMMARY OF PUBLIC COMMENTS

The comments received on the jointly published proposals to amend Rules 28 and 28.1 are described above. None of those comments related specifically to the proposed amendments to Rule 28.1.

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

* * * * *

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

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

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

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

_____	_____	_____	_____
_____	_____	_____	_____

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

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

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

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

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

* * * * *

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

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

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

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

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

☐ Yes ☐ No
If yes, how much? $ _____

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

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

_____
Your daytime phone number: (____) _____
Your age: _____ Your years of schooling: _____
Last four digits of your social-security number: _____

CHANGES MADE AFTER PUBLICATION AND COMMENT

No changes were made to the proposed amendments to Form 4 after publication and comment.

SUMMARY OF PUBLIC COMMENTS

The following comment was received on the proposal to amend Form 4.

11-AP-003: The National Association of Criminal Defense Lawyers. Peter Goldberger wrote on behalf of the National Association of Criminal Defense Lawyers ("NACDL") to propose a modification of one aspect of the published amendment to Form 4. The relevant portion of the proposed amendment, as published, would clarify that an institutional-account statement must be filed by a prisoner "seeking to appeal a judgment in a civil action or proceeding" in forma pauperis. NACDL suggested that the quoted language "be clarified to reflect more accurately the coverage of the Prison Litigation Reform Act, by adding '(not including a decision in a habeas corpus proceeding or a proceeding under 28 U.S.C. § 2255).'" The Committee decided not to incorporate this change into the currently proposed amendment, but has added it to its study agenda as a separate item.

Rule 6. Appeal in a Bankruptcy Case ~~From a Final Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel~~

(a) Appeal From a Judgment, Order, or Decree of a District Court Exercising Original Jurisdiction in a Bankruptcy Case. An appeal to a court of appeals from a final judgment, order, or decree of a district court exercising jurisdiction under 28 U.S.C. § 1334 is taken as any other civil appeal under these rules.

(b) Appeal From a Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel Exercising Appellate Jurisdiction in a Bankruptcy Case.

(1) Applicability of Other Rules. These rules apply to an appeal to a court of appeals under 28 U.S.C. § 158(d)(1) from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction under 28 U.S.C. § 158(a) or (b). ~~But there are 3 exceptions~~, but with these qualifications:

(A) Rules 4(a)(4), 4(b), 9, 10, 11, ~~12(b)~~ 12(c), 13-20, 22-23, and 24(b) do not apply;

(B) the reference in Rule 3(c) to "Form 1 in the Appendix of Forms" must be read as a reference to Form 5; ~~and~~

(C) when the appeal is from a bankruptcy appellate panel, ~~the term~~ "district court," as used in any applicable rule, means "appellate panel~~.~~"; and

(D) in Rule 12.1, "district court" includes a bankruptcy court or bankruptcy appellate panel.

(2) Additional Rules. In addition to the rules made applicable by Rule 6(b)(1), the following rules apply:

(A) Motion for r~~R~~ehearing.

(i) If a timely motion for rehearing under Bankruptcy Rule ~~8015~~ 8022 is filed, the time to appeal for all parties runs from the entry of the order disposing of the motion. A notice of appeal filed after the district court or bankruptcy appellate panel announces or enters a judgment, order, or decree – but before disposition of the motion for rehearing – becomes effective when the order disposing of the motion for rehearing is entered.

(ii) ~~Appellate review of~~ If a party intends to challenge the order disposing of the motion – or the alteration or amendment of a judgment, order, or decree upon the motion – then ~~requires~~ the party, in

compliance with Rules 3(c) and 6(b)(1)(B), ~~to amend a previously filed notice of appeal. A party intending to challenge an altered or amended judgment, order, or decree~~ must file a notice of appeal or amended notice of appeal. The notice or amended notice must be filed within the time prescribed by Rule 4 – excluding Rules 4(a)(4) and 4(b) – measured from the entry of the order disposing of the motion.

(iii) No additional fee is required to file an amended notice.

(B) The r~~R~~ecord on a~~A~~ppeal.

(i) Within 14 days after filing the notice of appeal, the appellant must file with the clerk possessing the record assembled in accordance with Bankruptcy Rule ~~8006~~ 8009 – and serve on the appellee – a statement of the issues to be presented on appeal and a designation of the record to be certified and ~~sent~~ made available to the circuit clerk.

(ii) An appellee who believes that other parts of the record are necessary must, within

14 days after being served with the appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included.

(iii) The record on appeal consists of:

• the redesignated record as provided above;

• the proceedings in the district court or bankruptcy appellate panel; and

• a certified copy of the docket entries prepared by the clerk under Rule 3(d).

(C) ~~Forwarding~~ Making the rRecord Available.

(i) When the record is complete, the district clerk or bankruptcy-appellate-panel clerk must number the documents constituting the record and ~~send~~ promptly make it available ~~them promptly to the circuit clerk together with a list of the documents correspondingly numbered and reasonably identified~~ to the circuit clerk. ~~Unless directed to do so by a party or the circuit clerk~~ If the clerk makes the record available in paper

form, the clerk will not send ~~to the court of appeals~~ documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals, unless directed to do so by a party or the circuit clerk. If ~~the exhibits are~~ unusually bulky or heavy exhibits are to be made available in paper form, a party must arrange with the clerks in advance for their transportation and receipt.

(ii) All parties must do whatever else is necessary to enable the clerk to assemble the record and ~~forward the record~~ make it available. When the record is made available in paper form, t~~T~~he court of appeals may provide by rule or order that a certified copy of the docket entries be ~~sent~~ made available in place of the redesignated record~~;~~ ~~b~~. But any party may request at any time during the pendency of the appeal that the redesignated record be ~~sent~~ made available.

(D) Filing the r<u>R</u>ecord. ~~Upon receiving the record – or a certified copy of the docket entries sent in place of the redesignated record – the circuit clerk must file it and immediately notify all parties of the filing date~~ <u>When the district clerk or bankruptcy-appellate-panel clerk has made the record available, the circuit clerk must note that fact on the docket. The date noted on the docket serves as the filing date of the record. The circuit clerk must immediately notify all parties of the filing date</u>.

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

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

<u>(A) Rules 3-4, 5(a)(3), 6(a), 6(b), 8(a), 8(c), 9-12, 13-20, 22-23, and 24(b) do not apply;</u>

<u>(B) as used in any applicable rule, "district court" or "district clerk" includes – to the extent appropriate – a bankruptcy court or bankruptcy appellate panel or its clerk; and</u>

(C) the reference to "Rules 11 and 12(c)" in Rule 5(d)(3) must be read as a reference to Rules 6(c)(2)(B) and (C).

(2) Additional Rules. In addition, the following rules apply:

(A) **The Record on Appeal.** Bankruptcy Rule 8009 governs the record on appeal.

(B) **Making the Record Available.** Bankruptcy Rule 8010 governs completing the record and making it available.

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

(D) **Duties of the Circuit Clerk.** When the bankruptcy clerk has made the record available, the circuit clerk must note that fact on the docket. The date noted on the docket serves as the filing date of the record. The circuit clerk must immediately notify all parties of the filing date.

(E) **Filing a Representation Statement**. Unless the court of appeals designates another time, within 14 days after entry of the order granting permission to appeal, the attorney who sought permission must file a statement with the

circuit clerk naming the parties that the attorney represents on appeal.

Committee Note

Subdivision (b)(1). Subdivision (b)(1) is updated to reflect the renumbering of 28 U.S.C. § 158(d) as 28 U.S.C. § 158(d)(1). Subdivision (b)(1)(A) is updated to reflect the renumbering of Rule 12(b) as Rule 12(c). New subdivision (b)(1)(D) provides that references in Rule 12.1 to the "district court" include – as appropriate – a bankruptcy court or bankruptcy appellate panel.

Subdivision (b)(2). Subdivision (b)(2)(A)(i) is amended to refer to Bankruptcy Rule 8022 (in accordance with the renumbering of Part VIII of the Bankruptcy Rules).

Subdivision (b)(2)(A)(ii) is amended to address problems that stemmed from the adoption — during the 1998 restyling project — of language referring to challenges to "an altered or amended judgment, order, or decree." Current Rule 6(b)(2)(A)(ii) states that "[a] party intending to challenge an altered or amended judgment, order, or decree must file a notice of appeal or amended notice of appeal …." Before the 1998 restyling, the comparable subdivision of Rule 6 instead read "[a] party intending to challenge an alteration or amendment of the judgment, order, or decree shall file an amended notice of appeal …." The 1998 restyling made a similar change in Rule 4(a)(4). One court has explained that the 1998 amendment introduced ambiguity into that Rule: "The new formulation could be read to expand the obligation to file an amended notice to circumstances where the ruling on the post-trial motion alters the prior judgment in an insignificant manner or in a manner favorable to the appellant, even though the appeal is not directed against the alteration of the judgment." *Sorensen v. City of New York*, 413 F.3d 292, 296 n.2 (2d Cir. 2005). Though the *Sorensen* court was writing of Rule 4(a)(4), a similar concern arises with respect to Rule 6(b)(2)(A)(ii). Rule 4(a)(4) was amended in 2009 to remove the ambiguity identified by the *Sorensen* court. The current amendment follows suit by removing Rule 6(b)(2)(A)(ii)'s reference to challenging "an altered or amended judgment, order, or decree," and referring instead to challenging "the alteration or amendment of a judgment, order, or decree."

Subdivision (b)(2)(B)(i) is amended to refer to Rule 8009 (in accordance with the renumbering of Part VIII of the Bankruptcy Rules).

Due to the shift to electronic filing, in some appeals the record will no longer be transmitted in paper form. Subdivisions (b)(2)(B)(i), (b)(2)(C), and (b)(2)(D) are amended to reflect the fact that the record sometimes will be made available electronically.

Subdivision (b)(2)(D) sets the duties of the circuit clerk when the record has been made available. Because the record may be made available in electronic form, subdivision (b)(2)(D) does not direct the clerk to "file" the record. Rather, it directs the clerk to note on the docket the date when the record was made available and to notify the parties of that date, which shall serve as the date of filing the record for purposes of provisions in these Rules that calculate time from that filing date.

Subdivision (c). New subdivision (c) is added to govern permissive direct appeals from the bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2). For further provisions governing such direct appeals, see Bankruptcy Rule 8006.

Subdivision (c)(1). Subdivision (c)(1) provides for the general applicability of the Federal Rules of Appellate Procedure, with specified exceptions, to appeals covered by subdivision (c) and makes necessary word adjustments.

Subdivision (c)(2). Subdivision (c)(2)(A) provides that the record on appeal is governed by Bankruptcy Rule 8009. Subdivision (c)(2)(B) provides that the record shall be made available as stated in Bankruptcy Rule 8010. Subdivision (c)(2)(C) provides that Bankruptcy Rule 8007 applies to stays pending appeal; in addition, Appellate Rule 8(b) applies to sureties on bonds provided in connection with stays pending appeal.

Subdivision (c)(2)(D), like subdivision (b)(2)(D), directs the clerk to note on the docket the date when the record was made available and to notify the parties of that date, which shall serve as the date of filing the record for purposes of provisions in these Rules that calculate time from that filing date.

Subdivision (c)(2)(E) is modeled on Rule 12(b), with appropriate adjustments.

TAB 5B

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

FRAP Item	Proposal	Source	Current Status
05-01	Amend FRAP 21 & 27(c) to conform to Justice for All Act of 2004.	Advisory Committee	Discussed and retained on agenda 04/05; awaiting proposal from Department of Justice Discussed and retained on agenda 04/06; Department of Justice will monitor practice under the Act
07-AP-E	Consider possible FRAP amendments in response to Bowles v. Russell (2007).	Mark Levy, Esq.	Discussed and retained on agenda 11/07 Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 04/11
07-AP-H	Consider issues raised by Warren v. American Bankers Insurance of Florida, 2007 WL 3151884 (10th Cir. 2007), concerning the operation of the separate document rule.	Appellate Rules Committee	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08
07-AP-I	Consider amending FRAP 4(c)(1) to clarify the effect of failure to prepay first-class postage.	Hon. Diane Wood	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal.	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08
08-AP-C	Abolish FRAP 26(c)'s three-day rule.	Hon. Frank H. Easterbrook	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09
08-AP-G	Consider substantive and style changes to FRAP Form 4	Appellate Rules Committee	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 10/10 Draft approved 04/11 for submission to Standing Committee Approved for publication by Standing Committee 06/11 Published for comment 08/11 Draft approved 04/12 for submission to Standing Committee

FRAP Item	Proposal	Source	Current Status
08-AP-H	Consider issues of "manufactured finality" and appealability	Mark Levy, Esq.	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 10/10 Discussed and retained on agenda 04/11
08-AP-J	Consider FRAP implications of conflict screening	Committee on Codes of Conduct	Discussed and retained on agenda 11/08
08-AP-L	Amend FRAP 6(b)(2)(A)(ii) to remove ambiguity	Reporter	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09 Discussed and retained on agenda 10/10 Discussed jointly with Bankruptcy Rules Committee and retained on agenda 04/11 Discussed and retained on agenda 10/11 Draft approved 04/12 for submission to Standing Committee
08-AP-M	Consider FRAP implications of interlocutory appeals in tax cases	Reporter	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Draft approved 10/10 for submission to Standing Committee Approved for publication by Standing Committee 01/11 Published for comment 08/11 Draft approved 04/12 for submission to Standing Committee
08-AP-N	Amend FRAP 5 to allow parties to submit an appendix of key documents from the record along with petitions and answers	Peder K. Batalden, Esq.	Discussed and retained on agenda 04/09
08-AP-P	Amend FRAP 32 to change from double line-spacing to 1.5 line-spacing for briefs	Peder K. Batalden, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09
08-AP-Q	Consider amending FRAP 10(b) to permit the use of digital audio recordings in place of written transcripts	Hon. Michael M. Baylson	Discussed and retained on agenda 04/09 Discussed and retained on agenda 10/10
08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 04/09
09-AP-A	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	ABA Council of Appellate Lawyers	Discussed and retained on agenda 04/09

FRAP Item	Proposal	Source	Current Status
09-AP-B	Amend FRAP 1(b) to include federally recognized Indian tribes within the definition of "state"	Daniel I.S.J. Rey-Bear, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed and retained on agenda 10/11 Discussed and retained on agenda 04/12
09-AP-C	Consider possible FRAP amendments in the light of project to revise Part VIII of the Bankruptcy Rules	Bankruptcy Rules Committee	Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed jointly with Bankruptcy Rules Committee and retained on agenda 04/11 Discussed and retained on agenda 10/11 Draft approved 04/12 for submission to Standing Committee
09-AP-D	Consider implications of Mohawk Industries, Inc. v. Carpenter	John Kester, Esq.	Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10
10-AP-B	Consider FRAP 28's treatment of statements of the case and of the facts	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Draft approved 04/11 for submission to Standing Committee Approved for publication by Standing Committee 06/11 Published for comment 08/11 Draft approved 04/12 for submission to Standing Committee
10-AP-D	Consider factors to be taken into account when taxing costs under FRAP 39	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/10 Discussed and retained on agenda 04/11 Discussed and retained on agenda 10/11
10-AP-H	Consider issues relating to appellate review of remand orders	Committee on Federal-State Jurisdiction	Discussed and retained on agenda 10/10
10-AP-I	Consider issues raised by redactions in appellate briefs	Paul Alan Levy, Esq.	Discussed and retained on agenda 04/11 Discussed and retained on agenda 10/11 Discussed and retained on agenda 04/12
11-AP-C	Amend FRAP 3(d)(1) to take account of electronic filing	Harvey D. Ellis, Jr., Esq.	Awaiting initial discussion
11-AP-D	Consider changes to FRAP in light of CM/ECF	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/11

FRAP Item	Proposal	Source	Current Status
11-AP-E	Consider amendment to FRAP 4(b)	Roger I. Roots, Esq.	Discussed and retained on agenda 04/12
11-AP-F	Consider amendment authorizing discretionary interlocutory appeals from attorney-client privilege rulings	Amy M. Smith, Esq.	Awaiting initial discussion
12-AP-B	Consider amending FRAP Form 4's directive concerning institutional-account statements for IFP applicants	Peter Goldberger, Esq., on behalf of the National Association of Criminal Defense Lawyers (NACDL)	Awaiting initial discussion
12-AP-C	Consider amending Rule 28(e) to require pinpoint citations to the appendix or record throughout briefs	Steven Finell, Esq., on behalf of the Council of Appellate Lawyers of the Appellate Judges Conference of the American Bar Association's Judicial Division	Awaiting initial discussion
12-AP-D	Consider the treatment of appeal bonds under Civil Rule 62 and Appellate Rule 8	Kevin C. Newsom, Esq.	Awaiting initial discussion
12-AP-E	Consider treatment of length limits for petitions for rehearing en banc under Rule 35	Professor Neal K. Katyal	Awaiting initial discussion

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Minutes of Spring 2012 Meeting of
Advisory Committee on Appellate Rules
April 12, 2012
Washington, D.C.

I. Introductions

Judge Jeffrey S. Sutton called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, April 12, 2012, at 9:00 a.m. at the Administrative Office of the United States Courts in Washington, D.C. The following Advisory Committee members were present: Judge Michael A. Chagares, Judge Robert Michael Dow, Jr., Justice Allison H. Eid, Judge Peter T. Fay, Professor Neal K. Katyal, Mr. Kevin C. Newsom, and Mr. Richard G. Taranto. Mr. Douglas Letter, Appellate Staff Director and Senior Counselor to the Attorney General, and Mr. H. Thomas Byron III, Civil Division, U.S. Department of Justice ("DOJ"), were present representing the Solicitor General. Also present were Ralph W. Johnson III, Counsel to Senator Chuck Grassley (the Ranking Member of the Senate Judiciary Committee); Judge Jeremy Fogel, Director of the Federal Judicial Center ("FJC"); Mr. Peter G. McCabe, Secretary to the Standing Committee; Mr. Jonathan C. Rose, Rules Committee Officer in the Administrative Office ("AO"); Benjamin Robinson, Deputy Rules Committee Officer and Counsel to the Rules Committees; Julie Wilson, Attorney Advisor in the AO; Mr. Leonard Green, liaison from the appellate clerks; Ms. Marie Leary from the FJC; Holly Sellers, Attorney Advisor in the AO; Julie Yap, Supreme Court Fellow assigned to the AO; Milena Sanchez de Boado, Supreme Court Fellow assigned to the FJC; Michael Duggan, Supreme Court Fellow assigned to the Supreme Court; Judge Fausto Martin de Sanctis, a Visiting Foreign Judicial Fellow at the FJC; and Dr. Roger I. Roots. Professor Daniel R. Coquillette, Reporter for the Standing Committee, participated by telephone.

Judge Sutton welcomed the meeting participants. He introduced one of the Committee's new members, Professor Katyal, who replaces former Committee member Maureen Mahoney. Professor Katyal served as Acting Solicitor General of the United States, and now is both a partner at Hogan Lovells and a professor at Georgetown University. Judge Sutton also informed the Committee that Mr. Letter – long an indispensable member of the Committee – has been promoted to Appellate Staff Director of the Civil Division of the DOJ, and is also serving as Senior Counselor to the Attorney General. Mr. Letter introduced Mr. Byron – his colleague from the Appellate Staff of the Civil Division of the DOJ – who has long experience working on matters relating to the Appellate Rules Committee's agenda, and who was a classmate of Justice Eid.

During the meeting, Judge Sutton thanked Mr. McCabe, Mr. Rose, Mr. Robinson, and the

AO staff for their preparations for and participation in the meeting.

II. Approval of Minutes of October 2011 Meeting

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

III. Report on January 2012 Meeting of Standing Committee

Judge Sutton summarized relevant events at the Standing Committee's January 2012 meeting. The meeting included a very interesting panel presentation on class actions. Also at the meeting, Judge Kravitz appointed Judge Gorsuch to chair a Subcommittee that will consider the choice of language in the national Rules to describe activities relating to electronic filing and service; Professor Struve will serve as the subcommittee's reporter. It seems likely that the Subcommittee will consider, among other things, the language that the Appellate Rules Committee proposes for Appellate Rule 6's treatment of the record in bankruptcy appeals.

Judge Sutton noted that, on December 1, 2011, the amendments to Appellate Rules 4 and 40 and to 28 U.S.C. § 2107 took effect. He observed that Mr. Johnson's work on the amendment to Section 2107 was invaluable. The process of amending Section 2107 was challenging because Congress's agenda was so full.

IV. Action Items

A. For final approval

1. Item No. 08-AP-G (FRAP Form 4)

Judge Sutton invited the Reporter to introduce this item, which concerns proposed amendments to Form 4 (relating to applications to proceed in forma pauperis ("IFP")). The proposed amendments will remove the current Form's requirement that the applicant provide detailed information concerning the applicant's expenditures for legal and other services in connection with the case. In addition, the amendments make technical changes to incorporate amendments that were approved by the Judicial Conference in fall 1997 but were not transmitted to Congress. During the public comment period, the Committee received only one comment on Form 4. This comment – from the National Association of Criminal Defense Lawyers ("NACDL") – focused on an aspect of the technical changes approved in fall 1997. The current Form 4 directs "prisoner[s]" to attach an institutional account statement to their IFP applications. The proposed amendment, as published, would specify that this requirement applies only to prisoners who are "seeking to appeal a judgment in a civil action or proceeding"; this more specific language tracks the wording in 28 U.S.C. § 1915(a)(2) (a provision added to Section 1915 by the Prison Litigation Reform Act ("PLRA")). NACDL suggests that Form 4 should further specify that the requirement of the institutional-account statement applies to prisoners "seeking to appeal a judgment in a civil action or proceeding (not including a decision in a

habeas corpus proceeding or a proceeding under 28 U.S.C. § 2255)."

The Reporter observed that the premise of NACDL's suggestion appears to be accurate, though there are a few doctrinal complexities. Caselaw in all twelve of the relevant circuits states that the PLRA's provisions concerning IFP litigation do not apply to state-prisoner habeas petitions under 28 U.S.C. § 2254. Seven circuits have, likewise, held the PLRA's IFP provisions inapplicable to federal-prisoner proceedings under 28 U.S.C. § 2255. Similarly, holdings in five circuits and dicta in two other circuits state that the PLRA's IFP provisions do not apply to habeas proceedings under 28 U.S.C. § 2241. An additional issue concerns how to categorize mandamus petitions arising in connection with habeas or Section 2255 proceedings. Caselaw in some circuits provides that the applicability of the PLRA's IFP provisions to mandamus petitions depends on whether the underlying proceeding is one to which those provisions would apply, but some cases suggest other possible approaches.

The Reporter stated that the caselaw refusing to apply the PLRA's IFP provisions to habeas and Section 2255 proceedings advances persuasive arguments for that refusal. Applying those provisions to such proceedings would run counter to the tradition of access to court for habeas petitioners. Moreover, the PLRA was directed toward suits challenging prison conditions, and habeas suits are not generally the proper vehicle for such challenges. And the Antiterrorism and Effective Death Penalty Act ("AEDPA"), enacted within days of the PLRA, addresses habeas and Section 2255 litigation (and specifically addresses the issue of successive petitions).

The Reporter suggested that though the doctrinal premise of NACDL's suggestion appears sound, there are reasons to consider the proposal further before deciding whether to adopt it. The change proposed by NACDL might itself cause confusion for some applicants. For example, if an IFP applicant (erroneously or not) styled a challenge to prison conditions as a habeas petition, NACDL's proposed language would suggest to that applicant that he or she need not provide an institutional-account statement – yet that suggestion would likely be inaccurate. Admittedly, a litigant's confusion as to the nature of his or her suit is likely to have been dispelled by the trial judge prior to the time that the litigant attempts to take an appeal. But it bears noting that some district courts use a form – promulgated by the AO – that tracks Form 4 quite closely. In addition, the Supreme Court's rules direct the use of Form 4 in connection with applications to proceed IFP in the Supreme Court. Accordingly, the Reporter suggested that the Committee approve the amendments to Form 4 as published and add NACDL's suggestion to the Committee's agenda as a new item.

An appellate judge member noted that the relevant language of Form 4 as reflected in the published amendments had been fully considered in the rulemaking process in 1997. A motion was made to approve the amendments as published and to place NACDL's suggestion on the study agenda. The motion was seconded and passed by voice vote without dissent.

2. Item No. 08-AP-M (FRAP 13, 14, and 24 / tax appeals)

Judge Sutton invited the Reporter to present this item, which concerns certain amendments relating to appeals in tax cases. The proposed amendments to Rules 13 and 14 will update those Rules to take account of permissive interlocutory appeals from the United States Tax Court under 26 U.S.C. § 7482(a)(2). Those amendments were developed in consultation with the Tax Court and the DOJ's Tax Division. In the course of those discussions, the Tax Court proposed a further amendment to Rule 24 (concerning applications to proceed IFP); that amendment revises Rule 24(b) to reflect the Tax Court's status as a court rather than an agency.

No comments were received on these proposed amendments. The Reporter suggested that the Committee approve them as published. A motion was made and seconded to approve the amendments to Rules 13, 14, and 24 as published. The motion passed by voice vote without dissent.

3. Item No. 10-AP-B (FRAP 28 & 28.1 / statement of the case)

Judge Sutton introduced this item, which concerns proposed amendments to Rule 28's list of the required contents of briefs (as well as a conforming amendment to Rule 28.1 concerning cross-appeals). During the comment period, only two commenters argued that the amendments should be abandoned; the other commenters agreed with the general purpose of the amendments. Judge Sutton noted that it makes sense to amend the rules so that briefs can present matters chronologically. However, some commenters expressed concern that the removal of some of Rule 28(a)(6)'s current language might be taken to suggest that the matters referred to in the deleted language can no longer be included in the brief.

Judge Sutton observed that the agenda materials proffered three options for the Committee's consideration. One approach would augment the Committee Note to address the commenters' concerns. Another approach would revise the amendment to the Rule text. And a third approach would simply revert to a different option previously considered by the Committee – namely, reversing the order of current Rules 28(a)(6) and 28(a)(7). That third approach has some appeal, but on the other hand there is much to recommend an approach that would bring Rule 28 into closer parallel with the Supreme Court's analogous rule. Lawyers have not had trouble understanding the requirements of the Supreme Court's rule. Judge Sutton recalled that a former attorney member of the Committee had argued in favor of keeping the Rule text relatively spare, in order to preserve flexibility for lawyers in drafting briefs. He observed that some of the specificity that commentators had proposed for the Rule text might be counterproductive; for example, a requirement that the brief specify the key facts giving rise to the claim would not make sense in the context of an appeal that concerns a purely procedural issue. Judge Sutton noted that Judge Newman had expressed the view that no amendment was needed, and also that Judge Newman had pointed out that judges and clerks want a place in the brief, with a heading, where they can quickly look to identify the rulings that are being appealed.

An attorney member observed that there are two different sorts of lawyers to consider; experienced appellate lawyers prefer flexibility, and for them, a simpler rule is better. Less-experienced lawyers may need a provision that spells things out. This member recalled that

Professor Coquillette had stated that matters of substance should not be addressed in the Notes. Mr. Letter agreed that if the Committee wishes to specify more detail, that detail should go in the Rule text rather than the Note. Some lawyers handle appeals only occasionally; and rules pamphlets usually do not include Committee Notes. Mr. Letter reiterated that it is important for briefs to be helpful to judges, and he noted that he has heard judges complain that briefs are not meeting this standard. He asked what the judge members of the Committee thought. An appellate judge member stated that he did not share Judge Newman's concern, and that he favored approving the proposal as published. Another appellate judge member agreed that the proposal should be approved as published; in his view, statements of the case under the existing Rule 28 are not helpful.

Judge Sutton asked whether it is inappropriate for a Committee Note to explain the intent of the amendment in the context of the prior rule – for example by explaining that the removal of a specific textual reference to a certain component is not meant to outlaw inclusion of that component. An attorney member questioned what aspects of the proposed augmented Committee Note would be substantive. The one change that he could see as possibly substantive would be the removal of a reference to the "course of proceedings"; the other changes seemed more like reordering and clarifying the present rule. He asked whether omission of any reference to procedural history might cause briefs to omit something that is important for understanding; but he noted that it would be almost impossible to indicate the "rulings presented for review" without discussing the relevant procedural history.

Turning to specific drafting issues, an attorney member questioned whether it is really appropriate to use the term "concise" in the proposed provision that combines the former Rules 28(a)(6) and 28(a)(7). He suggested deleting "concise." Judge Sutton observed that there is little risk that briefs will end up being too short, but he agreed that the use of the term "concise," coupled with the removal of references to specific components in a brief, might lead to an overly minimalist approach. An appellate judge member disagreed, predicting that there is no risk of undue minimalism in briefs; another appellate judge member concurred in this view. A participant asked whether the inclusion of the word "concise" in amended Rule 28(a)(6) would suggest – by negative implication – that other portions of the brief need not be concise. Members responded that similar words are employed in a number of the subsections of Rule 28(a).

The attorney member also stated that he understood a commentator's concern about the published rule's use of the term "relevant" as centering on the fact that the published language refers to "*the* facts relevant to the issues submitted for review" – that is to say, the use of the word "the" might cause a reader to conclude that facts not mentioned in the statement may not be relied upon in the brief. He noted, on the other hand, that such an argument is not strong and that similar language appears in the Supreme Court's rule.

With respect to the question of procedural history, participants recalled that the Committee's motivation for proposing to delete Rule 28(a)(6)'s reference to "the course of proceedings" had been a concern that briefs discuss the procedural history in inordinate detail.

Judge Sutton asked whether this concern could be addressed by referring, in the Rule text, to "the relevant procedural history." An appellate judge member stressed that procedural history is important, but only as to the issues presented in the appeal. Judge Sutton agreed with a member's earlier observation that lawyers are likely to mention the procedural history when describing the rulings presented for review.

Judge Sutton asked for Committee members' views on the published proposal's use of the term "identifying" in the phrase "identifying the rulings presented for review." Would it be better to say "describing the rulings presented for review"? An appellate judge member stated that "identifying" was useful because it is likely to prompt a more concise description.

Judge Sutton asked Professor Coquillette for his views on the proposed augmented Committee Note. Professor Coquillette stated that he was concerned by the inclusion of detail in that version of the Committee Note, because some lawyers use rule books that do not include Notes. The Standing Committee prefers to avoid placing in the Committee Note anything that actually changes the operation of the Rule. A member asked whether the augmented Note changed the operation of the Rule or whether it merely directed readers not to draw a negative inference based on the changes made to the Rule. Professor Coquillette responded that the augmented Note language fell in a gray area and was not an obvious abuse of the Note. An attorney member stated that Professor Coquillette's guidance made him wary of placing in a Note something that could be placed in the Rule text. Judge Sutton asked whether the Note can be used, not to modify the Rule text, but rather to address a possible negative inference that might be drawn by a reader who was comparing the amended Rule text to the previous version of the Rule. Professor Coquillette responded that that could be a valid use of a Note.

An attorney member suggested that the question of whether the Rule should mention procedural history was potentially significant; by contrast, he suggested, the Rule need not mention the nature of the case because the components of the brief (e.g., the statement of the issues) will make clear the nature of the case. This member noted that the Committee cannot predict how lawyers will respond to the deletion, from Rule 28(a)(6), of the reference to "the course of proceedings." He suggested that it might be useful to include a phrase such as "any procedural history necessary to understand the posture of the appeal or the issues submitted for review." He asked whether participants could think of a more concise substitute for that language. Judge Sutton responded that his concern about that language would not solely relate to its unwieldiness; he would also be concerned that the language could lead brief-writers to be over-inclusive. However, he added that he did not feel strongly about this, and that the main goals of the amendments, in his view, were to provide that the statements of the case and the facts could proceed in chronological order and to give flexibility to lawyers in drafting their briefs. He asked participants whether they would suggest adding language to the proposed Rule text. Mr. Byron asked whether one might add to the Rule a reference to "relevant" procedural history and leave the detailed explanation to the Committee Note. An appellate judge member suggested that "necessary" is a more limiting word than "relevant." Judge Sutton observed that the proposed Rule would continue to use the word "concise" to modify "statement of the case."

Judge Sutton suggested that there appeared to be an emerging consensus that the best way to address the commentators' concerns was to augment the Committee Note, but that it would be useful to amend the Rule text to refer to the relevant (or necessary) procedural history.

The Committee returned to this item after lunch; during lunch, the Reporter produced a revised draft that reflected the Committee's discussions prior to lunch. The revised draft would amend Rule 28(a)(6) to refer to "a concise statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record (see Rule 28(e))." A member suggested a conforming change to the Committee Note. A motion was made to approve the revised draft (as circulated at the meeting), subject to the change to the Committee Note. The motion was seconded and passed by voice vote without dissent.

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

Judge Sutton invited the Reporter to introduce these items, which concern proposed amendments to Appellate Rule 6 concerning bankruptcy appeals. The Reporter observed that the proposed amendments to Rule 6 have been developed jointly with the Bankruptcy Rules Committee, in the context of that Committee's discussions of proposed revisions to Part VIII of the Bankruptcy Rules. As part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Congress created an avenue for direct permissive appeals from the bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2). Initially those appeals were governed by interim procedures contained within BAPCPA, but some of those procedures have subsequently been displaced by an amendment to the Bankruptcy Rules, and it now seems worthwhile to amend Appellate Rule 6 to address the topic.

The Reporter noted that the Committee had already discussed the proposed amendments to Rule 6 in some detail at its fall 2011 meeting. She observed that several aspects of the proposed amendments seemed uncontroversial. The proposals would amend Rule 6's title, slightly restyle the Rule, update cross-references within the Rule, account for new Appellate Rule 12.1 (concerning indicative rulings), remove an ambiguity in Rule 6(b)(2), and add a new Rule 6(c) concerning permissive direct appeals. The Reporter observed that the draft Part VIII rules were included in the Committee's agenda materials and predicted that the Bankruptcy Rules Committee would welcome any suggestions that Appellate Rules Committee members might have on the Part VIII draft.

The Reporter suggested that one of the most significant decisions still facing the Committee was whether to attempt to tackle, in the proposed amendments to Rule 6, the question of the terminology that should describe the treatment of a record that is in electronic form. The Rule 6 draft presented to the Committee in fall 2011 had attempted to account for the shift to electronic records by using the term "transmit" (instead of "forward" or "send") to refer to the treatment of both electronic and paper records and using the term "send" to refer to the treatment of paper records. Members had quickly noted flaws in this approach, and the discussion during

and after the fall 2011 meeting had focused on the possibility of using either the term "furnish" or the term "provide."

The Committee's spring agenda materials presented two versions of the proposed amendments to Rule 6. The first version showed the terms "furnish" and "provide" as bracketed alternatives in each place where the Rule discussed the provision of the record to the court of appeals. If this alternative were to be adopted, the Committee would face further choices concerning whether to specify in the text of Rule 6(b) what acts constitute "furnishing" or "providing"; or whether to add in Rules 6(b) and 6(c) provisions inviting the courts of appeals to adopt local rules concerning the mode of provision of the record; or whether to place the detailed discussion of that issue in the Committee Note. The second alternative version made no attempt to update the terminology used to describe the treatment of the record, except where updating was absolutely necessary; this approach would leave for another day the question of the terminology that the Appellate Rules should employ to account for records (and other documents) in electronic form.

Judge Sutton recalled that, when the Committee discussed the question of word choice, it had focused on the fact that a record could be provided to the court of appeals in paper form, or as one or more electronic records, or in the form of links that enable a user to access the record in electronic form; the difficulty arose concerning the choice of a term that would encompass the third of these possibilities. Judge Sutton noted that the Appellate Rules Committee has commenced a project concerning possible amendments to the Appellate Rules, generally, in the light of the shift to electronic filing; but that project may not proceed as quickly as the proposed amendments to Appellate Rule 6. He observed that even when the shift to electronic filing is complete, the courts will still need to handle paper filings by some litigants. Professor Coquillette predicted that the Standing Committee would need to undertake a project, involving all the advisory committees, concerning the implications of the shift to electronic filing. Because technology is developing so rapidly, that will require some serious study and coordination.

Returning to the question of terminology, Judge Sutton stated that he did not think either "furnish" or "provide" fully addressed the question that had been troubling the Committee. An attorney member stated that he was indifferent as between "furnish" and "provide"; in his view, the key was to include a sentence defining the meaning of the term that was chosen. An appellate judge suggested that "transmit" was a good choice.

After further discussion, Mr. Green suggested a different word choice: Rather than referring to the lower-court clerk's "furnishing" or "providing" the record to the court of appeals, the rule could direct the lower-court clerk to "make the record available" to the court of appeals, and could direct the circuit clerk to "obtain" the record. An attorney member agreed that Mr. Green's proposed language would address his concern about instances in which access to the record is provided by means of electronic links. Professor Coquillette observed that it would be better not to include Rule text that invites local rulemaking. Judge Sutton suggested that it could make sense to modify the first alternative shown in the agenda materials as suggested by Mr. Green. An attorney member agreed that that was a promising approach.

Next, the Reporter sought the Committee's views on a point previously discussed by the Committee at its fall 2011 meeting. Proposed Rule 6(b)(2), as amended, would provide that "[i]f a party intends to challenge the order disposing of [a tolling] motion – or the alteration or amendment of a judgment, order, or decree upon the motion – then the party, in compliance with Rules 3(c) and 6(b)(1)(B), must file a notice of appeal or amended notice of appeal." The next sentence, as shown in the Committee's fall 2011 agenda materials, read: "The notice or amended notice must be filed within the time prescribed by Rule 4 – excluding Rules 4(a)(4) and 4(b) – measured from the entry of the order disposing of the motion." At the fall 2011 meeting, the Committee discussed Professor Kimble's advice that "The notice or amended notice" in this second sentence should be replaced by "It." Some members believed that the longer formulation was clearer. After the fall meeting, Professor Kimble reviewed the Rule 6 draft and continued to maintain strongly that this was purely a question of style and that "It" was preferable. Thus, the Reporter asked the Committee to consider the issue once again.

A participant asked whether the issue could be addressed by using the formulation "That notice ..."; but the Reporter responded that referring only to a "notice" might cause confusion by omitting reference to an amended notice. Mr. Letter observed that the concern over confusion arises because a reader might wonder whether "It" referred to the notice (or amended notice) of appeal or to the order disposing of the tolling motion. The Reporter agreed that this accurately described the concern. She noted that a litigant would have to be relatively confused in order to take "It" to refer to the order rather than the notice of appeal, but she observed that the Committee often worries (when drafting) about litigants who are easily confused. And she noted that such concerns are heightened with respect to provisions that concern potentially jurisdictional deadlines. A participant suggested that the problem under discussion arose because the proposed amendment adds a period in the midst of what previously had been a single sentence, and he wondered whether a solution could be found by removing the period and merging the two sentences into one. Another participant responded that the resulting single sentence would be quite complex. A member asked whether the problem could be avoided by revising the second sentence to use an active rather than passive formulation ("The party must file ..."); that would make it less likely that a reader would believe "it" referred to a court order. A participant stated that the difference in length between the longer and shorter formulations was small, and that if there is a nontrivial chance that the shorter formulation might confuse some readers, he favored the longer formulation. A district judge member observed that bankruptcy proceedings often involve pro se debtors, and that for those litigants it is best for the rules to be very specific. An attorney member stated that he favored the longer formulation; an appellate judge member agreed. Professor Coquillette observed that the question was whether the choice was substantive or purely one of style. The Reporter suggested that the district judge member's concern about access to courts for pro se debtors sounded like a substantive concern. A motion was made to retain the longer formulation on the ground that the difference was one of substance rather than style; the motion was seconded and passed by voice vote without opposition.

The Committee next turned to the text of proposed Rules 6(b)(2)(D) and 6(c)(2)(D). As shown in the agenda materials, those provisions direct the circuit clerk to note on the docket the fact that the lower-court clerk has furnished the record, and the provisions state that "The date

noted on the docket serves as the filing date of the record for purposes of [these Rules] [Rules 28.1(f), 30(b)(1), 31(a)(1), and 44]." Judge Sutton suggested that general wording was preferable in this instance. The Reporter asked whether that would counsel in favor of ending the relevant sentence after "the record" – or whether truncating the sentence in that way might lead to unanticipated effects if the revised Rule is taken to define the record's filing date for purposes of, for example, a local rule. On the other hand, a participant suggested that if the provision defines the filing date "for purposes of these Rules," this wording might lead readers to wonder whether that definition in Rule 6 modifies the treatment of the record's filing date under Rule 12(c) (which will continue to apply to non-bankruptcy appeals). The Reporter noted that if the Committee chose to truncate the sentence after "the record," it could seek input (during the comment period) on whether that would create problems in any area of practice; on the other hand, she observed, this would be a relatively detailed point on which to seek specific comment. A district judge member stated that he expected that the definition in Rule 6 could technically affect provisions in local rules, but he also stated that he did not think this would cause a problem because, in practice, the same definition would likely be used anyway. Judge Sutton suggested that it would make sense to truncate the sentence after "the record" for purposes of publication, and that it would be useful to solicit comment on that choice. For example, he suggested, it would be very useful to learn what bankruptcy clerks think about the question.

After lunch, the Committee considered a revised draft of the Rule 6 proposal – prepared and circulated during lunch – that incorporated the Committee's discussions during the morning session. An attorney member suggested some conforming changes to the Committee Note. Mr. Byron asked whether the proposal would be circulated to the Bankruptcy Rules Committee for its views; the Reporter stated that it would be circulated to the Bankruptcy Rules Committee and also to the Standing Committee's subcommittee that will consider questions of terminology relating to electronic filing. Mr. Robinson suggested a wording change to the revised Rule 6 draft; members concurred in the change.

A motion was made to approve the revised language circulated to the Committee members, with Mr. Robinson's change to the Rule text and with the revisions a member had suggested to the Committee Note. The motion was seconded and passed by voice vote without dissent.

V. Discussion Items

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

Judge Sutton invited Justice Eid to introduce this issue, which concerns a proposal that Appellate Rule 29 be revised to treat federally recognized Native American tribes the same as states for purpose of amicus filings.

Justice Eid reminded the Committee that this item came to the Committee at the suggestion of Daniel Rey-Bear, who asked the Committee to consider adding Indian tribes to the list of entities that can file amicus briefs as of right. The Committee received letters in support

of Mr. Rey-Bear's proposal from a number of groups. The Committee further benefited from a report by Ms. Leary, who examined the frequency of tribal amicus filings and the rate at which leave to file was granted. Ms. Leary found that most such filings occur in the Eighth, Ninth, and Tenth Circuits and that leave to file is typically granted. At the Committee's request, Judge Sutton wrote to the Chief Judges of those three circuits to ask for those circuits' views on the adoption of a local or national rule authorizing filings as of right by tribal amici. The three circuits' responses varied, with the Ninth Circuit expressing support for a national rule, the Tenth Circuit expressing a contrary view, and the Eighth Circuit evincing mixed views. More recently, Judge Sutton wrote to the Chief Judges of the remaining circuits to solicit their views on a possible rule change that would add both tribes and municipalities to the list of entities that can file amicus briefs as of right. Among the circuits that have thus far responded to that letter, the views have been mixed. The Eleventh Circuit appears ambivalent; the First Circuit is more supportive of the idea of authorizing amicus filings by tribes, but also expresses concern about the possible effects of the change on recusal issues (especially if municipalities are included along with tribes); the Seventh Circuit has not expressed a view and does not receive many amicus filings from tribes.

Justice Eid observed that in the Committee's previous discussions, participants have expressed varying views. Justice Eid favors the proposal and views it as a question of dignity for tribes. She noted that she had practiced in the field of federal Indian law, that she lives in a state where two large tribes are located, and that her husband practices federal Indian law. She observed that some participants in the discussion had asked whether the inclusion of tribes on the list of those who can file amicus briefs as of right would place the Committee on a slippery slope by leading to requests to include other types of entities. Participants had suggested, for example, that if the Rule is amended to treat tribes the same as states then the expanded category should include municipalities as well as tribes. Participants had also asked what, if anything, the addition of tribes to the list would suggest about tribal sovereignty generally. Justice Eid suggested that, at this point, the Committee may wish to consider whether it has done all the research that can be done on this issue. Perhaps the Committee could ask Judge Sutton to write to the circuits, summarizing the Committee's research and discussions and leaving the question, for the moment, to each circuit for treatment on a local basis.

Judge Sutton observed that one reason the Committee's discussions expanded to encompass municipalities as well as states was that the Supreme Court's rule authorizes amicus filings (without court permission or party consent) by municipalities but not tribes. He noted that, if municipalities as well as tribes were added to the list of entities that can make amicus filings as of right, the change would not correlate with sovereignty issues because municipalities are not sovereign. Thus far, he observed, there did not appear to be support for adding foreign governments to the list. He noted that, when the Standing Committee has previously discussed this item, participants expressed varying views. Among the responses that the Committee has received thus far from the circuits, a negative response has been received from the Tenth Circuit; and the First Circuit has expressed concern about recusal issues (though that concern arose more with respect to the possible inclusion of municipalities). An attorney member asked whether the Committee knows what, exactly, the recusal practices are in each circuit. Mr. Letter responded

that the practices vary from circuit to circuit, but that he can think of instances when a request to file an amicus brief has been denied because of a recusal issue, and other instances in which a judge has recused from a case because of an amicus filing.

Judge Sutton asked whether – as an interim approach – Committee members favored writing to the circuits to report on the Committee's discussions to date. The letter would explain that the Committee thinks the issue warrants serious consideration but that the Committee is not sure that now is the time to adopt a national rule change on this issue, and that the Committee plans to revisit the issue in five years. A member stated that this approach sounds right to him, and that he would be very concerned about proceeding with a national rule in the light of the possible recusal issues mentioned by the First Circuit. Mr. Letter noted that the DOJ urges that the Committee consult tribes for their views on this issue. The DOJ, he stated, favors the proposed national rule change for tribes but not for municipalities; the DOJ considers this to be an issue relating to sovereignty and believes that the change would not burden the courts because tribes' requests to file amicus briefs are usually granted. On the other hand, Mr. Letter observed, the Committee's discussions have raised some very real practical considerations. The DOJ would not oppose a proposal that would allow circuits to study the issue and adopt a local rule on the subject if they would like. An appellate judge member expressed support for the approach suggested by Judge Sutton; another appellate judge member agreed. Professor Coquillette observed that, in the past, other committees have dealt with some issues in a similar way.

Mr. Letter suggested that Judge Sutton's letter should note that there is substantial support, within the Committee, for the proposal. Judge Sutton suggested that the letter could say that all members of the Committee believe that the proposal implicates serious dignity issues and think that the proposal warrants serious consideration. Mr. Letter asked whether the letter should say that the Committee believes that the idea of a local rule on the subject is worthy of consideration. Judge Sutton responded that it would be problematic to set a precedent of urging circuits to adopt local rules. A district judge member predicted that a letter from Judge Sutton, representing the sense of the Committee, would usefully generate discussion in circuits where the judges have not previously considered the issue.

A motion was made in support of the proposal that Judge Sutton write to the Chief Judges of each circuit. The motion was seconded and passed by voice vote without opposition. Judge Sutton promised to circulate a draft letter to the Committee members for their feedback during the spring.

B. Item No. 10-AP-I (redactions in briefs)

Judge Sutton invited Judge Dow to report on this item, which concerns a proposal by Paul Levy of Public Citizen Litigation Group that the Committee consider questions relating to the sealing or redaction of appellate briefs. Judge Dow summarized the variety of approaches among the circuits. In some circuits there is a presumption that documents that were sealed below remain sealed on appeal. In the Seventh Circuit (and to some extent, apparently, the Third Circuit) there is a presumption that documents will be unsealed on appeal, so that a party must

file a motion if it wants to maintain sealing on appeal. The Federal Circuit and the D.C. Circuit direct the attorneys to review the sealed portions of the record and identify the portions that need not remain sealed on appeal.

Judge Dow observed that it may make sense to distinguish, for purposes of the treatment of sealing, between materials exchanged in discovery and materials that become part of the court record. It would be useful, he noted, to consult the circuit clerks in selected circuits – perhaps the Seventh Circuit, the D.C. Circuit, the Federal Circuit, and a circuit in which items sealed below presumptively remain sealed on appeal. He observed that evolutions in technology will affect these issues; relevant questions include, for example, how the Next Generation CM/ECF software will address sealing. He also noted that there may be differences in the approaches that one would adopt in civil and criminal cases. An overarching question, Judge Dow suggested, is whether a national rule would be appropriate, given that the circuits currently take at least three different approaches to sealing on appeal.

Judge Dow noted that Mr. Letter had volunteered to work with him and the Reporter on this project. Judge Sutton thanked Judge Dow for his work.

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

Judge Sutton invited the Reporter to introduce this item, which concerns whether Rule 28 should be amended to mention the possibility of including introductions in briefs. This question dovetails with the Committee's earlier discussions – in connection with the pending proposal concerning the statement of the case – about the different constituencies that use the Rules. Experienced appellate litigators are well aware that they can include introductions in their briefs, and they do so to good effect. The question might be whether to amend the Rule to provide guidance for young lawyers or other lawyers with less appellate experience. A former Committee member had pointed out to the Committee that the proposed amendment concerning the statement of the case would make Rule 28(a)(6) flexible enough to permit a lawyer to include an introduction as part of the statement of the case. On the other hand, the flexibility provided by amended Rule 28(a)(6) would not serve the function of giving notice to less-experienced lawyers. Some participants in the discussion have questioned whether it would be practicable to provide guidance, in the Rule text, concerning the nature and function of the introduction. One possibility that had been floated – providing guidance in the Committee Note – would appear to run afoul of the principle, discussed earlier in the day, that Committee Notes should not be used for the purpose of providing advice to lawyers.

Judge Sutton observed that it would be hard to devise a rule that specifies what an introduction should do, and how to distinguish the introduction from the summary of argument. Professor Coquillette noted that traditionally, neither Rules nor Notes include advice for practitioners. An attorney member suggested that one would not necessarily wish to place the introduction within the statement of the case. On the other hand, if and when the proposed amendments to Rule 28(a)(6) take effect, that Rule will give lawyers flexibility in drafting the statement of the case – which diminishes the reasons to amend the Rules specifically to address

the topic of introductions. A member noted that a bad introduction is worse than no introduction.

Mr. Byron suggested that the Committee Note to the pending amendments to Rule 28(a) could be revised to include a discussion of introductions. The Note could state that an introduction is not prohibited under the Rules and can be included either as the first item in the brief or in the statement of the case. (Mr. Byron noted that in his own practice he has alternated between those two placements for the introduction, depending on the circumstances of the case.) Judge Sutton noted that the benefit of mentioning those considerations in the Note would be to inform lawyers about the topic; the risk would be that this information would encourage the inclusion of poorly written introductions. A participant observed that – because the Standing Committee has the ability to make changes to Committee Notes when proposed amendments are presented to it for approval – one could be confident that the language of the Committee Note would be reviewed by the Standing Committee.

An appellate judge member said that introductions are helpful but not indispensable. Another appellate judge member noted that if the Rules invited the inclusion of introductions, they might elicit introductions that are similar to arguments to a jury. A member suggested that it might be preferable to wait and see how practice develops under the pending amendments to Rule 28(a). An attorney member stated that he would oppose adding language to the Rule 28(a) Committee Note to mention introductions.

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

VI. Additional Old Business and New Business

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

Judge Sutton invited the Reporter to introduce this item, which concerned a suggestion by Dr. Roger Roots that Appellate Rule 4(b) be amended to accord criminal defendants the same 30-day appeal period that applies to government appeals in criminal cases. The Reporter suggested that it would be difficult to argue that the difference between the defendant's and the government's appeal time is unconstitutional. A more significant question is whether the current 14-day appeal time period poses a hardship for defendants. Another question arises from the fact that the appeal times in Rule 4 depend on the categorization of the appeal as civil or criminal; at the margins, there is the possibility that the differential in appeal times between civil and criminal cases could give rise to difficulties if there is uncertainty over how to categorize a particular appeal. A third question is whether there should be symmetry between the appeal times that apply to the opposing parties in a given type of case.

As to the question of hardship, the Reporter suggested a few considerations. Fourteen days is a short period, and it is shorter than the period for civil appeals. The notice of appeal is a simple document. In some cases there may be challenges involved in identifying colorable

issues for appeal, or difficult strategic questions where a defendant has received a lower sentence than he or she might receive if re-sentenced; but setting such instances aside, ordinarily the decision whether to appeal should not be a difficult one. Additionally, some safeguards exist. In cases where there is a difficulty the defendant can seek an extension of the time to appeal under Rule 4(b)(4). At sentencing, the district court must advise the defendant of his or her right to take an appeal, and if the defendant requests, the clerk will file the notice of appeal on the defendant's behalf. When an incarcerated defendant files the notice of appeal himself or herself, Rule 4(c)'s inmate-filing provision would apply. These features, the Reporter suggested, might alleviate possible hardships. But she noted her lack of experience in criminal law; those with such experience are better situated to assess this question.

With respect to the question of categorization, it turns out that, at the margins, there are some cases that may be difficult to categorize as civil or criminal. If a defendant errs by viewing the case as criminal when it is actually civil, then the harm would be that the defendant files a notice of appeal earlier than is actually necessary. A defendant who is aware of a difficult categorization question and is unsure whether the case counts as civil or criminal can protect himself or herself by filing within the deadline set by Rule 4(b). But a litigant who wrongly assumes that a case is civil when it is actually criminal could lose his or her appeal rights by filing too late. The Reporter observed that this concern had surfaced a decade ago, when the Committee last discussed a proposal to lengthen Rule 4(b)'s appeal deadline for criminal defendants.

As to the question of symmetry between litigants, the Reporter observed that there is an attraction to the idea that if one litigant receives additional time to appeal, their opponent should also have the benefit of the longer period. That principle is applied in Appellate Rule 4(a), which provides additional time to all litigants when one of the litigants is a United States government entity. Perhaps counterbalancing that, there are a number of asymmetries in criminal practice – such as asymmetries in discovery and asymmetries in rights to take an appeal.

The Reporter observed that if the Committee were to be interested in proceeding with this item, it would be important to consult the Criminal Rules Committee. Moreover, if one were to amend Rule 4(b) on grounds of symmetry, that might also raise a question about Civil Rule 12(a) (which provides federal government defendants with additional time to respond to the complaint).

A member stated that he was unpersuaded by the constitutional arguments and the arguments concerning symmetry. However, he suggested that it would be useful for the Committee to obtain data that would bear on the hardship argument. How often do criminal defendants fail to take an appeal, and why? For example, are appeals foregone for strategic reasons or are they forfeited due to lawyer incompetence? This member noted that there might be an alternative approach to protecting appeal rights; one could adopt a system in which the default is that there will be an appeal, and leave it up to the litigant to opt out if he or she does not wish to take an appeal.

Mr. Byron reported that he had discussed this item with Mr. Letter prior to the meeting; Mr. Letter had discussed the issue of hardship with a friend who is a federal public defender in the District of Columbia, who reported that in the experience of that office this typically is not a problem. Most criminal defendants who wish to file appeals tend to do so expeditiously. A district judge member stated that he would have no objection to a rule that gave criminal defendants 30 days to appeal. He observed, though, that all criminal defendants are represented by counsel unless they decide, after a waiver, that they don't want a lawyer. And by the time of sentencing, the defendant and the lawyer have already had time (often, a lot of time) to consider possible issues of trial error. So the only issues that would arise shortly before the appeal deadline would relate to possible sentencing error. And, as noted, the judge informs the defendant at sentencing concerning the right to take an appeal. In sum, this member stated, he did not see the 14-day appeal time period posing a problem in his district; but, he suggested, a 30-day appeal time period could be useful if the defendant needs to think through a tricky sentencing issue. On the other hand, he noted, the latter sort of difficulty can be addressed under the current rules if the judge grants a request to extend the appeal time.

An attorney member asked why it is important to require the defendant to decide within 14 days whether to appeal; what events, this member wondered, turn on the date on which the defendant's appeal time runs out? A district judge member queried whether the timing had any implications for speedy trial requirements. The attorney member asked whether the expiration of the time to appeal would have implications for the timing of a remand to custody, or whether there is any similar systemic interest in getting the defendant's punishment started sooner rather than later. The district judge member responded that he did not think so; he observed that the question of whether the defendant can stay out on bond after sentencing is governed by statute. He noted that in a given circuit, the timing of the notice of appeal might affect the appellate briefing schedule.

Mr. Byron observed that the DOJ has an interest in the speedy resolution of criminal cases. Even the government's appeal time period in criminal cases, he noted, is shorter than the government's appeal time period in civil cases. An attorney member asked why one would not adopt a system in which the 14-day appeal time period applied to both sides in criminal cases; the government could file protective notices of appeal and then withdraw the notices if it decided not to appeal. Another member responded that there would be serious costs to a system that required the government to file a notice of appeal before it had had time to fully consider whether it wished to take an appeal. This member observed that to the public, the government's filing of a notice of appeal is not treated as merely an administrative act; it would be counter-productive if the government either had to decide whether to appeal within a very short time period or else withdraw a protective notice of appeal that it had previously filed. The attorney member who raised the question about applying the 14-day period to both sides suggested that if the 14-day deadline would impose those sorts of costs on the government, it was worth considering whether that deadline imposes similar costs on the defendant. The other member responded that he viewed those costs as asymmetric; when a criminal defendant files a notice of appeal it does not trigger the same sorts of public, institutional concerns that arise when the government files a notice of appeal.

An appellate judge stated that, in his experience, defendants in the Eleventh Circuit are not denied the right to an appeal due to a late notice. If the defendant asked his lawyer to file the notice and the lawyer did not do so, then the court of appeals sends the case back to the district court for resentencing and the entry of a new judgment. He suggested that the Committee should be cautious about altering a time period that is so long-established.

Returning to the fact that the Committee had considered a similar proposal a decade earlier, Judge Sutton asked who had submitted the proposal on that earlier occasion. An attorney member asked what reasons had been given for the Committee's rejection of that prior proposal. Mr. Byron agreed to provide the Committee with the materials that Mr. Letter had submitted to the Committee in connection with that earlier discussion. The Reporter noted that she would locate the initial proposal that triggered the earlier discussion, and that she would update the Criminal Rules Committee Chair and Reporters concerning the Committee's discussion. By consensus, the Committee decided to retain this item on its study agenda. Judge Sutton thanked Dr. Roots for raising this issue with the Committee.

B. Other possible items for consideration by the Committee

Judge Sutton invited Committee members to suggest items for the Committee's consideration.

An attorney member suggested that it might be useful to clarify practice under Appellate Rule 8 and Civil Rule 62 concerning procedures for appeal bonds. The bonding process unfolds quickly and can be confusing. For example, Civil Rule 62(b) provides that "[o]n appropriate terms" the court may stay execution of a judgment pending disposition of a postjudgment motion, while Civil Rule 62(d) discusses the obtaining of a supersedeas bond to secure a stay of the judgment pending appeal. So there are two different episodes as to which security is an issue, and the would-be appellant will likely need to provide security both with respect to the time period when the postjudgment motions are pending and then also with respect to the time period of the appeal. Moreover, a would-be appellant, he observed, might not always get a bond; it might use a letter of credit, or let the other side hold a check, or pay the other side a sum of money. So the way that bonding occurs in practice will depend on what method is both cost-effective for the would-be appellant and satisfactory to the prospective appellee. Perhaps there is no reason to amend the Rules to reflect the variety of actual practices, but even an experienced practitioner can find the process opaque. An amendment to the Rules might bring greater order to this area of practice. The Reporter stated that she would consult Professor Cooper in order to determine when the Civil Rules Committee had last considered the question. The attorney member noted that in some state court systems the amount of the bond is specified by law (for example, a provision might set the bond at a certain percentage of the judgment); by contrast, he observed, in federal litigation no provision specifies the amount of the bond and thus the issue sometimes ends up getting litigated.

A member asked why Rule 35(b)(2) sets the length limit for a petition for rehearing en banc in pages rather than words. The Reporter undertook to investigate this question.

VII. Other Information Items

A. *Gonzalez v. Thaler*, 132 S. Ct. 641 (2012)

Judge Sutton invited Mr. Newsom to introduce this item, which concerns the Supreme Court's recent decision in *Gonzalez v. Thaler*, 132 S. Ct. 641 (2012). In this 8-1 decision, the Court held that 28 U.S.C. § 2253(c)(3)'s requirement that a certificate of appealability ("COA") indicate which issue or issues meet the statutory test for issuance of a COA is not a jurisdictional requirement. Thus, the COA's failure to include that specification did not deprive the court of appeals of jurisdiction.

Mr. Newsom reviewed for the Committee the structure of Section 2253(c). Section 2253(c)(1) provides that "[u]nless a circuit justice or judge issues a [COA], an appeal may not be taken to the court of appeals" in a habeas or Section 2255 proceeding. Everyone recognizes that this provision sets a jurisdictional requirement because it meets the clear statement test set out in *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006). Section 2253(c)(2) states that the COA "may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." That provision was not squarely at issue in *Gonzalez*. And then Section 2253(c)(3) states that the COA "shall indicate which specific issue or issues satisfy the showing required by" Section 2253(c)(2).

Mr. Gonzalez's federal habeas petition raised a Sixth Amendment issue. The district court denied the petition as untimely. Gonzalez sought a COA on both the timeliness issue and the underlying Sixth Amendment issue. A court of appeals judge granted the COA, mentioning timeliness but not the Sixth Amendment issue. The question was whether the COA's failure to mention the Sixth Amendment issue (as required by Section 2253(c)(3)) deprived the court of appeals of jurisdiction. The state first raised this issue in response to Gonzalez's petition for certiorari.

The Supreme Court – contrasting Section 2253(c)(3)'s wording with that of Section 2253(c)(1) – held that Section 2253(c)(3)'s requirement is mandatory but not jurisdictional. Justice Scalia, writing in dissent, argued that the relationship between Sections 2253(c)(3) and 2253(c)(1) was similar to the relationship between Appellate Rules 3 and 4. Rule 4 sets the deadline for filing the notice of appeal, and Rule 3 specifies the contents of the notice of appeal. In *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), the Court held that Rule 3 – the content provision – was jurisdictional because of its relationship to Rule 4's jurisdictional deadline. In response, the Court stated that *Torres* presented a different question; in part, the Court observed that it had relied on the Committee Note to Rule 3.

One question raised by this case is whether the approach that the *Gonzalez* Court took to Section 2253(c) signals a retrenchment from the *Torres* rule. Another question is whether the *Gonzalez* Court's approach will affect the courts' views on whether Appellate Rule 4(a)(4)'s requirement of a "timely" tolling motion is jurisdictional.

B. D.C. Circuit Rule 35(a)

Judge Sutton invited the Reporter to introduce this topic, which was drawn to the Committee's attention by Mr. Letter. Mr. Letter pointed out that D.C. Circuit Rule 35(a) alters the time to seek rehearing. For criminal appeals, it lengthens the time from 14 days to 45 days, and for civil appeals in cases involving no federal parties, it lengthens the time from 14 to 30 days. Two other circuits also have rules that lengthen the time to seek rehearing to some extent. For appeals generally (other than civil appeals in cases involving federal parties), Eleventh Circuit Rule 35-2 lengthens the time period from 14 days to 21 days while Federal Circuit Rule 40(e) lengthens the time period from 14 days to 30 days. Perhaps these circuits feel that lengthening these deadlines will lead parties to be more judicious in their decision whether to seek rehearing; or perhaps these circuits prefer to avoid the need to resolve motions to extend the time to seek rehearing. At least two circuits (the Fourth and Fifth Circuits) have local rules that suggest a reluctance to extend the time to seek rehearing.

Mr. Byron explained that the DOJ has an interest in uniformity, because inter-circuit variations can pose pitfalls for those who practice in multiple circuits. A longer period for seeking rehearing would have the benefit of removing the need to seek extension of that period by motion. On the other hand, he said, the DOJ does not have a strong position on this issue and it defers to the views of judges and circuit clerks, who have to deal with these issues more directly. An appellate judge member observed that the Eleventh Circuit is willing to grant extension motions if there is a reason for the motion, and that the Eleventh Circuit's local rules include a provision stating that an attorney is not obligated to seek rehearing, and that lawyers should think before filing a petition for rehearing. Judge Sutton observed that some circuits might wish to expedite the time from the filing of an appeal to decision of the appeal. The Fourth and Eleventh Circuits, for example, are known to dispose of appeals swiftly. He asked whether the question of deadlines for seeking rehearing is one that implicates issues specific to local circuit culture, and he questioned whether judges would favor a rule that required national uniformity on this issue. An attorney member suggested that the question of time to disposition might not be affected by deadlines for seeking rehearing, because it depends on how one counts the time to disposition. Mr. Green observed that the usual calculus looks at the time when the case is finally disposed of after the disposition of any timely petition for rehearing. An appellate judge member suggested that there was no reason for the Committee to take action on the question of deadlines for seeking rehearing.

By consensus, the Committee decided not to add this item to its study agenda.

VIII. Date and Location of Fall 2012 Meeting

Judge Sutton reminded the Committee that it will next meet in Philadelphia, Pennsylvania on September 27 and 28, 2012.

IX. Adjournment

The Committee adjourned at 2:30 p.m. on April 12, 2012.

Respectfully submitted,

Catherine T. Struve
Reporter