

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

**I. Introductions**

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

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

**II. Approval of Minutes of November 2008 Meeting**

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

**III. Report on January 2009 meeting of Standing Committee**

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

The Reporter noted that the Supreme Court has approved a number of proposed amendments which are currently on track to take effect on December 1, 2009, assuming that Congress takes no contrary action. The amendments include the proposed clarifying amendment to FRAP 26(c)'s three-day rule; new FRAP 12.1 (and new Civil Rule 62.1) concerning indicative rulings; an amendment that removes an ambiguity in FRAP 4(a)(4)(B)(ii); an amendment to FRAP 22 that parallels amendments to the habeas and Section 2255 rules; and the package of time-computation amendments.

The Reporter also pointed out that the Bankruptcy Rules Committee has begun a review of Part VIII of the Bankruptcy Rules concerning appellate practice. The Bankruptcy Rules Committee has held one mini-conference on the subject in spring 2009 and intends to hold another mini-conference in fall 2009; Judge Swain has invited Professor Struve to attend the fall mini-conference, which will take place in September 2009.

#### **IV. Other Information Items**

Judge Stewart noted that the Appellate Rules Committee had discussed at its fall 2008 meeting the draft Best Practices Guide to Using Subcommittees. He observed that the preparation of the draft was occasioned by concerns that subcommittees of some Judicial Conference Committees were taking on a life of their own. Such problems, Judge Stewart noted, had not arisen with subcommittees of the Rules Committees. Judge Stewart reported that he had written to Judge Rosenthal to summarize the Appellate Rules Committee's past use of subcommittees and to proffer suggestions on the draft Best Practices Guide; Judge Rosenthal then collected the responses of the Rules Committees and provided them to Chief Judge Scirica. Mr. Rabiej reported that the Judicial Conference Executive Committee has removed from its policy the language explicitly disfavoring the use of subcommittees (though the use of full committees is preferred whenever possible). Judge Stewart stated that the Appellate Rules Committee will continue to comply with Judicial Conference policy concerning the use of subcommittees. Two subcommittees have recently been formed or revived and will involve participation by the Appellate Rules Committee.

The first such subcommittee is the newly reconstituted Privacy Subcommittee. That subcommittee, which had been active in preparing the privacy rules adopted in response to the E-Government Act, has been revived in order to respond to ongoing privacy concerns. Judge Reena Raggi, a member of the Standing Committee, chairs the Privacy Subcommittee. James Bennett has accepted Judge Stewart's invitation to serve as the Appellate Rules Committee's representative to the Privacy Subcommittee. Judge Stewart noted that the Privacy Subcommittee will provide a framework for considering important privacy issues. Mr. McCabe reported that Senator Lieberman has recently raised concerns about social security numbers appearing in court opinions. Mr. Rabiej stated that this inquiry responds to information provided by Carl Malamud of Public.Resource.Org, and that the Administrative Office is currently analyzing that information. Mr. Rabiej pointed out that Mr. Malamud has also raised concerns with respect to alien registration numbers. Mr. Fulbruge reported that he had shared these developments with

some of the appellate clerks, and their consensus is that the local circuit rules put the burden of complying with privacy requirements on the filer. Mr. Fulbruge stated that the appellate clerks do not want to be made responsible for reviewing filings; he noted that such a responsibility would be particularly problematic with respect to handwritten pro se filings and with respect to state-court records that are filed in federal habeas cases. Mr. Fulbruge pointed out that the clerks' offices lack the personnel necessary for such tasks.

The second subcommittee is the newly created Civil / Appellate Subcommittee. This subcommittee will investigate issues of common interest to the Civil and Appellate Rules Committees and will provide a framework for those two Committees to share insights and engage in joint study. Judge Stewart noted that the new Appellate Rule 12.1 and Civil Rule 62.1 exemplify the sort of joint project to be tackled by the new subcommittee. Not all the projects addressed by the subcommittee will necessarily lead to amendments of both sets of Rules. But the subcommittee framework will facilitate communication between the two Committees. Topics that may be considered by the subcommittee include the manufactured finality issue as well as the issues relating to the implications of *Bowles v. Russell*. To represent the Civil Rules Committee, Judge Kravitz has named Judge Steven Colloton, Chief Judge Vaughn Walker, and Peter Keisler as members of the subcommittee. Judge Bye, Maureen Mahoney and Douglas Letter have agreed to serve as the Appellate Rules Committee's representatives on the subcommittee. Judge Colloton will likely serve as the subcommittee's chair. The subcommittee is likely to conduct its deliberations by telephone and email rather than by meeting in person. Professors Cooper and Struve will serve as reporters to the subcommittee.

## **V. Action Items**

### **a. For final approval**

#### **i. Item No. 07-AP-D (amend FRAP 1 to define "state")**

Judge Stewart invited the Reporter to present the proposed amendment to Appellate Rule 1(b). New Rule 1(b) would define the term "state," for purposes of the Appellate Rules, to include the District of Columbia and any United States commonwealth or territory. The Committee received two comments relating to this proposed amendment. Mr. Benjamin Butts wrote in support of the proposed Appellate Rules amendments generally, including the proposed new Rule 1(b). After the close of the comment period, the Committee received comments from Mr. Daniel Rey-Bear, who wrote to propose that federally recognized Indian tribes be included within the definition of "state."

The Reporter suggested that the Committee approve the proposed new Rule 1(b) as published and that it add Mr. Rey-Bear's suggestion to the study agenda as a new item. Mr. Rey-Bear's suggestion is thoughtful and important and deserves careful study. The suggestion does not, however, seem amenable to treatment in the context of the proposed new Rule 1(b). Mr. Rey-Bear rightly points out that Native American nations are sovereigns and deserve to be

treated with the dignity accorded other sovereigns. That fact, however, does not establish that Indian nations should be encompassed within the definition of “state” for purposes of the Appellate Rules; as a point of comparison, that definition does not encompass foreign nations.

Moreover, before defining “state” to include Native American tribes it would be necessary to consider carefully the effect of such a definition on Rules 22, 26(a), 29, 44 and 46. As to Rule 22, it is not at all clear that one seeking to appeal the denial of a habeas petition brought under the Indian Civil Rights Act (to challenge detention by a Native American tribe) currently must obtain a certificate of appealability (“COA”). To the extent that no COA is currently required for appellants challenging detention by a tribe, including tribes within the term “state” for purposes of Rule 22 would significantly alter current law. As to Rule 26(a), there are technical questions concerning how one would treat tribal holidays for purposes of defining “legal holiday” in the context of Rule 26(a)’s time-computation provisions. Even apart from such technical questions, there is an overarching need for coordination of Rule 26(a)’s time-computation framework with the time-computation provisions in the Civil, Criminal and Bankruptcy Rules; any change to Rule 26(a), thus, must be considered in coordination with the other advisory committees.

Mr. Rey-Bear’s comments indicate that the main impetus for his proposal is his view that Native American nations should be treated the same as states for purposes of amicus filings: He proposes that tribes should be entitled under Rule 29(a) to file amicus briefs without obtaining party consent or leave of court, and he also argues that tribes should not be subjected to the new authorship and funding disclosure requirement that was published for comment as proposed new Rule 29(c)(7). These points are well worth considering, but it is unclear that they could be adequately considered in the context of the current Rules amendments; therefore, it seems preferable to consider them as a new item.

Mr. Rey-Bear’s proposal concerning the definition of “state” also implicates Rules 44 and 46. As to Rule 44, it would make sense to require notification of a tribe if the legality of that tribe’s laws is challenged in a case. But it is not clear that Rule 44 as currently drafted would fit comfortably with the special issues relating to Native American tribes: For instance, it is not at all clear that all tribes would wish to cast issues concerning the *validity* of a tribal law as issues concerning *constitutionality*. With respect to Rule 46, it may be useful to learn more about the attorney admission rules of different Native American nations before defining those nations as “states” for purposes of admission to practice before the courts of appeals.

Mr. Letter agreed that Mr. Rey-Bear’s points deserve serious consideration, but also that such consideration requires close study as well as consultation with many relevant entities. Defining tribes as “states,” he noted, might have implications for a variety of areas of law and practice. A member wondered whether an across-the-board definition of Native American tribes as “states” might be too dramatic a change. That member suggested, however, that as to amicus filings Native American tribes should be treated with the same dignity accorded to states. An attorney member agreed that it might be preferable to consider the treatment of Native American tribes on a rule-by-rule basis rather than defining tribes as “states” for purposes of all the rules.

That member wondered whether it would be possible to obtain data concerning the frequency with which Native American tribes are denied leave to file amicus briefs. A judge member stated that he did not think that a court would deny a tribe permission to file an amicus brief.

A motion was made and seconded to place on the agenda the question of amicus filings by Native American tribes and to ask Mr. Letter to make initial inquiries among relevant federal government entities concerning both Rule 29(a)'s provision for filing without party consent or court leave and the provision (to be added to Rule 29(c) by the proposed amendment discussed below) concerning disclosure of amicus-brief authorship and funding. The motion passed by voice vote without opposition. By consensus, Mr. Rey-Bear's proposals concerning Rules 22, 26, 44 and 46 were also placed on the study agenda. Mr. McCabe will write to Mr. Rey-Bear to advise him that the Committee is studying his proposals.

Turning back to the Rule 1(b) proposal as published, a judge member asked why "state" is not capitalized in the proposed amendment. The Reporter stated her belief that this was a style choice on which the Committee had deferred to Professor Kimble.

A motion was made and seconded to approve the proposed new Rule 1(b) as published. The motion passed by voice vote without opposition.

**ii. Item No. 07-AP-D (amend FRAP 29 in light of definition of "state")**

The proposed amendment to Rule 29(a) was presented for discussion in connection with the Rule 1(b) amendment discussed above. In the light of Rule 1(b)'s new definition, Rule 29(a) can now refer simply to "a state" rather than to "a State, Territory, Commonwealth, or the District of Columbia."

A judge member asked why Rule 29(a) states that federal officers or agencies may make amicus filings without party consent or court permission but does not include a similar statement concerning *state* officers or agencies. The Reporter responded that she would need to investigate the Rule's history in order to determine the reason for the difference.

A motion was made and seconded to approve the proposed amendment to Rule 29(a) as published. The motion passed by voice vote without opposition.

**iii. Item No. 06-04 (amend FRAP 29 to require amicus brief disclosure)**

Judge Stewart invited the Reporter to introduce the proposed amendment to Rule 29(c). This amendment would add to Rule 29(c) a disclosure requirement – modeled on Supreme Court Rule 37.6 – concerning the authorship and funding of an amicus brief. This proposed amendment attracted seven sets of comments, from Mr. Butts; Richard Samp on behalf of the Washington Legal Foundation; Chief Judge Frank Easterbrook; Luther Munford; the Council of Appellate Lawyers (“Council”) (a bench-bar group within the American Bar Association); Steven Finell (who chairs the Council’s rules committee); and Mr. Rey-Bear. The comments raise many thoughtful points, and the Reporter suggested that it might be useful for the Committee to group those points conceptually for the purposes of discussion.

The Reporter noted that both Chief Judge Easterbrook and the Council have made suggestions concerning the existing corporate-disclosure requirements set by Rule 26.1 and by the sentence in Rule 29(c) that directs corporate amici to make a disclosure “like that required of parties by Rule 26.1.” The published proposal concerning Rule 29(c) would not alter the substance of those requirements (though as published the proposal would have moved the Rule 29(c) requirement to a new subdivision (c)(6)). That being so, the Reporter suggested that proposals to alter the corporate-disclosure provisions would more appropriately be treated as new agenda items rather than in the context of the proposed authorship and funding disclosure requirement. By consensus, the Committee resolved to treat these suggestions as new agenda items (see the discussion later in these minutes of Item Nos. 08-AP-R & 09-AP-A).

The Reporter next described the Council’s proposal that Rule 29(c) be revised to follow the structure of Rule 28(b) – i.e., to set a default directive that amicus briefs conform to Rule 28(a)’s requirements for appellants’ briefs and to list the deviations from that default position. The Reporter questioned whether such an approach would be useful for amicus briefs, given that when one compares the contents of appellants’ briefs and amicus briefs the distinctions outnumber the similarities. By consensus the Committee determined not to adopt the Council’s suggestion on this point.

The Reporter observed that Mr. Munford questions the basic approach taken by the proposed Rule 29(c) amendment. Rather than require disclosure of party funding or authorship of amicus briefs, Mr. Munford suggests, the Rule should ban the practice outright. Mr. Munford notes that the recent book by Justice Scalia and Bryan Garner states that it is unethical for a party or its counsel “to have any part of funding or preparing [an] amicus brief.” Another commenter, however, has questioned whether a ban on party funding or authorship might raise First Amendment or Enabling Act concerns. The Reporter stated that she had not analyzed such issues in detail, because her sense was that the Committee had deliberately chosen the disclosure approach rather than the ban approach. A disclosure requirement, she noted, is likely to deter parties and their counsel from funding or authoring amicus briefs. By consensus, the Committee determined to maintain the disclosure approach rather than adopting a ban.

The Reporter noted that Mr. Munford also has voiced the concern that by specifically mentioning party funding and authorship the disclosure requirement might be seen to legitimize the practice. Mr. Munford suggests that if the Committee is determined to use a disclosure approach it should word the disclosure requirement more generally so as not to mention parties and their counsel in particular. But the Reporter noted that substituting the broader wording suggested by Mr. Munford would prevent the Committee from distinguishing – as the published proposal does – between parties and their counsel and every other person who might author or fund the amicus brief. Under the published proposal, if a party or its counsel contributed money intended to fund the preparation or submission of the brief, disclosure is required whether or not the contributor is a member of the amicus. But contributions by one who is neither a party nor counsel to a party need not be disclosed if the contributor is a member of the amicus. The Reporter also suggested that if mentioning party funding in the disclosure rule has the effect of legitimizing that practice, such an effect has already occurred to some extent due to the existence of Supreme Court Rule 37.6. By consensus, the Committee determined not to make the disclosure’s wording more general.

The Reporter next described Mr. Finell’s proposal that language be added to Rule 29(c) to warn would-be amici against making redundant arguments. The Reporter noted that when leave to file is needed Rule 29(b) already requires the motion for leave to state why the amicus brief is desirable and relevant. And the Reporter observed that some circuits have local provisions that provide a warning similar to the one proposed by Mr. Finell. By consensus, the Committee decided not to adopt Mr. Finell’s suggestion.

The Committee discussed the placement of the authorship and funding disclosure requirement. The published proposal, tracking Supreme Court Rule 37.6, directed that the disclosure be made in “the first footnote on the first page.” Both Mr. Munford and the Council question this choice. Mr. Munford suggests that the disclosure instead be placed in a footnote appended to the Rule 29(c)(3) statement. The Council objects to the placement of the disclosure in a footnote and instead suggests that it follow the Rule 29(c)(3) statement in the text. An attorney member agreed that it would work well for the new disclosure to be placed after the Rule 29(c)(3) statement. After further discussion the Committee determined by consensus that the issue of placement could be resolved by moving the authorship and funding disclosure requirements – which had been published as subdivision (c)(7) – up into subdivision (c)(3).

The Committee also made a change in response to an observation by the Washington Legal Foundation concerning the published proposal’s requirement that the filer identify “every person – other than the amicus curiae, its members, or its counsel – who contributed money that was intended to fund preparing or submitting the brief.” The Washington Legal Foundation expressed concern that this wording would not make clear that if there is no such person, the filer must so state. The Committee determined by consensus to reword this subpart to require a statement that “indicates whether a person – other than the amicus curiae, its members, or its counsel – contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person.”

The Reporter observed that both Chief Judge Easterbrook and Mr. Finell criticize the published rule's use of the term "authored." Chief Judge Easterbrook suggests substituting "wrote," while Mr. Finell suggests substituting "prepared." A member voiced a preference for using "authored" because that is the word used in Supreme Court Rule 37.6. A judge suggested that "authored" seems to reflect the Committee's sense of the appropriate scope of the disclosure requirement. By consensus, the Committee decided to retain "authored."

The Committee discussed a number of other suggestions concerning the proposal's wording and decided not to implement them. These suggestions included the Council's suggestion that additional Rule text be added to define what is meant by "authored ... in part"; the Council's suggestion that the authorship disclosure provision should mention not only a party's counsel but also the party itself or a party's non-counsel representative; suggestions by Mr. Finell and the Council that "states" be substituted for "indicates"; and Chief Judge Easterbrook's suggestion that the language "contributed money that was intended to fund preparing or submitting the brief" be changed to read "contributed money toward the cost of the brief." As to the latter suggestion, it was observed that the intent requirement had not been part of the proposed amendment to Supreme Court Rule 37.6 as originally published, and that the intent requirement had been added to the Supreme Court Rule 37.6 amendment in response to vigorous criticism (during the public comment period) of the original proposal's breadth.

A motion was made and seconded to approve the proposed amendment to Rule 29(c) subject to the changes described above. The motion passed by voice vote without opposition. A clean copy reflecting the revised text and Note of the amendment were distributed to Committee members later in the meeting for their review. The revised text and Note read as follows:

#### **Rule 29. Brief of an Amicus Curiae**

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- (c) **Contents and Form.** An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. If an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 26.1. An amicus brief need not comply with Rule 28, but must include the following:
- (1) a table of contents, with page references;



- (2) a table of authorities — cases (alphabetically arranged), statutes and other authorities — with references to the pages of the brief where they are cited;
- (3) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file, and – unless filed by an amicus curiae listed in the first sentence of Rule 29(a) – a statement that:
  - (A) indicates whether a party’s counsel authored the brief in whole or in part;
  - (B) indicates whether a party or a party’s counsel contributed money that was intended to fund preparing or submitting the brief; and
  - (C) indicates whether a person – other than the amicus curiae, its members, or its counsel – contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person;
- (4) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; and
- (5) a certificate of compliance, if required by Rule 32(a)(7).

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**Committee Note**

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**Subdivision (c)(3).** Subdivision (c)(3) – which already requires a statement of the amicus’s identity, interest in the case, and authority to file – is revised to set certain disclosure requirements concerning authorship and funding. Subdivision (c)(3) exempts from the authorship and funding disclosure requirements entities entitled under subdivision (a) to file an amicus brief without the consent of the parties or leave of court. Subdivision

(c)(3) requires amicus briefs to disclose whether counsel for a party authored the brief in whole or in part and whether a party or a party’s counsel contributed money with the intention of funding the preparation or submission of the brief. A party’s or counsel’s payment of general membership dues to an amicus need not be disclosed. Subdivision (c)(3) also requires amicus briefs to state whether any other “person” (other than the amicus, its members, or its counsel) contributed money with the intention of funding the brief’s preparation or submission, and, if so, to identify all such persons. “Person,” as used in subdivision (c)(3), includes artificial persons as well as natural persons.

The disclosure requirement, which is modeled on Supreme Court Rule 37.6, serves to deter counsel from using an amicus brief to circumvent page limits on the parties’ briefs. *See Glassroth v. Moore*, 347 F.3d 916, 919 (11th Cir. 2003) (noting the majority’s suspicion “that amicus briefs are often used as a means of evading the page limitations on a party’s briefs”). It also may help judges to assess whether the amicus itself considers the issue important enough to sustain the cost and effort of filing an amicus brief.

It should be noted that coordination between the amicus and the party whose position the amicus supports is desirable, to the extent that it helps to avoid duplicative arguments. This was particularly true prior to the 1998 amendments, when deadlines for amici were the same as those for the party whose position they supported. Now that the filing deadlines are staggered, coordination may not always be essential in order to avoid duplication. In any event, mere coordination — in the sense of sharing drafts of briefs — need not be disclosed under subdivision (c)(3). *Cf.* Eugene Gressman et al., *Supreme Court Practice* 739 (9<sup>th</sup> ed. 2007) (Supreme Court Rule 37.6 does not “require disclosure of any coordination and discussion between party counsel and amici counsel regarding their respective arguments . . .”).

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#### **iv. Item No. 07-AP-G (amend Form 4 in light of privacy requirements)**

Judge Stewart invited the Reporter to present the proposed amendment to Form 4. The amendment will adapt Form 4 so that it conforms to the privacy rules that took effect December 1, 2007. Those rules require redaction of social security numbers (except for the last four digits) and provide that references to an individual known to be a minor should include only the minor’s initials. New Criminal Rule 49.1(a)(5) also requires redaction of individuals’ home addresses (so that only the city and state are shown). Only one comment addressed this proposed amendment: As noted above, Mr. Butts expressed general support for all the proposed Appellate Rules amendments. A motion was made and seconded to approve the proposed amendment as published. The motion passed by voice vote without opposition.

## **VI. Discussion Items**

**a. Item No. 03-09 (FRAP 4(a)(1)(B) & 40(a)(1) – treatment of U.S. officer or employee sued in individual capacity)**

Judge Stewart noted that the Appellate Rules Committee at its fall 2008 meeting had given final approval to the proposed amendment to Rule 40(a)(1). The Department of Justice had originally proposed amending both Rule 40(a)(1) and Rule 4(a)(1)(B) to clarify those Rules' treatment of suits involving federal officers or employees. However, the Department withdrew its proposal concerning Rule 4(a)(1)(B) and the Committee did not proceed further with that proposal. Judge Stewart reminded the Committee that he had presented the proposed Rule 40(a)(1) amendment at the January 2009 Standing Committee meeting for discussion rather than final approval, so as to provide the new administration with an opportunity to review the Department's preferences concerning the possibility of coordinating changes to both Rule 4(a)(1)(B) and Rule 40(a)(1).

The Reporter observed that the grant of certiorari in *United States ex rel. Eisenstein v. City of New York*, 129 S. Ct. 988 (2009), was of interest with respect to the interpretation of Rule 4(a)(1)(B) and 28 U.S.C. § 2107. The circuits have split on the classification – for purposes of the 30-day and 60-day appeal periods set by Rule 4(a)(1) and Section 2107 – of qui tam actions in which the government has not appeared. Four circuits have held that the 60-day period applies even if the government has chosen not to intervene. But in the Tenth Circuit, the 30-day appeal period ordinarily applies if the government has chosen not to intervene, unless special circumstances exist. And last August the Second Circuit held that the 30-day period applies. The Supreme Court's resolution of this issue in *Eisenstein* may provide some guidance on how best to interpret Section 2107.

Mr. Letter reported that the Solicitor General has been very busy dealing with urgent litigation-related decisions and that he has not yet been able to seek her guidance on the questions relating to Rules 40(a)(1) and 4(a)(1)(B). He promised to try to consult with the Solicitor General and provide input to Judge Stewart and the Committee prior to the June 2009 Standing Committee meeting. The Committee determined by consensus that in the meantime Judge Stewart will seek to place the Rule 40(a)(1) amendment on the Standing Committee's agenda for action at the June meeting.

**b. Item No. 07-AP-E (issues relating to *Bowles v. Russell*)**

Judge Stewart introduced the Committee's discussion of this item – concerning the implications of *Bowles v. Russell* for appeal deadlines – by noting that the joint Civil / Appellate Subcommittee will consider the matter. Obviously, that does not foreclose discussion by the Appellate Rules Committee; rather, the Committee's discussion can be conveyed to the Subcommittee so as to inform the Subcommittee's work.

Professor Struve noted that *Bowles*-related questions have aroused interest among members of the bar. For example, one practitioner has pointed out to the Reporter that a court of

appeals' directive concerning the appropriate choice of time period for filing a rehearing petition (14 or 45 days) may have implications for the timeliness of a subsequent petition for certiorari, and that such a situation could present another context in which the availability of the "unique circumstances" doctrine might become salient.

In preparation for the Committee's discussion the Reporter prepared three spreadsheets. The first spreadsheet lists statutory and rule-based time periods for taking an appeal to the court of appeals from a lower court or for seeking court of appeals review of an agency determination. The second spreadsheet lists some of the cases that analyze such time periods. The third spreadsheet lists statutory provisions concerning non-appellate litigation – such as statutes of limitations, prerequisites to suit, numerical limits on statutory scope, and trial-level litigation deadlines. The Reporter stressed that the spreadsheet lists are exemplary rather than exhaustive; more research would be needed to try to identify all relevant provisions and cases. But one can reach some tentative conclusions based on the current lists. There are many statutory deadlines relating to practice in the courts of appeals. Those deadlines span a wide range in terms of the nature of the interested parties, the type of substantive legal area, the time of the relevant statute's adoption, and the possible applicability of interpretive presumptions. In at least a few instances, a statute contains provisions relating to practice in the trial court as well as the court of appeals, suggesting that a proposed amendment of such a statute should be evaluated with a view to its effects at both levels.

An attorney member asked how big a problem the *Bowles*-related issues are in practice. An appellate judge wondered how many of the case citations to *Bowles* appear in dictum rather than holdings. Another appellate judge echoed this question and suggested that further research might shed light on the frequency with which *Bowles*'s doctrinal implications determine the outcome of an appeal. Another appellate judge suggested that many questions concerning the nature of a statutory deadline can be usefully dealt with by applying a clear statement rule like that stated in *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515-16 (2006); another line of research might investigate how broadly *Arbaugh* is applied in connection with such questions. He also noted that *Bowles* has raised questions concerning the tolling of certain deadlines and he suggested that it could be useful to provide guidance on such questions. Another focus of research might be the extent to which precedents such as *Becker v. Montgomery*, 532 U.S. 757 (2001), are applied to protect litigants against the loss of rights due to insubstantial defects in the notice of appeal.

An attorney member asked what policies are served by classifying a litigation deadline as jurisdictional. The Reporter responded that the context of the question will influence the answer: If a court is interpreting a statutory deadline, the relevant concerns may include separation-of-powers values, as suggested in *Bowles*. Mr. Letter agreed with this point. Apart from that observation, the Reporter suggested that the jurisdictional / non-jurisdictional choice may also take account of considerations such as the finality of judgments and the value of fairness to parties. An appellate judge observed that in pro se prisoner litigation, the government defendants might fail to brief a timeliness question and it would then fall to the court to raise the timeliness issue sua sponte. The Reporter noted that even non-jurisdictional deadlines might

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

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

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

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

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

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

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

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

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

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

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

Mr. Batalden’s concern is unlikely to arise in the Seventh Circuit, due to caselaw that interprets Civil Rule 58(a)’s reference to orders “disposing of” tolling motions to mean orders *denying* postjudgment motions. Under the Seventh Circuit’s reading of Civil Rule 58(a), that Rule requires a separate document for an order *granting* a postjudgment motion. When a court enters an order granting a postjudgment motion and the order contemplates an amendment of the judgment, the court is most unlikely to provide the requisite separate document until the judgment has in fact been amended. Accordingly, in the Seventh Circuit Mr. Batalden’s concern is very unlikely to arise. One possible way to address Mr. Batalden’s concern, then, would be to amend Civil Rule 58(a) to explicitly adopt the Seventh Circuit’s approach in this respect. An attorney member stated that the possible amendment to Civil Rule 58(a) is worth investigating. An appellate judge member suggested that the Seventh Circuit’s approach to this question is the right one; he asked whether any circuit has rejected that approach. The Reporter stated that she was not aware of caselaw from other circuits disapproving of the Seventh Circuit’s approach.

The Public Citizen and Seventh Circuit Bar Association proposals present a distinct set of issues. A threshold question is whether these proposals should be implemented. If the answer to that question is yes, then there will follow more specific questions concerning implementation. As a possible example, Rule 4(b)(3)(C) states (with respect to criminal appeals) that “[a] valid notice of appeal is effective – without amendment – to appeal from an order disposing of” tolling motions referred to in Rule 4(b)(3)(A). But adapting Rule 4(b)(3)(C)’s approach to the Rule 4(a) context may not be simple, because wording like that in Rule 4(b)(3)(C) could sweep quite broadly in some complex civil cases. Another issue relates to the caselaw that sometimes applies the *expressio unius* canon to interpret narrowly a notice of appeal that references fewer than all the possible orders that might be appealed. Some caselaw reasons that such a notice of appeal – by specifying that the appeal is taken from some orders – excludes the possibility that the appeal is also taken from other orders that are not listed in the notice of appeal. If Rule 4(a) were amended to provide that an initial notice of appeal also effects an appeal from orders subsequently disposing of tolling motions, how should that provision treat an initial notice of appeal that is narrowly drafted to specify only some orders?

On the Public Citizen / Seventh Circuit Bar Association proposals, an attorney member stated that Rule 4(b)’s approach is an appealing one. Another attorney member agreed that simpler procedure is better procedure. But this member also suggested that because the appellant is master of the notice of appeal, the appellant can draft the notice of appeal in a way that limits its scope.

By consensus, the Committee retained these items on its study agenda.

**e. Item No. 08-AP-G (substantive and style changes to FRAP Form 4)**

Judge Stewart invited the Reporter to introduce this item, which concerns substantive and style changes to Appellate Form 4. Appellate Rule 24 requires an applicant seeking to appeal in *forma pauperis* (“i.f.p.”) to attach an affidavit that “shows in the detail prescribed by Form 4” the

party's inability to pay or give security for fees and costs. Supreme Court Rule 39.1 requires a party seeking to proceed i.f.p. in the Supreme Court to use Form 4. As noted above, the Committee earlier in the meeting approved privacy-related amendments to Form 4. Apart from those amendments, the Committee has on its study agenda other possible changes to Form 4. One possibility is that Form 4, like other forms, may be restyled. Another question is whether a short form should be adopted as an alternative to the current (and very detailed) Form 4. And another set of issues concerns whether Questions 10 and 11 in Form 4 might intrude on matters covered by attorney-client privilege or work product immunity or might otherwise raise policy concerns. Question 10 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; Question 11 inquires about payments for non-attorney services in connection with the case.

The Reporter stated that on a preliminary review, it seems that much of the information sought by Questions 10 and 11 is unlikely to be covered by attorney-client privilege. However, it seems possible that – depending on how broadly Question 11 is interpreted – it might request some information concerning investigators or experts that might be covered by work product immunity. There are other questions to investigate, such as the effect on these concerns of the timing of applications for which Form 4 would be employed. Another line of research might investigate the scope of work product protection for pro se litigants (given that many i.f.p. applicants may be proceeding pro se).

The Reporter noted that Questions 10 and 11 might be argued to raise policy concerns as well. One such concern might be that by requiring the applicant to divulge the applicant's compensation arrangement with his or her attorney, Question 10 might give the applicant's opponent information that could provide a strategic advantage in settlement negotiations. Another concern is that by asking about payments to a lawyer in connection with the case, Question 10 could require a pro se litigant to divulge the fact that the litigant has paid a lawyer for discrete services (short of representation) in connection with the case. Such discrete services are sometimes referred to as "unbundled" legal services. The professional-responsibility implications of the "unbundling" of legal services have been much discussed. Proponents of unbundling argue that the practice increases access to courts and helps to level the playing field by enabling litigants who could not afford full representation to obtain specific types of episodic legal assistance. Opponents respond that such a practice is deceptive and undesirable because it allows litigants to obtain advantages by seeming to be "pro se" when they are not and because it allows the lawyer to avoid the strictures of Rule 11. To the extent that Question 10 requires an applicant to divulge payments for unbundled legal services, it might offer the applicant's opponent an opportunity to raise objections to the practice.

An attorney member noted the possibility that an i.f.p. litigant's lawyer might be paid by a relative of the litigant. The member also noted that the defendant will often be able to seek discovery concerning attorney fees during the pendency of the litigation in cases where the fees are an element of the plaintiff's claim.



A judge member noted that i.f.p. applications may be made by represented parties. A member suggested that the “unbundling” of legal services is a hot topic in his home state, and he suggested that it is important for the Rules Committee to avoid making a value judgment on this topic. A judge member stated his impression that the trend is to permit “unbundling” so as to promote pro bono work.

An appellate judge asked whether Form 4, once it is submitted, is public, and if so, why it should be public. The member wondered whether the court might treat Form 4 as a confidential document that is not provided to the applicant’s opponent. Though an attorney member mentioned the usual presumption that court filings are public, it was noted (by analogy) that some filings made in connection with Criminal Justice Act applications do not go into the court file. A judge member suggested that making an applicant’s Form 4 responses public seems unduly invasive. One member asked whether i.f.p. applications are ever opposed, and, if so, whether that would weigh in favor of disclosing the Form 4 to the applicant’s opponent. An attorney member wondered when the information requested by Questions 10 and 11 would really be material to an i.f.p. determination.

Judge Stewart asked Mr. Fulbruge whether Form 4’s contents are kept confidential in the Fifth Circuit. Mr. Fulbruge stated that he did not think that the contents are made available on PACER. An attorney member suggested that this is an area for coordination with the other advisory committees, given that this issue may also arise in the lower courts.

By consensus, the Committee retained this matter on the study agenda.

**f. Item No. 08-AP-H (“manufactured finality” and appealability)**

Judge Stewart invited the Reporter to introduce this item, which was raised originally by Mr. Levy and which concerns the viability of “manufactured finality” as a means of securing appellate review. The topic can be briefly described as follows: If the court dismisses the plaintiff’s most important claims (“central claims”), leaving only claims about which the plaintiff cares less (“peripheral claims”), the continued pendency of the peripheral claims means there is no final judgment despite the dismissal of the central claims. If it is not possible to obtain a partial final judgment under Civil Rule 54(b) or to obtain the requisite rulings from both the district court and the court of appeals for a permissive appeal under 28 U.S.C. § 1292(b), can the plaintiff “manufacture” a final judgment by voluntarily dismissing the peripheral claims?

The Reporter noted that the Committee had discussed the variations in circuit caselaw on this question at its fall 2008 meeting. This is a topic on which the work of the Civil / Appellate Subcommittee will be very useful; it will also be important to consult with the Bankruptcy and Criminal Rules Committees. Preliminary discussions with Judge Stewart, Judge Kravitz, and Professor Cooper have identified some possible policy choices. It would make sense – and would generally accord with existing circuit caselaw – to provide that where the plaintiff dismisses the peripheral claims with prejudice, this produces a final judgment that permits

appellate review of the central claims. Where the dismissal was nominally without prejudice but a time-bar or other impediment ensures that the peripheral claims can no longer be reasserted (one might term this dismissal with “de facto prejudice”), one might argue that it would make sense to treat the dismissal the same as one that is nominally “with prejudice.” This, however, seems less important to establish, assuming that the plaintiff can cure any problem by stipulating after the fact that the dismissal is with prejudice. Moreover, when it is uncertain whether the peripheral claim can or cannot be reasserted, that uncertainty might provide a reason not to treat the dismissal as one with prejudice unless the plaintiff provides a stipulation (or the district court amends the order of dismissal) to that effect. Where the peripheral claims are conditionally dismissed with prejudice, the plaintiff agrees to dismiss the peripheral claims and not to reassert them unless the central claim’s dismissal is reversed on appeal. It would probably make sense to provide that this creates a final judgment. By contrast, when the peripheral claims are dismissed without prejudice, it is much less clear that the resulting judgment should be considered final.

The Reporter mentioned that in addition to these broad policy choices, there would also be more specific drafting choices. For instance, there is the question how to specify what events can trigger a conditional dismissal that results in an appealable judgment. There will also be questions concerning how to handle complex cases. And there is a further question whether the rule should recognize discretion in the court of appeals to take up and decide (on the appeal) the merits of the conditionally-dismissed claim as well as the claim on which the appeal was taken (so as to focus the proceedings on remand). As to that last question, Mr. Levy expressed concern that such a reservoir of discretion might prove to be a trap for the unwary appellant, and he suggested that such a concept would need to be carefully thought through.

Mr. Levy stated that if a rule can be drafted to resolve this set of questions, it would perform an important service. He suggested that the dismissal of the peripheral claims with prejudice is the easiest case – that should result in an appealable judgment. In his view the next easiest case is the conditional dismissal with prejudice, and here too, he thinks that the result should be an appealable judgment; this concept would be administrable because there would be a formal piece of paper memorializing the conditional dismissal with prejudice. By contrast, he is concerned that in the case of a dismissal with “de facto prejudice,” there may be uncertainty as to whether the peripheral claim really cannot be reasserted, and that this uncertainty could generate satellite litigation. As to a dismissal of peripheral claims without prejudice, he sees this as falling within the heartland of the matters already addressed by Civil Rule 54(b).

An appellate judge wondered why the Supreme Court has not granted certiorari to resolve these issues. It was suggested that perhaps the posture in which these issues arise would make it unlikely that a party would seek certiorari on this issue.

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

**g. Item No. 08-AP-M (interlocutory appeals in tax cases)**

Judge Stewart invited the Reporter to introduce this item, which concerns the framework for interlocutory tax appeals. At its fall 2008 meeting, the Committee discussed the fact that Appellate Rules 13 and 14 appear designed to deal only with appeals as of right from Tax Court decisions and not to deal with permissive appeals from Tax Court orders under 26 U.S.C. § 7482(a)(2). The Reporter stated that in the time since the Committee's discussion of this item last fall, she had obtained useful insights from Judge Mark Holmes of the United States Tax Court. Judge Holmes states that this seems like an omission in the Appellate Rules that it would be a good idea to fix, but he also states that the number of cases that would be affected is tiny.

Mr. Letter noted that though the number of affected cases may be small, some of them can present very important issues. Mr. Letter reported that he discussed the question with his colleagues who handle tax appeals, and that those discussions indicate that the problem is worth fixing.

A motion was made and seconded to consider a possible rules amendment to address interlocutory tax appeals. The motion passed by voice vote without opposition.

**h. Item No. 06-08 (amicus briefs with respect to rehearing)**

Judge Stewart invited the Reporter to summarize this item, which concerns Mr. Levy's suggestion that the Committee consider amending the Appellate Rules to clarify the procedure for amicus briefs with respect to rehearing. The Committee had discussed this item at its three previous meetings (in fall 2007, spring 2008 and fall 2008). By consensus, the Committee removed this item from its study agenda.

**i. Item No. 08-AP-I (discussion of the uses of postjudgment motions)**

Judge Stewart invited the Reporter to summarize this item, which relates to a suggestion made by Professor Daniel Meltzer during the June 2008 Standing Committee meeting. Professor Meltzer noted his impression that some of those involved in trial-level practice had raised concern about superfluous post-trial motions, and he asked whether the Committees might wish to consider whether the Civil Rules are too permissive about when a postjudgment motion can be made. The Appellate Rules Committee's discussion of this question at the fall 2008 meeting revealed support for the view that postjudgment motions serve important functions, and did not reveal support for the view that a change is needed in order to rein in the use of such motions. At the Committee's request, the Reporter conveyed the substance of the discussion to Professor Cooper. By consensus, the Committee removed this item from its study agenda.

**VII. Additional Old Business and New Business**

**a. Item No. 08-AP-N (appendix for petitions for permission to appeal)**

Judge Stewart invited the Reporter to introduce this item, which was suggested to the Committee by Mr. Batalden. Mr. Batalden proposes that Rule 5 be amended to provide for the inclusion (in the appendix to a petition for permission to appeal) of key documents from the district court record. Rule 5(b)(1) requires the petition for permission to appeal to include, among other things, a copy of the challenged order or judgment and any related opinion, as well as any order stating the district court's permission to appeal or stating the district court's findings concerning any preconditions for appeal. Rule 5(c) sets a presumptive limit of 20 pages, excluding (among other things) the orders or judgments specified by Rule 5(b)(1). Rule 5 does not prevent the applicant from including additional record documents as attachments to the petition but such documents would appear to count toward the presumptive length limit.

The Reporter noted that Mr. Batalden pointed out that it may be particularly useful to include record documents with the petition in the context of petitions for permission to appeal under Civil Rule 23(f). The Reporter's memorandum in preparation for the meeting had asked whether the Federal Judicial Center's research on the Class Action Fairness Act (the "CAFA project") might shed light on these issues. In preparation for the meeting, Ms. Leary had consulted with her colleague Thomas Willging and based on that consultation she suggested that the Committee should not delay its consideration of this item for the purpose of seeking further data from the CAFA project. Ms. Leary explained that the focus of the CAFA project is to look at CAFA's effect on trial-level activity, and therefore the project was unlikely to provide a great deal of data that would directly pertain to practice on petitions for permission to appeal. She reported that the project still has about another year of work to go.

Mr. Fulbruge observed that the circuits take varying approaches to the questions raised by Mr. Batalden. Mr. Fulbruge suggested that it is hard to generalize about these approaches and that they are still developing in the light of the shift to electronic filing. An appellate judge stated that in the Sixth Circuit joint appendices are no longer generally used; rather, the matter proceeds on the basis of the original record as it is available through the CM / ECF system. Another appellate judge suggested that the shift to electronic filing may eventually render this item moot. Mr. Fulbruge agreed that the CM / ECF system generally provides the court of appeals with access to the electronic records filed in the district court. He mentioned, however, that sealed documents can be hard to obtain in electronic form. Mr. Fulbruge also mentioned that handwritten documents require different treatment; but he observed that the court can run paper documents through an optical character recognition ("OCR") system which can render many of them electronically searchable.

An appellate judge noted that though judges may be able to access documents electronically through CM / ECF, some judges may also prefer to have key documents appended to a paper copy of the petition; but he suggested that a wait-and-see approach may be appropriate with respect to this item. Another appellate judge noted that law clerks tend to be particularly comfortable using electronic copies of the record. This judge noted that another question is how to deal with instances when a particular judge wants a paper copy of the documents; in particular, there is the question of who prints the paper copy (the clerk's office or the judge's

chambers). Mr. Fulbruge noted that one way to resolve that question is for the clerk's office to send the documents electronically to print on a special printer in chambers. An appellate judge noted that prisoner and other pro se filings present distinct issues. He pointed out that death-penalty habeas cases involving state-court convictions will involve the filing of the paper state-court record. An attorney member asked how much expense the government incurs in printing paper copies of filings; Mr. Fulbruge responded that it can be costly.

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

**b. Item No. 08-AP-O (clarify briefing deadlines in appeals with multiple parties)**

Judge Stewart invited the Reporter to introduce this item, which arises from Mr. Batalden's question concerning the application of Rule 31's briefing deadlines in appeals in which multiple parties on a side serve and file separate briefs on different days. Rule 31(a) pegs the time for serving and filing the appellee's brief and the appellant's reply brief to the date of service of the previous brief. Rule 28.1 takes a similar approach to the timing of briefs in cases involving cross-appeals. The Committee Notes to Rule 28.1 and Rule 31 do not discuss the timing of briefs in an appeal in which there are multiple parties on a side. In two circuits, local provisions address Mr. Batalden's question. This timing question is not likely to trouble litigants in circuits where the briefing schedule is set by order, assuming that the scheduling order uses dates certain. In circuits where the briefing schedule is not set by order or where the scheduling order does not use dates certain, this timing question will still not arise if the multiple parties on a given side file a joint brief rather than separate briefs.

An attorney member expressed doubt that this question would pose a serious problem: If the attorney is unsure of the deadline, he or she can call the clerk's office to seek clarification. Another attorney agreed; he suggested that Mr. Batalden's question might be worth considering if the Committee decides to undertake a broader set of rules amendments in the future, but that the question is not worth addressing at this time. Another attorney member agreed. This member stated that he had never seen this problem arise in his practice in the courts of appeals; though he has seen a similar question arise in Supreme Court briefing, when the question arises one simply asks the Clerk for clarification.

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

**c. Item No. 08-AP-P (FRAP 32 – line spacing of briefs)**

Judge Stewart invited the Reporter to introduce this item, which concerns Mr. Batalden's suggestion that Rule 32 be amended to provide for 1.5-spaced briefs rather than double-spaced briefs. At Mr. Levy's suggestion, the Reporter had prepared two samples – one using 1.5

spacing and the other using double spacing. Those samples were circulated among the Committee members during the meeting.

An appellate judge suggested that so long as the briefs are readable, 1.5 spacing could save costs. A member asked why the proposed change should specify 1.5 spacing rather than permitting single spacing. It was suggested, however, that single spacing might make a non-printed brief less readable. Members noted that the double-spacing requirement is a holdover from the time when non-printed briefs were typed as opposed to printed on a computer printer. Mr. Letter asked why the rules should not permit computer-printed briefs to be printed on both sides of the page. An attorney member agreed that double-sided printing should be permitted. An appellate judge member noted that when he prints briefs in his chambers he prints them double-sided. Judge Stewart noted that his law clerks print briefs double-sided. Judge Stewart stressed the importance of ensuring that judges find the briefs readable; if briefs could be presented in a format that is both readable and light-weight, that would be desirable. An appellate judge member observed that the questions of line spacing and single-sided versus double-sided printing have implications at the trial level too.

An appellate judge suggested that the Appellate Rules Committee is likely to be considering possible Rules amendments relating to electronic filings and that the line-spacing and single-sided versus double-sided printing questions might be considered as part of that larger set of possible amendments. This member wondered whether judges may already be able to print their copies of electronically-filed briefs with the exact line spacing and other format choices that they prefer. He also predicted that if the Committee proposes rules that change the current line-spacing or single-sided printing practices without permitting local variations, such proposals would elicit very strong reactions. Mr. Rabiej noted that the development of the current provisions concerning brief fonts proved very controversial. Mr. Letter suggested that the cost savings of 1.5 spacing and double-sided printing might be significant enough to justify proceeding with a proposal targeting these topics without awaiting a broader set of amendments concerning electronic filing. He pointed out that even with the advent of electronic filing, judges are likely to continue to require parties to submit hard copies.

Mr. Fulbruge observed that if the rules are changed to permit double-sided printing, this will require the Committee to re-consider the question of how the briefs should be bound. If the brief is double-sided, it becomes very important to ensure that the brief lies flat when it is open; he suggested that spiral binding is preferable for this purpose. Mr. Letter noted that if the rules are changed to permit double-sided printing, they should make that practice voluntary rather than mandatory, because older computer printers may not be capable of printing double-sided. An attorney member predicted that views on these questions will be divergent and perhaps irreconcilable; he asked whether this might be an area in which an appropriate interim step might be to permit local variation. Another member stated that raising these issues might produce a very constructive dialogue. Another attorney member emphasized that adopting these reforms would cut the bulk of the files in half. An appellate judge stated that the Eighth Circuit is heading in the direction of using double-sided, spiral-bound briefs; he suggested that this is the best approach and that the sooner it is adopted, the better. Judge Stewart observed that cost

containment is a priority, and that making briefs less costly to produce also increases the accessibility of the courts. An attorney member stated that he, personally, prefers reading briefs that are printed single-sided – for example, single-sided briefs are easier to read on airplanes. An appellate judge member predicted that eventually courts will cease to require paper copies, and he stressed that if the only people doing the printing are the judges, and if they can alter the format of electronic briefs to suit their tastes, there will be no need to change the rule.

By consensus, the Committee determined to retain this item on its study agenda.

**d. Item No. 08-AP-Q (FRAP 10 – digital audiorecordings in lieu of transcripts)**

Judge Stewart invited the Reporter to introduce this item, which concerns a suggestion by Judge Michael Baylson that the Appellate Rules Committee consider the possibility of allowing the use of digital audiorecordings in place of written transcripts for the purposes of the record on appeal. Judge Baylson has permitted the use of digital audiorecordings in lieu of written transcripts for the purpose of post-trial motions. Such a practice can save the parties the expense of obtaining a transcript. However, it is likely that a transcript will need to be prepared for purposes of the appeal. Even if a particular circuit were inclined to experiment with the use of audiorecordings in lieu of transcripts, the current Appellate Rules would not fit comfortably with such an experiment. Thus, the Reporter suggested, this topic merits monitoring by the Committee.

An appellate judge member asked whether it is possible to convert a written brief into an audio file. Mr. Fulbruge stated that there is software that can enable one to convert a written brief into spoken word, but that the software can be finicky. Mr. McCabe provided the Committee with background on the history of audiorecording in federal court proceedings. He observed that discussions concerning transcripts and audiorecordings have been going on for years and that the topic is a controversial one. There is little consensus; views are divergent and strongly held. Mr. Fulbruge noted that views on audiorecordings may evolve as the technology becomes easier to use.

Judge Hartz observed that, for the last 25 years, most appeals in the New Mexico Court of Appeals have been proceeding on the basis of audiorecordings. That court adopted the practice out of frustration with the delays that attended the preparation of transcripts. He noted that the court was very strict with attorneys if they did not accurately quote from the audiorecordings. In his experience, the judges did not have to listen to the audiorecordings very often. On the other hand, he noted, the New Mexico Court of Appeals has more central staff assistance than the federal courts of appeals generally do. It was suggested that the provision of an audiorecorded record can affect the standard of review; for example, when the question is whether a closing argument was inflammatory the answer might be unclear on the face of the transcript but the audiorecording might demonstrate that the argument was not, in fact, inflammatory. An appellate judge member noted that the Kentucky Supreme Court has used

audiorecordings in place of transcripts for years, but that court nonetheless states that it employs a deferential standard when reviewing credibility assessments.

Judge Stewart noted that the relevant technology is changing rapidly. He noted that the recent Supreme Court decision in *Scott v. Harris*, 550 U.S. 372 (2007), referred to the videotape evidence that had been entered into the record below. An attorney member supported studying Judge Baylson's suggestion; he noted that obtaining a transcript poses a significant expense (for example, obtaining the transcript for a small four-day trial recently cost \$1,200.00).

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

**e. Item Nos. 08-AP-R & 09-AP-A (FRAP 26.1 & FRAP 29(c) – corporate disclosure requirement)**

Judge Stewart invited the Reporter to introduce this item, which concerns suggestions made by Chief Judge Frank H. Easterbrook and the ABA's Council of Appellate Lawyers as part of their respective comments on the pending proposal to amend Rule 29(c) (discussed earlier in these minutes). These commenters suggest that the Committee should rethink the scope of Appellate Rule 26.1's disclosure requirement. They also suggest that the Committee revise the part of Rule 29(c) that requires amicus briefs filed by a corporation to include "a disclosure statement like that required of parties by Rule 26.1."

The ABA's Council of Appellate Lawyers suggests amending Rule 26.1 to cover amicus briefs and amending Rule 29(c) to require provision of the "same disclosure statement" required by Rule 26.1. This suggestion appears to arise from a view that Rule 29(c)'s current language – "a disclosure statement like that required of parties by Rule 26.1" – is unclear in some way and that the current language could be read to permit "some degree of difference" between the Rule 29(c) corporate-disclosure statement and the Rule 26.1 corporate-disclosure statement. But that concern is somewhat puzzling, because it is difficult to imagine (and the Council does not specify) what sort of difference would arise.

An attorney member asked whether a filing by an amicus could cause a recusal. The Reporter observed that a related issue surfaced in the discussions concerning amicus filings in connection with rehearing en banc; in that context, at least one circuit prohibits such filings if they would cause the recusal of a judge. An appellate judge suggested that some recusal issues are to some extent discretionary and perhaps the standard is slightly less stringent with respect to amicus briefs. Another appellate judge noted that though it may be unusual for an amicus filing to trigger a recusal, it is possible – for example, if a judge's relative authors the amicus brief.

Chief Judge Easterbrook argues that the term "corporation" (in Rules 26.1 and 29(c)) is both over- and under-inclusive. On the first point, Chief Judge Easterbrook asserts that some corporations – such as municipal corporations, Harvard University or the Catholic Bishop of Chicago – have no stock and no parent corporations and ought not to be required to make



disclosures of the type specified by Rule 26.1. Presumably, the concern about municipal corporations focuses on Rule 29(c), given that Rule 26.1(a) explicitly limits the disclosure requirement to “nongovernmental” corporate parties. It may be the case that Rule 29(c) requires an amicus that is a municipal corporation to file a disclosure statement. But the only downside, in that event, is that such an amicus must include a statement that there is no parent corporation and no publicly held corporation that owns 10 % or more of its stock.

On the second point, it is true that both Rule 26.1(a) and Rule 29(c) require disclosures by a corporation even if the corporation does not have stock. But the problem with amending the rules to exempt corporations that do not have stock from the disclosure obligation is that such an amendment would create ambiguity when a corporate amicus makes no disclosure. In at least some instances when a corporate entity makes no disclosure, it could be unclear whether the lack of disclosure arises from a lack of anything to disclose or from a failure to comply with the disclosure requirement. Where the filer is the Catholic Bishop of Chicago, it may be clear that the lack of disclosure arises from the absence of anything to disclose. But without knowing much more about the use of the corporate form in every relevant jurisdiction, it would be difficult to say with confidence that the answer would be equally clear in every other possible instance. The downside of the current language is that some corporate parties will have to include a sentence noting that they have no stock and no parents. But that downside is counter-balanced by the advantage of avoiding ambiguity.

Chief Judge Easterbrook’s other critique is that the Rules are under-inclusive because they fail to elicit all information that would be relevant to a judge in considering whether to recuse. A number of circuits have adopted considerably more expansive local disclosure rules. There are strong local variations on this point. There have been a number of deliberations on this issue over the past 20 years. It would significantly alter practice in some circuits to expand the range of disclosures required by the Appellate Rules. If the Appellate Rules Committee were to consider proposals to amend Rule 26.1, it would presumably wish to do so in coordination with the Civil, Criminal and Bankruptcy Rules Advisory Committees and also with the Codes of Conduct Committee. The Codes of Conduct Committee has recently raised a number of questions concerning disclosure requirements. The committees’ discussion of those questions might also provide a context for discussing Chief Judge Easterbrook’s proposal.

Mr. McCabe agreed that there is a long history of deliberations on such questions. The current Rules reflect a compromise position of setting a baseline requirement and then allowing the circuits to add further requirements if they see fit. Mr. Rabiej noted that the previous Appellate Rules Committee Reporter had initially drafted a detailed rule, but the Committee on Codes of Conduct argued for a less detailed and narrower rule.

An attorney member observed that it can be time-consuming to comply with this type of disclosure requirement. He noted that if any affiliate of his client has public debt or shares or sells limited partnership units to the general public, he errs on the side of disclosure. He suggested that the current Rule sets a fairly good baseline.

By consensus, the Committee determined to retain this item on its study agenda and to monitor the topic for further developments.

### **VIII. Schedule Date and Location of Fall 2009 Meeting**

The dates of November 5 and 6, 2009, were selected for the Committee's fall 2009 meeting.

### **IX. Adjournment**

During the meeting, Judge Stewart had noted his regret that Judge Ellis and Mr. Levy would be leaving the Committee. Both have provided astounding contributions to the Committee's discussions. At the meeting's conclusion, Judge Stewart thanked all the meeting participants, and expressed deep appreciation to Mr. McCabe, Mr. Rabiej, Mr. Ishida, Mr. Barr and the AO staff for their superb work and attention to detail. Judge Stewart stated that he had greatly enjoyed his work with the Committee.

The Committee adjourned at 10:15 a.m. on April 17, 2009.

Respectfully submitted,

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Catherine T. Struve  
Reporter