Minutes of Spring 2011 Meeting of
Advisory Committee on Appellate Rules
April 6 and 7, 2011
San Francisco, California

I. Introductions

Judge Jeffrey S. Sutton called the meeting of the Advisory Committee on Appellate Rules to order on Wednesday, April 6, 2011, at 8:35 a.m. at the Fairmont Hotel in San Francisco, California. The following Advisory Committee members were present: Judge Kermit E. Bye, Judge Robert Michael Dow, Jr., Justice Allison Eid, Judge Peter T. Fay, Professor Amy Coney Barrett, Mr. James F. Bennett, Ms. Maureen E. Mahoney, and Mr. Richard G. Taranto. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice ("DOJ"), was present representing the Solicitor General. Also present were Judge Lee H. Rosenthal, Chair of the Standing Committee; Professor Daniel R. Coquillette, Reporter for the Standing Committee; Mr. Peter G. McCabe, Secretary to the Standing Committee; Mr. Leonard Green, liaison from the appellate clerks; Mr. James N. Ishida and Mr. Jeffrey N. Barr from the Administrative Office ("AO"); Ms. Holly Sellers, a Supreme Court Fellow assigned to the AO; and Ms. Marie Leary from the Federal Judicial Center ("FJC"). Peder K. Batalden, Esq., attended the meeting on April 6. Prof. Catherine T. Struve, the Reporter, took the minutes. (On the second day of the meeting, the Appellate Rules Committee met jointly with the Bankruptcy Rules Committee. The attendees of the joint meeting are noted in Part VIII below.)

Judge Sutton welcomed the meeting participants and introduced the Committee's newest member, Professor Amy Coney Barrett. He noted that Professor Barrett attended Rhodes College and Notre Dame Law School, clerked for Judge Silberman and then for Justice Scalia, and now teaches Civil Procedure (among other subjects) at Notre Dame. Judge Bye introduced Mr. Batalden, who clerked for Judge Bye and who now, as an appellate practitioner, has submitted thoughtful suggestions and comments to the Appellate Rules Committee. Judge Sutton welcomed Mr. Batalden.

During the meeting, Judge Sutton thanked Mr. McCabe, Ms. Kuperman, Mr. Ishida, Mr. Barr, and the AO staff for their expert work in preparing for the meeting.

II. Approval of Minutes of October 2010 Meeting

A motion was made and seconded to approve the minutes of the Committee's October 2010 meeting. The motion passed by voice vote without dissent.

III. Report on January 2011 Meeting of Standing Committee

Judge Sutton summarized relevant events at the Standing Committee's January 2011 meeting. The Standing Committee approved for publication proposed amendments to Rules 13, 14, and 24; these amendments would address permissive interlocutory appeals from the United States Tax Court and also would revise Rule 24(b)'s reference to the Tax Court to remove a possible source of confusion concerning the Tax Court's legal status.

Judge Sutton noted that he also discussed with the Standing Committee the pending proposal to treat federally recognized Native American tribes the same as states for the purpose of amicus filings. Members of the Standing Committee expressed varying views concerning this proposal, with a couple of members expressing support and two or three others taking a contrary view. Judge Rosenthal observed that members from western states tend to be more familiar with the issue. Judge Sutton noted that the Appellate Rules Committee has consulted the Chief Judges of the Eighth, Ninth, and Tenth Circuits (where relatively many tribal amicus filings occur) for their views; so far, the Committee has received formal responses from the Eighth and Ninth Circuits and informal feedback from the Tenth Circuit. With that input, the Committee will be in a position to revisit this item in the fall.

IV. Other Information Items

Judge Sutton reported that the Supreme Court has approved the proposed amendments to Appellate Rules 4 and 40 that will clarify the treatment of the time to appeal or to seek rehearing in civil cases to which a United States officer or employee is a party. Because the time to appeal in a civil case is set not only by Appellate Rule 4 but also by 28 U.S.C. § 2107, the Judicial Conference is seeking legislation to make the same clarifying change to Section 2107. Senate Judiciary staff have conveyed an inquiry by the Office of Senate Legal Counsel (SLC), who have questioned whether the "safe harbors" in the proposed rule and statute amendments[1] apply in cases in which a House or Senate Member, officer, or employee is sued in an individual capacity and is represented by SLC or by the House Office of General Counsel rather than by the DOJ. Judge Sutton noted that the language of the proposals, as drafted, covers such cases, but he observed that the Senate Judiciary staff have expressed an inclination to add language underscoring that point in the legislative history of the proposed amendment to Section 2107. It has also been suggested that similar language should be added to the Committee Notes to Rules 4 and 40; but changing the Notes at this stage would be unusual and complicated, given that the Supreme Court has already approved the proposed amendments. Mr. Letter noted that he has spoken with House staffers to underscore the DOJ's support for the proposed amendments.

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[1] The "safe harbors" provide the longer appeal or rehearing periods when the United States represents the officer or employee at the time the relevant judgment is entered or when the United States files the appeal or petition for the officer or employee.

Judge Sutton recalled that the Committee, at its fall 2010 meeting, had discussed Chief Judge Rader's proposal, on behalf of the judges of the Federal Circuit, that 28 U.S.C. § 46(c) be amended to include in an en banc court any senior circuit judge "who participated on the original panel, regardless of whether an opinion of the panel has formally issued."[2] It turns out that the Judicial Conference Committee on Court Administration and Case Management (CACM) simultaneously considered this proposal and decided to recommend it favorably to the Judicial Conference. The CACM proposal was on the agenda for the Judicial Conference's March 2011 meeting, but was taken off the agenda in order to permit time for coordinated consideration of the proposal by CACM and the Appellate Rules Committee. The two committees will form a joint subcommittee to consider this question over the summer.

V. Action Items

A. For publication

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

Judge Sutton invited the Reporter to introduce this item, which concerns proposed revisions to Form 4 (the form that is used in connection with applications to proceed in forma pauperis ("IFP") on appeal). Effective December 1, 2010, Form 4 was revised to accord with the recently-adopted privacy rules. During the discussions that led to the 2010 amendments, the Committee also discussed possible substantive changes to the Form. In particular, it was suggested that Questions 10 and 11 request unnecessary information. 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. In the past, the National Association of Criminal Defense Lawyers ("NACDL") has suggested that questions like Question 10 intrude upon the attorney-client privilege. More recently, comments received from attorneys in the Pro Se Staff Attorneys Office for the District of Massachusetts have suggested that requiring IFP applicants to disclose information concerning legal representation could impose a strategic disadvantage on those applicants.

The Reporter stated that, at least in most instances, the information requested by Questions 10 and 11 would not seem to be covered by attorney-client privilege. However, to the extent that Question 11 is read to encompass payments to investigators or to experts (especially non-testifying experts), it might elicit information that reveals litigation theories and strategy and that therefore qualifies as opinion work product. In addition, as the comments mentioned above suggest, the disclosures required by Questions 10 and 11 would enable an IFP applicant's opponent to learn the details of a represented applicant's fee arrangement with the applicant's

[2] The statute currently provides that a senior judge may participate in an en banc court that is "reviewing a decision of a panel of which such judge was a member."

lawyer, and could reveal the fact that an IFP applicant who is proceeding pro se has obtained legal advice from a lawyer who has not appeared in the case.

During the Committee's previous discussions of Form 4, members did not identify any reason to think that the details currently sought by Questions 10 and 11 are necessary to the disposition of IFP applications. Because Form 4 is also used in connection with applications to proceed IFP in the Supreme Court, members suggested seeking the Court's views on the question. Judge Sutton spoke informally to the Supreme Court Clerk's Office, which could not think of any reason why the information was necessary. In light of these discussions, the Reporter suggested, it would make sense to amend Form 4 by combining Questions 10 and 11 into a single, simpler question: "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 Reporter also suggested that the Committee 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.

A district judge member stated if the purpose of Form 4 is to enable the court to determine whether the applicant's finances qualify him or her to proceed IFP, then the simpler the form is, the better. He noted that information showing that a litigant has obtained legal advice might affect a judge's determination of how to construe the litigant's pleadings, but that the question of the amount of latitude to give a pro se litigant is separate from the question of whether a litigant should be permitted to proceed IFP. Professor Coquillette observed that the proposed amendment would address the complaints that NACDL has raised in the past.

Apart from the merits of the proposed amendments, Professor Coquillette suggested, the Committee should give attention to the process by which they are to be adopted. He reported that the Civil Rules Committee has begun to reconsider the procedures for adopting and amending forms. Participants have queried whether the forms should go through the standard rulemaking process. Judge Rosenthal observed that, at present, Civil Rule 84 addresses the forms that accompany the Civil Rules. The time may be opportune to reconsider the relationship of the forms and the rulemaking process. In 1938, the forms had a key function: to instruct the bench and bar concerning the new approach taken by the Civil Rules. But in 2011, the forms are no longer necessary for that purpose. Rather, in the case of the Civil Rules, it may be preferable for the Forms to focus on ministerial topics. Moreover, it is no longer practicable for the Rules Committees to monitor and maintain the forms on an ongoing basis in the way that they monitor and maintain the Rules themselves. It seems worthwhile for the rules committees jointly to consider how to handle the revision and maintenance of the forms. Mr. McCabe stated that the Bankruptcy Forms raise special issues. Under Bankruptcy Rule 9009, the Official Bankruptcy

Forms go to the Judicial Conference for approval, but the Director of the AO is authorized to issue additional forms as well. Depending how quickly this inter-committee project proceeds, the fruits of this project may yield a new process that can be used to implement the proposed Form 4 amendments. However, it was noted that the project was likely to take at least three years.

An attorney member asked how a litigant responding to the proposed new Question 10 should answer the question if the litigant has a contingent fee arrangement with a lawyer. The Reporter responded that this excellent question also arises with respect to current Question 10. She suggested that such a litigant should check the “Yes” box in response to the amended Question 10, but that it would be unclear how to respond to the question’s inquiry concerning “how much” money would be spent. The attorney member, though, predicted that an applicant who has a contingent fee arrangement might well check the “No” box in response to proposed Question 10 as drafted. He suggested revising proposed Question 10 to ask whether the litigant has agreed to share part of any recovery. Another attorney member, though, questioned whether that additional query is worthwhile; most of those applying to proceed IFP on appeal, she noted, will have lost in the court below.

Professor Coquillette mentioned the significant changes that are occurring concerning litigation financing. Mr. Letter noted that if a litigant’s answers on Form 4 left the Clerk’s Office unsatisfied, the office could inquire further of the litigant; given this possibility, he suggested, there is no need to further complicate the form. Mr. Green agreed that if the information provided on Form 4 proved inadequate, his office would request more information from the litigant; he reported that such situations are very rare.

A judge member suggested that even if the proposed amended Question 10 might not elicit full information in all cases, it strikes a reasonable balance. He noted that one might, in fact, argue for striking Questions 10 and 11 altogether, as unnecessary to the assessment of the litigant’s finances. But he has seen some cases in which a litigant who was represented during part of a lawsuit later applies for IFP status. Gathering some information about the money spent on the litigation could be useful in assessing such requests.

A district judge member suggested that proposed Question 10 might be revised to read, in part, “or might you be spending” (rather than “or will you be spending”) in order to more clearly encompass contingent fees arrangements. An attorney member responded that the key question is whether the Committee feels that it is necessary for Form 4 to elicit information that will reveal whether the applicant has a contingent-fee arrangement with a lawyer who may be advancing some of the litigation costs. If that is not a pressing concern, then it would be less important to draft Form 4 with a view to eliciting detailed information on this question. The Reporter observed that IFP status also relieves the litigant from any otherwise-applicable obligation to post security for costs.

Professor Coquillette expressed strong support for revising Questions 10 and 11. These

questions, he suggested, should not be posed without a good reason. If the only goal of Form 4 is to elicit information concerning a litigant's poverty, Questions 10 and 11 are not germane. An appellate judge member asked whether it would be useful to seek the views of some practitioners' organizations such as the Litigation Section of the American Bar Association; another appellate judge predicted that such groups would be happy with the proposed revisions to Questions 10 and 11. An attorney member expressed support for adopting the proposed revisions to Form 4 as shown in the agenda book. The main issue that usually rides on IFP status, this member stated, is whether a litigant will be required to pay the $450 docket fee.

A motion was made and seconded to approve for publication all of the proposed revisions to Form 4 as shown in the agenda book. The motion passed by voice vote without dissent.

2. Item No. 10-AP-B (statement of the case)

Judge Sutton presented this item, which concerns Rule 28(a)(6)'s requirement that the brief contain "a statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below." The statement required by Rule 28(a)(6) must precede the "statement of facts" required by Rule 28(a)(7); and these requirements have confused practitioners and produced redundancy in briefs. Judge Sutton observed that the Committee has obtained input on this item from two groups – the ABA Council of Appellate Lawyers and the American Academy of Appellate Lawyers. Nearly everyone whom the Committee has heard from agrees that there is a problem with the current Rule. To focus the discussion, the agenda materials presented three possible options for revising Rule 28(a). The first option would revise Rule 28(a) to emulate the Supreme Court's approach of combining the statement of the case and of the facts. The second option would retain the separate subdivisions of Rule 28(a) requiring statements of the case and the facts, but would reverse their order and revise the reference to the "course of proceedings." The third option would relocate the "course of proceedings" requirement from Rule 28(a)(6) to Rule 28(a)(7) so as to permit the description of the course of proceedings in chronological order (after the facts). Mr. Batalden, in a recent letter, suggested another possible variation. Ms. Sellers, meanwhile, provided the Committee with illuminating research on similar requirements in state-court briefing rules. Judge Sutton invited Ms. Sellers to present the results of her research.

Ms. Sellers noted that characterizing the various state approaches had presented a challenge. It is possible to sort states into two rough categories – those with rules similar to Rule 28 and those with rules that diverge from Rule 28. Some states appear to model their rules on a former version of the U.S. Supreme Court rules. Three states have rules that provide explicitly for an introduction. Depending on what approach the Committee decides to take, the state-court rules may provide models. Judge Sutton thanked Ms. Sellers for her thorough and informative research, and noted that it was useful to know that the states have reached no consensus on the best means of approaching the question. He observed that the question of providing for an introduction in briefs warrants consideration as a distinct agenda item.

Judge Sutton next invited Mr. Batalden to comment. Mr. Batalden stated that the most important question, for attorneys, is the ordering of the statements: Was it necessary, he asked, that the statement of the course of proceedings precede the statement of the facts? Mr. Letter noted that he is part of a group of lawyers whom Chief Judge Kozinski has appointed to advise the Ninth Circuit on various matters; Mr. Letter reported that the group has discussed this question, and that judges who were present observed that when lawyers comply with the current Rule's ordering the result is unhelpful.[3] Judges, Mr. Letter emphasized, are the audience for briefs, so the question is what judges find most useful. Judge Sutton reported that he spoke with one appellate judge who does not read the statement of the case in view of the redundancy caused by it. Mr. Letter agreed that judges' perspectives on this question are likely to vary; but most judges, he suggested, would favor a change in the order of the requirements.

An attorney member stated that she has always struggled with Rule 28(a)'s requirements, and she stressed that there is a need for more flexibility in the Rule. This member stated that she liked the first option set forth in the agenda materials, but suggested a change to that option. The first option, as shown in the agenda materials, proposed that the later references in Rules 28 and 28.1 to the "statement of the case" and "statement of the facts" be replaced by references to "the statement of the case and the facts." The member proposed deleting "and the facts," so as to refer simply to the "statement of the case." (Later in the discussion the Committee determined by consensus that conforming revisions should be made to the proposed amendments to Rules 28(b) and 28.1 – so that those Rules, as amended, would refer simply to "the statement of the case" rather than to "the statement of the case and the facts.") Also, the member proposed deleting from the Committee Note to the proposed amendment to Rule 28(a) a statement that the amendment "permits the lawyer to present the factual and procedural history in one place chronologically." The member stated that she did not favor the second of the options shown in the agenda materials because that option did not provide attorneys with flexibility in drafting their briefs. Nor did she favor the third option; that option, she suggested, could confuse attorneys who might wonder what the revised Rule 28(a)(6) meant by referring (without more) to "a statement of the case briefly indicating the nature of the case." Responding to the suggestion that flexibility is better than an approach that simply reverses the order of the statement-of-the-case and statement-of-the-facts requirements, Mr. Letter observed that in some instances a lawyer may wish to provide context for the brief and an introductory statement can be useful in that regard.

An attorney member stated that he also favored the first option set forth in the agenda materials, but he suggested inserting a reference to the "rulings presented for review" into the proposed new Rule 28(a)(6) so that the amended Rule would require "a concise statement of the case setting out the facts relevant to the issues submitted for review and identifying the rulings presented for review with appropriate references to the record (see Rule 28(e))." Mr. Batalden agreed that the inclusion of that language would be helpful, but wondered whether it could

[3] Later in the discussion, Mr. Letter noted that the Ninth Circuit is currently considering moving the table of authorities to the back of the brief.

instead be added to Rule 28(a)(5), which currently directs the inclusion of "a statement of the issues presented for review." The attorney member responded that inserting the "rulings presented for review" requirement into subdivision (a)(5) might make the statement of the issues unduly long. An appellate judge noted that briefs filed in the Eleventh Circuit have a separate page for the issues and a separate page for the standard of review; this system, he observed, is very helpful. The attorney member suggested that it would also be useful to revise the Committee Note to Rule 28(a) to state that the amended Rule 28(a)(6) "permits but does not require the lawyer to present the factual and procedural history chronologically."

A motion was made and seconded to approve for publication the proposed amendments to Rules 28 and 28.1, with the changes noted above. The motion passed by voice vote without dissent.

Prior to the vote, an attorney member had stated that she read the proposed amended Rule 28(a)(6) to permit brief writers to include an introduction at the beginning of the "statement of the case" section of the brief. This member suggested that it might be useful to mention that fact in the Committee Note – perhaps by saying something like "Briefs may, but are not required to, include an introduction in the statement of the case." Judge Sutton responded, however, that it would be better to keep the issue of introductions to briefs separate from the proposed amendment to the statement of the case. Accordingly, after the Committee completed its consideration of Item No. 10-AP-B, Judge Sutton invited further discussion of the topic of introductions to briefs.

Mr. Letter reported that the United States Attorneys' Offices in the Southern District of New York and in districts within the Ninth Circuit customarily include introductions in their briefs. The U.S. Attorney's Office in the Southern District of New York usually keeps the introduction to a single page. But Mr. Letter reported occasions when a very complex case had occasioned a four-page introduction in a brief. He noted that there are no local rules provisions in the Second or Ninth Circuits that explicitly provide for introductions in briefs but that courts do not reject briefs that include such introductions. Mr. Letter noted the possibility that the Ninth Circuit might consider revising the Ninth Circuit's local rules to permit (though not require) an introduction. Judges, he reported, consider introductions very useful. Mr. Letter also observed that he has read briefs by public interest groups such as Public Citizen and the ACLU that make very effective use of introductions. Mr. Letter noted that one question that might arise is whether the inclusion of an introduction diminishes the need for a summary of the argument.

An appellate judge noted that introductions can be provided for by local rule; given that fact, he wondered, was it necessary for the national rules to address introductions? Mr. Letter responded that the key is what judges prefer; if judges would prefer to have an introduction, then the rules should require it. Mr. Batalden observed that lawyers include introductions in their briefs despite the fact that Rule 28 does not mention them. Thus, any rule amendment would be a matter of accommodating existing practice. He pointed out that if Rule 28(a) is amended to refer explicitly to introductions, then such an amendment could alter existing practice by

mandating a particular placement for the introduction (because Rule 28(a) states that the listed items must be included "in the order indicated").

An attorney member reiterated her view that the new statement of the case provision that the Committee had approved for publication would permit the inclusion of an introduction in the statement of the case, and she advocated revising the Committee Note to mention that. The introduction, she suggested, could be placed either at the start of the statement of the case or directly before it. Somewhat later in the discussion, another attorney member returned to this suggestion. He wondered whether it might be useful to consider moving the statement of issues (currently required by Rule 28(a)(5)) so that it comes after rather than before the statement of the case. The jurisdictional statement required by Rule 28(a)(4) is short, but the statement of issues can be longer. If the statement of issues followed rather than preceded the statement of the case, then an introduction contained in the statement of the case would be the first item of substance in the brief. An appellate judge member noted that under the Supreme Court's rules, the questions presented are the first item in petitions for certiorari and in merits briefs. The attorney member suggested, however, that the questions presented section in a Supreme Court brief differs from the statement of issues section in a court of appeals brief. Mr. Letter noted that Supreme Court briefs tend to include, in the questions presented section, a couple of sentences that serve, in effect, as an introduction.

An attorney member noted that if the Rule were revised to mandate (rather than merely permit) an introduction, then the Committee would have to determine what the introduction should contain. An appellate judge responded to this observation by asking what an introduction would contain that is not already set forth somewhere in the existing parts of the brief. Mr. Letter noted that while introductions can be designed to provide information concerning the posture of the case and the relevant issues, introductions can also serve a persuasive function. He observed that the proposal currently being considered by the Ninth Circuit contemplates that if the brief is to have an introduction, the introduction should be the first substantive item in the brief.

A member asked whether a provision concerning introductions would be better placed in the national rules or in local rules. Addressing the topic through local rules, she suggested, might provide more flexibility. A district judge member stated that he saw appeal in the idea of including the introduction in the statement of the case; that option, he suggested, would provide flexibility. He noted that the lawyers know more about the case than the judges do. On the other hand, he observed, the inclusion of an introduction in the statement of the case might occasion tension to the extent that the introduction is argumentative. This member noted that in the Seventh Circuit, lawyers must anchor in the record any citations to the facts. An appellate judge member asked Mr. Letter whether the proposed Ninth Circuit rule concerning introductions would provide for citations to the record in the introduction. Mr. Letter responded that the rule would not provide for record citations in the introduction, but that factual assertions elsewhere in the brief would be accompanied by citations to the record. The judge member noted that the quality of briefs filed in the Eleventh Circuit is very high. Mr. Letter suggested that judges in the Ninth Circuit may be less satisfied with the briefs filed in their circuit.

Judge Sutton summed up the range of issues that might arise with respect to introductions in briefs: Should introductions be permitted? Should they be mandatory? What should an introduction contain? Where should it be placed? He stated that it would make sense to solicit input on these questions. He suggested, however, that it would be difficult to take up these questions simultaneously with the proposed amendment to Rule 28(a)(6). Instead, he proposed, the Committee should make the introduction question a separate agenda item and discuss it in the fall. This new agenda item would include both the topic of introductions and also the possibility, noted above, of moving the statement of issues so that it follows rather than precedes the statement of the case.

VI. Discussion Items

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

Judge Sutton invited the Reporter to update the Committee on this item, which concerns issues related to the Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007). The Reporter noted that in *Dolan v. United States*, 130 S. Ct. 2533 (2010), the Court had provided a typology of deadlines. The *Dolan* Court noted (citing *Bowles*) that some deadlines are jurisdictional; some other deadlines are claim-processing rules; and still other deadlines "seek[] speed by creating a time-related directive that is legally enforceable but do[] not deprive a judge ... of the power to take the action to which the deadline applies if the deadline is missed."

More recently still, in *Henderson ex rel. Henderson v. Shinseki*, 2011 WL 691592 (U.S. March 1, 2011), the Court held that the 120-day deadline set by 38 U.S.C. § 7266(a) for seeking review in the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans' Appeals is not jurisdictional. The Court of Appeals for Veterans Claims had dismissed Mr. Henderson's appeal because he had filed it 15 days late. A divided en banc Federal Circuit affirmed, holding (in reliance on *Bowles*) that the deadline is jurisdictional. The dissenters pointed out that the very veterans who most deserve service-related benefits may be the litigants least likely to be able to comply with the filing deadline. The sympathetic facts of the case spurred legislative action, and four bills were introduced in Congress in response to the Federal Circuit's decision. This spring, the Supreme Court (with all eight participating Justices voting unanimously) reversed. The Court held that *Bowles* was inapplicable because *Bowles* involved a deadline for taking an appeal from one court to another; by contrast, Section 7266(a) sets a deadline for taking an appeal from an agency to an Article I court in connection with a "unique administrative scheme." Instead of applying *Bowles*, the Court applied the clear statement rule from *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006). The Court found no clear indication that Congress intended Section 7266(a)'s deadline to be jurisdictional. This holding, the Reporter observed, does not directly affect any deadlines that affect practice in the courts of appeals. But the *Henderson* Court's method of distinguishing *Bowles* – as a case that concerned court/court review – might leave the door open in future cases for the argument that *Bowles* does not govern

the nature of deadlines for seeking court of appeals review of an administrative agency decision. Such an argument, though, would have to confront the precedent set by *Stone v. INS*, 514 U.S. 386 (1995), in which the Court held that the then-applicable statutory provision delineating the procedure for petitioning for court of appeals review of a final deportation order by the Board of Immigration Appeals was jurisdictional. The Reporter suggested that it will be interesting to see how this branch of the doctrine continues to develop. She also suggested that the Court's decision in *Henderson* appears likely to remove the impetus for the legislative proposals that grew out of the Federal Circuit's decision.

The Reporter also briefly noted a certiorari petition pending before the Court in *United States ex rel. O'Connell v. Chapman University* (No. 10-810), in which the petitioner seeks to narrow *Bowles* through the application of 28 U.S.C. § 2106. With respect to the development of *Bowles*-related caselaw in the courts of appeals, the Reporter observed that the most interesting questions continue to arise with respect to hybrid deadlines – namely, appeal deadlines set partly by statute and partly by rule.

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

Judge Sutton invited Ms. Mahoney to introduce this item. Ms. Mahoney observed that this item arose from Mr. Batalden's observation that under Appellate Rule 4(a)(4)(B) the time to appeal from an amended judgment runs from the entry of the order disposing of the last remaining tolling motion. In some scenarios, Mr. Batalden had suggested, the judgment might not be issued and entered until well after the entry of the order. Ms. Mahoney noted that the Committee has been considering how to clarify the Rule. The Committee has discussed a possible solution that would peg the re-starting of appeal time to the "later of" the entry of the order disposing of the last remaining tolling motion or the entry of any resulting judgment.

Ms. Mahoney reported that Mr. Taranto had recently suggested another possible approach – one that would require the entry of a new judgment on a separate document after the disposition of all tolling motions. If the court were to deny all of the tolling motions, it would re-enter the same judgment that it had originally entered. Such an approach, Ms. Mahoney suggested, could be by far the most sensible solution. Judge Sutton observed that Mr. Taranto has presented the Committee with a new way of thinking about the issue, and he suggested that it would be worthwhile to consider this new proposal over the summer.

Mr. Taranto noted that the proposal will require joint discussion with the Civil Rules Committee. He explained that his proposal uses the term "resetting motion," rather than "tolling motion," to indicate that the relevant motions, when timely filed, reset the appeal-time clock to 0. He stated that the objective of extending the separate-document requirement is to provide the benefit of formality in all cases, even when the end of a case follows from the disposition of a resetting motion. Extending the separate-document requirement, Mr. Taranto noted, might eliminate the need to define the term "disposing of" (a question that had occupied the Committee

at the fall 2010 meeting). The extension of the separate-document requirement could also, he argued, provide an opportunity to simplify Civil Rule 58 and Appellate Rule 4(a), because there would be no need to address separately the situations in which no separate document is currently required. Mr. Taranto explained that the proposal would make use of the statutory authorization, in 28 U.S.C. § 2072(c), to define when a district court's ruling is final for purposes of appeal under 28 U.S.C. § 1291. Under the proposal, the judgment in a case where timely resetting motions have been made would not be final for appeal purposes until the entry of the required separate document after the disposition of all resetting motions. But an appellant could waive the separate-document requirement and appeal an otherwise-final judgment after disposition of all resetting motions but prior to the provision of the separate document.

Judge Sutton expressed the Committee's gratitude for Mr. Taranto's work on this item, and he suggested that Mr. Taranto's proposal be forwarded to the Civil / Appellate Subcommittee for its consideration. Judge Sutton noted he had previously heard some misgivings about the separate document requirement. Judge Rosenthal observed that it would be optimistic to assume that the separate document requirement is widely known or understood. Judge Sutton asked Mr. Green how the circuit clerks would react to an expansion of the separate document requirement. Mr. Green responded that the change should be straightforward from the clerks' perspective. A district judge member observed that district judges within the Seventh Circuit do not question the separate document requirement. If a separate document were always (rather than sometimes) required, this member suggested, that could make compliance simpler for the district judges. Mr. Batalden expressed support for Mr. Taranto's proposal; he suggested that an additional benefit of requiring a new judgment on a separate document would be that enforcement of the judgment would be easier.

Judge Sutton thanked Mr. Taranto, Ms. Mahoney, Mr. Letter, and Mr. Batalden for their efforts with respect to this item.

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

Judge Sutton invited Mr. Letter to introduce this item, which concerns the doctrines that govern a litigant's attempt to "manufacture" a final judgment in order to take an appeal. Mr. Letter offered the following example: Suppose that a plaintiff includes five claims in a complaint and the court dismisses two of the five. Without obtaining a certification under Civil Rule 54(b), the plaintiff cannot appeal the dismissal of the two claims until the other three claims have been finally disposed of. Some lawyers have suggested that the option of seeking a Civil Rule 54(b) certification does not satisfactorily address this scenario because Rule 54(b) certification lies within the district judge's discretion. It is generally accepted that if the plaintiff dismisses the remaining three claims with prejudice, that dismissal results in a final judgment so that the plaintiff can appeal the dismissal of the two claims. If the plaintiff dismisses the three remaining claims without prejudice, some would argue this produces finality for appeal purposes but most take the contrary view. More difficult questions arise if the plaintiff dismisses the remaining

three claims with conditional prejudice (that is to say, stating that the dismissal is without prejudice to the reinstatement of the remaining three claims if the two previously-dismissed claims are reinstated on appeal).

Mr. Letter reported that the Civil / Appellate Subcommittee, which has been considering this item, has recently discussed suggestions by Ms. Mahoney and by Mr. Keisler. Judge Rosenthal observed that the Civil Rules Committee – at its spring meeting – discussed this item and concluded that it would welcome guidance from the Appellate Rules Committee.

Mr. Letter noted that lawyers in his office regularly ask him questions relating to the manufactured-finality doctrine. During the Subcommittee's prior discussions, questions were raised concerning the experience within the Second Circuit (which is the only Circuit so far to issue a decision approving the use of a conditional-prejudice dismissal to create an appealable judgment). Mr. Letter informally canvassed Assistant United States Attorneys in the Second Circuit – and especially in the Southern District of New York – to ask their experience; they told him that the issue of conditional-prejudice dismissals does not come up frequently.

Ms. Mahoney noted that there is consensus on the Subcommittee that a dismissal of the remaining claims with prejudice should produce finality. As to dismissals without prejudice, there is a circuit split, but the Subcommittee members believe that such dismissals should not produce finality. The question on which the Subcommittee has not reached consensus is how to treat conditional-prejudice dismissals. An attorney member of the Subcommittee from the Civil Rules Committee has expressed support for permitting conditional-prejudice dismissals to produce finality, and has expressed opposition to amending the rules to bar such dismissals from producing finality. Ms. Mahoney argued that the rules should be amended to provide for a nationally uniform approach to the question of manufactured finality. She noted that she finds the conditional-prejudice idea appealing but that it is proving complicated to devise a rule that would implement the idea in multi-party cases. In such cases, she observed, there is a possibility that unrestrained use of the conditional-prejudice dismissal mechanism could result in unfairness to parties other than the would-be appellant. Ms. Mahoney suggested that one possible approach would be to amend Civil Rule 54(b) to provide that the district court shall certify a separate Rule 54(b) judgment when the would-be appellant has dismissed all other claims with conditional prejudice, unless another party shows that such a certification would be unfair.

Mr. Taranto observed that the question of manufactured finality also arises in the context of criminal cases, and he asked Mr. Letter whether the DOJ has a view concerning potential amendments that would address this topic. Mr. Letter responded that the DOJ would definitely wish to express its views on the matter. Judge Rosenthal observed that many districts will not allow a criminal defendant to plead guilty unless the defendant waives appeal (including with respect to constitutional issues). Thus, in the criminal context, these issues could implicate the dynamic of plea bargaining. She noted that it would be wise to seek the views of the Criminal Rules Committee in order to gain a sense of how such changes would be viewed on the criminal side.

An appellate judge member observed that it is useful to ask whether a question of this nature is better resolved by rule or by caselaw; in this instance, he noted, the fact that the question concerns appellate jurisdiction might weigh against leaving the issue to development in the caselaw. Concerning Ms. Mahoney's suggestion that it would be useful for a rules amendment to address the circuit split concerning the effect of dismissals without prejudice, the member noted that such an amendment would seek to achieve uniformity by adopting the more stringent side of the circuit split. Ms. Mahoney acknowledged this point but argued that the circumstances under which an appeal is available should be uniform from one circuit to another. She suggested that it would be useful to know whether the Appellate Rules Committee feels that the circuit split should be addressed.

An appellate judge member of the Civil / Appellate Subcommittee expressed a preference for not amending the rules to address the manufactured-finality issue. Amending the rules, he suggested, might interfere with the flexibility that is currently available to district judges. Another appellate judge member of the Committee expressed agreement with this view. An attorney member argued, in response, that in the circuits where the manufactured-finality doctrine currently permits the appellant an alternative way to appeal without obtaining a Civil Rule 54(b) certification, the existing doctrine can be seen as removing control from the district judges. The appellate judge member responded that such a result would only occur in a circuit in which the court of appeals has chosen to move the doctrine in that direction. This judge member stated that if the Rules Committees were to do anything with respect to this item, he would lean toward putting control in the hands of the district judge.

An appellate judge member wondered whether it would be beneficial for the Committee to ask the Subcommittee whether the Subcommittee's members could reach consensus on a concrete proposal. Mr. Letter suggested that it would be a mistake not to take action to address the question of manufactured finality. The appellate judge member responded that it would be helpful for the Subcommittee to craft a concrete proposal, at least concerning the treatment of dismissals without prejudice. An attorney member of the Subcommittee suggested that it would be useful to encourage the Subcommittee to address both dismissals without prejudice and conditional-prejudice dismissals. An appellate judge member of the Subcommittee reiterated his view that the rulemakers should not proceed at this time to propose an amendment; rather, he suggested, the Committee could re-consider the question later if someone in the future formulates a proposal on the subject.

It was decided that the Committee would request that the Subcommittee attempt to reach consensus on a specific proposal. Consultation with the Criminal Rules Committee will become necessary in the event that the Civil and Appellate Rules Committees decide to move forward with a proposal.

D. Item No. 08-AP-K (alien registration numbers)

Judge Sutton invited the Reporter to introduce this item, which arose from concerns voiced in 2008 by Public.Resource.Org about the presence of social security numbers and alien registration numbers in federal appellate opinions. The Appellate Rules Committee discussed the issue in fall 2008 and referred it to the Standing Committee's Privacy Subcommittee, which was considering various privacy-related questions relating to the national Rules. The Privacy Subcommittee reviewed the materials submitted by Public.Resource.Org; it commissioned the FJC to conduct a survey of court filings; it reviewed local rules concerning redaction; with the assistance of the FJC, it surveyed judges, clerks and attorneys about privacy-related issues; and it held a day-long conference at Fordham Law School in April 2010. One of the panels at the Fordham Conference focused specifically on immigration cases.

In its recent report to the Standing Committee, the Privacy Subcommittee concluded that alien registration numbers should not be added to the list of items for which the national Rules require redaction. The Subcommittee found that disclosure of alien registration numbers does not pose a substantial risk of identity theft. In addition, the Subcommittee noted that both the DOJ and circuit clerks had emphasized that alien numbers provide an essential means of distinguishing among litigants and preventing confusion.

The Reporter suggested that in the light of the Privacy Subcommittee's determination, the Committee might wish to consider removing Item No. 08-AP-K from the Committee's study agenda. A motion to remove that item from the study agenda was made and seconded and passed by voice vote without opposition.

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

Judge Sutton introduced this item, which concerns the possibility of amending Appellate Rule 4(a)(2) to address the question of the relation forward of a premature notice of appeal. Judge Sutton noted that the Committee's previous review of the caselaw applying the relation-forward doctrine to a range of fact patterns had found a number of lopsided circuit splits concerning the availability of relation forward in particular sorts of circumstances. He observed that, since the time that the Committee commenced its consideration of this issue, developments in the caselaw appear to have lessened or removed some of the circuit splits. He suggested that the Committee should consider whether it would prefer to consider amending Rule 4(a)(2); or hold the item on the agenda while monitoring the developing caselaw; or remove the item altogether.

Judge Sutton pointed out that if the Committee decides to consider amending Rule 4(a), the agenda materials included four sketches designed to illustrate different possible approaches. Judge Sutton stated that among those four sketches, he slightly favored the fourth, which would amend Rule 4(a)(2) to provide a (non-exhaustive) list of scenarios in which relation forward occurs. He asked participants for their views on whether pursuit of a Rules amendment would be worthwhile.

A district judge member asked whether the relation-forward ruling in in *Strasburg v. State Bar of Wisconsin*, 1 F.3d 468 (7th Cir. 1993), *overruled on other grounds by Otis v. City of Chicago*, 29 F.3d 1159 (7th Cir. 1994), was still good law. He suggested that the Seventh Circuit's caselaw may be moving away from the *Strasburg* approach for cases where a decision is announced contingent on a future event and the notice of appeal is filed between the announcement and the occurrence of the contingency. He wondered whether there is any problem that needs to be addressed through a Rules amendment.

Judge Sutton responded that Rule 4(a)(2) does not set out the approaches that courts have developed through the caselaw, and he wondered whether the Rule could usefully codify existing practice. The question, he suggested, is whether the existence of inter-circuit consensus on a given approach provides a reason to codify that approach in the Rule. Judge Rosenthal observed that one could view the recent adoption of Civil Rule 62.1 and Appellate Rule 12.1 as an example of such codification. There was general consensus (subject to variation on some details) among the circuits concerning the practice of indicative rulings, but many practitioners were unfamiliar with the indicative-ruling mechanism. There is a role, she suggested, for Rule amendments that codify and/or clarify existing practice. Such rules can be especially helpful in providing guidance to pro se litigants.

An attorney member expressed support for retaining this item on the agenda and continuing to work on it while also monitoring the caselaw developments. This member pointed out that the Eighth Circuit has rejected the majority approach to scenarios that involve a judgment as to fewer than all claims or parties, with later disposition of all remaining claims with respect to all parties. There is no reason to think, the member suggested, that the Eighth Circuit will reverse itself on this point. Turning to the four possibilities sketched in the agenda materials, this member expressed skepticism concerning the second and third sketches because those approaches would not resolve all of the existing circuit splits. The member stated that the first sketch[4] provides an approach that seems harsh but would be clear. As to the fourth sketch, the member suggested that the list of scenarios in which relation forward can occur should be introduced by the phrase "including but not limited to" in order to avoid creating the impression that the listed scenarios are the only ones in which relation forward can occur. There are, the member observed, many possible permutations.

By consensus, the Committee resolved to continue its work on this item.

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

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[4] In that sketch, Rule 4(a)(2) would be amended to read: "A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry, if and only if the decision or order, as announced, would otherwise be appealable."

Judge Sutton thanked Ms. Leary for her excellent research concerning the award of costs under Appellate Rule 39, and he invited her to present that research to the Committee. Ms. Leary observed that the Committee had asked the FJC to provide data in response to concerns raised about the taxation of costs by the Fourth Circuit in the case of *Snyder v. Phelps*. Ms. Leary explained that the FJC had researched each circuit's local rules and procedures for determining cost awards, and that the FJC had used the courts of appeals' CM/ECF databases to identify cases in which cost awards had been made.

Ms. Leary reported that there is no simple answer to the question what constitutes a typical award of appellate costs under Rule 39. Multiple variables determine the amount of a Rule 39 cost award, and each circuit has adopted its own combination of those variables. The variables include the range of documents and fees that are recoverable, the amount recoverable for copying each page of a document, and the number of copies for which costs are recoverable.

Turning to the results of the FJC's database search, Ms. Leary cautioned that the search was limited by the fact that the FJC had not obtained data from the Federal Circuit because that Circuit was not yet live on CM/ECF. In addition, the data from the Second and Eleventh Circuits were limited because those Circuits only recently went live on CM/ECF. Some limitations also applied to the data from the Fifth, Seventh, and Ninth Circuits. The data show that most cost awards go to appellees upon affirmance of the judgment below. But when appellants received cost awards upon reversal, partial reversal, modification, or vacatur of the judgment below, their average cost award was higher than the average cost award to appellees. Using the range in size of a majority of the awards in a given circuit as a benchmark, the FJC assessed whether any awards in that circuit could be seen as "outliers" in relation to that circuit's normal range. Such outliers were found in nine circuits; the award in *Snyder* was one such outlier. The very large award in *Snyder* resulted from the length of the appendix and the fact that the Fourth Circuit permits recovery of printing costs up to $4.00 per page (which in *Snyder* meant recovery of 50 cents per page for each of eight copies of the appendix).

Judge Sutton noted that in the *Snyder* case, the existing rules gave the court of appeals the discretion not to impose costs on the appellant. Professor Coquillette agreed that Rule 39 gives the court of appeals discretion. Mr. Letter noted that it would not be a good idea for Rule 39 to be amended to distinguish among particular types of cases with respect to the permissibility of cost awards.

Judge Sutton asked how costs would be computed in a case where the briefs are filed electronically. Mr. Green responded that if the briefs were filed only in electronic form, then no printing costs would be awarded. However, he noted that – with the exception of the Sixth Circuit – the circuits that have transitioned to electronic filing nonetheless require paper copies as well.

Judge Sutton stated that he would send a copy of Ms. Leary's report to the Chief Judge and Circuit Clerk for each Circuit. By consensus, the Committee retained this item on its study

agenda.

G. Item No. 10-AP-E (effect of withdrawal of a timely-filed post-judgment motion on the time to appeal in a civil case)

Judge Sutton invited the Reporter to introduce this item, which arose from Howard Bashman's suggestion that the Committee consider issues raised by *Vanderwerf v. SmithKline Beecham Corp.*, 603 F.3d 842 (10th Cir. 2010). The Reporter reminded the Committee that in *Vanderwerf*, the majority held that the withdrawal of a Civil Rule 59(e) motion deprived that motion of tolling effect and rendered the movant's appeal untimely. No consensus emerged, at the fall 2010 meeting, in favor of a rulemaking response to *Vanderwerf*. Members did express interest in considering further the situation faced by a non-movant who has relied on the tolling effect of a post-judgment motion that is subsequently withdrawn. One might question whether the *Vanderwerf* holding extends to cases in which the movant and the appellant are different parties. It would not seem to make sense to extend the *Vanderwerf* holding to situations in which the tolling motion is made (and then withdrawn) by a litigant other than the would-be appellant. Admittedly, no textual basis is readily apparent in Appellate Rule 4(a)(4) for distinguishing between appeals by the litigant that made the withdrawn motion and appeals by other litigants. However, there has as yet been no decision that applies *Vanderwerf* to an appeal by a non-movant. The Reporter suggested that the Committee consider whether, in the absence of such a decision, it is worthwhile to maintain this item on the study agenda.

A motion was made and seconded to remove Item No. 10-AP-E from the study agenda. The motion passed by voice vote without dissent.

H. Item No. 10-AP-G (intervention on appeal)

Judge Sutton invited discussion of this item, which arose from Mr. Letter's observation that Civil Rule 24 sets standards for intervention in the district courts, but that no comparable provision covers the general question of intervention in the courts of appeals. Mr. Letter noted that the United States has been successful in moving to intervene in a number of appeals. He observed that unless a statute provides a right to intervene, the decision whether to allow intervention rests in the court's discretion. An attorney member expressed concern with the idea of formalizing a procedure for seeking to intervene in the court of appeals (instead of in the district court); such a measure, this member suggested, might have unintended consequences.

A motion was made and seconded to remove Item No. 10-AP-G from the study agenda. The motion passed by voice vote without dissent.

VII. Additional Old Business and New Business

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

Judge Sutton invited the Reporter to present this item, which arises from concerns expressed by Paul Alan Levy, an attorney at Public Citizen Litigation Group, concerning redactions in appellate briefs. Mr. Levy explains that in some cases, broadly worded district court orders permitting the parties to designate discovery materials as confidential may be followed by the filing, on appeal, of briefs that are heavily redacted to obscure references to those materials. Mr. Levy reports that the filers of such redacted briefs often provide no justification for the redactions. In some cases, no one files a motion to unseal the unredacted copies of the briefs; and even if such a motion is filed, by the time that the unredacted copies of the briefs are filed it is too late for would-be amici to have a meaningful chance to draft their briefs in the light of the unredacted record.

The Reporter noted that she had shared Mr. Levy's suggestion with the Chairs and Reporters of the Privacy and Sealing Subcommittees, and that Judge Hartz had provided thoughtful comments. Judge Hartz observed that the questions raised by Mr. Levy fall outside the scope of the Sealing Subcommittee's inquiries, because that Subcommittee considered only the sealing of entire cases. But some of the Subcommittee's suggestions – such as requiring judicial oversight of sealing decisions and sealing as little as necessary – could be relevant to Mr. Levy's concerns. Judge Hartz noted that the appellate context poses challenges because judges are not usually assigned to a case until after the answering brief is filed, and even then judges may feel uncomfortable resolving a sealing question before having had a chance to fully consider the merits of the appeal. The challenge, he suggested, is to provide for judicial involvement without creating too great a burden. One possibility might be an approach that provides that matters are unsealed when submitted to the court of appeals absent a showing of good cause.

The Reporter noted that all circuits have one or more local provisions dealing with sealed materials. Not all circuits specify whether materials sealed below presumptively remain sealed on appeal. Seven circuits have provisions that state or imply (with varying degrees of explicitness) that materials sealed below presumptively remain sealed on appeal. But two of those seven circuits – the First and the Sixth – also provide that a party wishing to file a sealed brief must move for leave to do so. Two circuits take a different approach: When records have been sealed below, these circuits maintain the seal only for a limited period to afford an opportunity for a party to move in the court of appeals to seal the materials. The Seventh Circuit applies this approach to all cases, except where a statute or procedural rule provides otherwise. The Third Circuit follows this approach in appeals in civil cases, and also provides that a litigant must move for leave to file a sealed brief.

Mr. Taranto drew the Committee's attention to the Federal Circuit's recent decision in *In re Violation of Rule 28(d)*, 2011 WL 1137296 (Fed. Cir. Mar. 29, 2011), in which the court of appeals sanctioned counsel for improperly marking portions of briefs confidential in violation of Federal Circuit Rule 28(d). Judge Rosenthal noted the Civil Rules Committee's extensive

consideration of protective orders issued under Civil Rule 26. She observed that the law is quite clear that good cause is required in order for the court to seal discovery items. And a more stringent showing is required in order to seal materials filed with the court in support of a request for judicial action. Despite the clarity of the law, however, practitioners persist in asserting that materials subject to a protective order are for that reason subject to sealing even when submitted as part of a court filing. There is a divide between law and practice. A district judge member agreed, and noted that in the Seventh Circuit matters are presumptively unsealed if the litigant fails to show within 14 days why they should remain sealed. Judge Sutton asked whether the concerns about sealing in the court of appeals would dissipate if questions of sealing were properly addressed at the district court level. A district judge participant said that they would.

A district judge member suggested that practices would improve if the Appellate Rules embodied the approach taken by the Seventh Circuit; the presence of such a provision in the Appellate Rules would help to focus district judges on the need to require a stringent showing to seal materials filed in support of a request for judicial action. An attorney member stated that the standards for sealing in the district court and the court of appeals should be the same. Another attorney member agreed, but noted that the application of those standards in the court of appeals might differ from that in the district court if the reason for protecting the materials at issue has dissipated by the time of the appeal. Mr. Letter pointed out that D.C. Circuit Rule 47.1(b) requires the parties to an appeal to review the record to make sure that continued sealing is appropriate.

Judge Sutton suggested that the Committee coordinate its consideration of these questions with the Civil Rules Committee. Mr. Letter observed that this topic also has implications for criminal matters. He suggested that one approach to the issue might be to impose a requirement that the district court review any sealing orders before closing a case. An alternative approach would be to adopt the D.C. Circuit's requirement of continuing review. Judge Rosenthal observed that the question of Rule 26 and protective orders has been on the agenda of the Civil Rules Committee for a very long time. The Civil Rules Committee has not, to date, found it necessary to update Rule 26 as it relates to protective orders and confidentiality, because the caselaw dealing with this issue is on the right track. However, a conclusion by the Civil Rules Committee that there is no need to amend Civil Rule 26 does not necessarily answer the question raised by Mr. Levy. The Appellate Rules Committee could consider requiring re-justification of any sealing decisions in the context of an appeal; it might be the case that a separate set of arguments becomes relevant in the appeal context. Professor Coquillette expressed agreement.

A district judge member observed that in the Seventh Circuit, lawyers know that the court of appeals will unseal matters that should not have been sealed, and this provides accountability. An attorney member asked whether the Appellate Rules Committee should consider adopting in the national rules an approach like the Seventh Circuit's. An appellate judge member asked whether the Supreme Court has a rule governing sealed documents. Mr. Letter stated that he did not think that the Supreme Court has a rule. Sealed filings are rare in the Supreme Court, he observed, but the DOJ has made such filings on occasion.

By consensus, the Committee retained this item on its study agenda. Judge Dow agreed to work with the Reporter to develop a proposal for presentation to the Committee in the fall.

B. Item No. 11-AP-A (exempt amicus statement of interest from length limit)

Judge Sutton invited the Reporter to introduce this item, which concerns a proposal by R. Shawn Gunnarson and Alexander Dushku that Appellate Rule 32(a)(7)(B)(iii) be amended to "provide that the statement of interest by an amicus curiae, required by Rule 29(c)(4), is not included in the word count for purposes of the type-volume limitation of Rule 32(a)(7)(B)." The proponents argue that amici's statements of interest are more similar to items already excluded from Rule 32(a)(7)(B)'s limits than to other items that must be counted under those limits. They report that counting the statement of interest for purposes of Rule 32(a)(7)(B)'s limits is burdensome when a brief is filed by a large consortium of amici. And they state that the interpretations of the current Rule by clerk's offices vary from circuit to circuit.

The Reporter stated that Messrs. Gunnarson and Dushku make good arguments for exempting the statement of interest from the length limit. On the other hand, it is worth considering the possible downside of such an exemption: It might tempt amici to skirt the length limits by smuggling argument into the statement of interest. To get a sense of length of statements of interest, the Reporter had performed a small and rough search on Westlaw. The search – described in the agenda materials – found a wide variation in length, both in absolute terms and when measured in number of words per amicus. Many statements in the sample were concise, but not all were. And the three briefs, within the sample, that had the greatest number of words per amicus contained argumentation.

The Reporter noted that most circuits do not appear to address by local rule whether the statement of interest is included in the length limit; the Third Circuit, though, does have a local rule that appears intended to exclude the statement. A member asked whether the three longest statements in the sample came from briefs filed in a circuit that excluded the statement of interest from the length limit. The Reporter stated that she would check.[5] An attorney member observed that the Rules should attempt to encourage multiple amici to file a single brief when possible. This member wondered whether a rule could be drafted that would exclude the statement of interest from the word count, but only up to a specific number of words per amicus. Another attorney member responded that any rule that depended on the number of amici could be manipulated – for example, by listing as amici not only an association but also its members. This member suggested, as an alternative, a rule that would exclude the statement of interest up to a uniform ceiling (such as 250 words). A third attorney member stated that he did not think it was worthwhile to address this matter in the national Rules.

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[5] Subsequent to the meeting, the Reporter determined that one of the three briefs in question was filed in the Third Circuit.

An attorney member noted that in Supreme Court briefs, it has become customary to place in a separate addendum or appendix a paragraph describing each amicus; that addendum or appendix does not count toward the length limit. A district judge member observed that some court of appeals judges prefer not to encourage amicus filings, and he suggested that such judges would fail to see a reason to address this question in the national Rules; he noted that an amicus can make a motion for permission to serve an over-length brief. Judge Sutton asked the meeting participants whether any of them had found the current Rule to be problematic. An attorney member responded that she could envision cases in which it could be a problem, but that in such instances the amicus could file a motion.

The Reporter had noted earlier that an argument might be made for excluding new Rule 29(c)(5)'s authorship-and-funding disclosure requirement from the length limits. Judge Sutton recommended that the Committee defer considering that possibility until such time as it is considering other amendments to the relevant Rule.

A motion was made and seconded to remove Item No. 11-AP-A from the study agenda. The motion based by voice vote without dissent.

VIII. Joint Discussion with Advisory Committee on Bankruptcy Rules concerning Item No. 09-AP-C (Bankruptcy Rules Committee's project to revise Part VIII of the Bankruptcy Rules), and Item No. 08-AP-L (FRAP 6(b)(2)(A) / *Sorensen* issue)

At 8:35 a.m. on April 7, Judge Sutton and Judge Eugene R. Wedoff called to order the joint meeting of the Bankruptcy Rules Committee and the Appellate Rules Committee. Present from the Bankruptcy Rules Committee were Judge Wedoff (the Chair of the Committee); Judge Karen K. Caldwell; Judge Arthur I. Harris; Judge Sandra Segal Ikuta; Judge Robert James Jonker; Judge Adalberto Jordan; Judge William H. Pauley III; Judge Elizabeth L. Perris; Chief Judge Judith H. Wizmur; J. Michael Lamberth, Esq.; David A. Lander, Esq.; and John Rao, Esq. J. Christopher Kohn, Esq., Director of the Commercial Litigation Branch of the Civil Division of the DOJ, was present as an ex officio member of the Bankruptcy Rules Committee. Judge Laura Taylor Swain attended as the past Chair of the Bankruptcy Rules Committee. Judge James A. Teilborg attended as liaison from the Standing Committee and Judge Joan Humphrey Lefkow attended as liaison from the Committee on the Administration of the Bankruptcy System. Present as Advisors or Consultants to the Bankruptcy Rules Committee were Patricia S. Ketchum, Esq.; Mark A. Redmiles (Deputy Director, Executive Office for U.S. Trustees); and James J. Waldron (Clerk of the United States Bankruptcy Court for the District of New Jersey). Also present were Judge Dennis Montali, Molly T. Johnson from the FJC, and James H. Wannamaker III and Scott Myers from the AO. Professor S. Elizabeth Gibson and Professor Troy A. McKenzie were present as the Reporter and Assistant Reporter for the Bankruptcy Rules Committee. Also in attendance were Philip S. Corwin, Esq. of Butera & Andrews; David Melcer, Esq. of Bass & Associates P.C.; and Lisa A. Tracy of the Executive Office for U.S. Trustees.

Judge Sutton commenced by observing that the joint meeting would be interesting and helpful. He noted that the Appellate Rules Committee members were eager to benefit from discussions with the Bankruptcy Rules Committee, including with respect to the experience with electronic filing in bankruptcy. Judge Wedoff thanked the Appellate Rules Committee for agreeing to meet jointly with the Bankruptcy Rules Committee. He noted that one of the goals of the Bankruptcy Rules Committee's Part VIII revision project is to achieve consistency with the Appellate Rules. Judge Wedoff introduced three new members of the Bankruptcy Rules Committee. Judge Robert James Jonker is a district judge in the Western District of Michigan who has had a longstanding interest in bankruptcy law. Judge Adalberto Jordan, who clerked for Justice O'Connor, will be joining the subcommittee on appeals and will bring a great deal of appellate experience to that subcommittee. Professor Troy A. McKenzie joins the Committee as its Assistant Reporter; Professor McKenzie, who teaches at N.Y.U. Law School, has a rare combination of expertise in both bankruptcy and civil procedure.

Judge Pauley observed that the Part VIII revision project arose from the efforts of Eric Brunstad, who produced an initial draft of the proposed revision. The Bankruptcy Rules Committee's Subcommittee on Privacy, Public Access, and Appeals has held two mini-conferences on the subject. The process has been iterative and thoughtful.

Professor Gibson proposed that the joint meeting focus on issues of common interest to the two Committees. Those include issues relating to electronic filing and transmission, as well as issues concerning the intersection of the Bankruptcy and Appellate Rules (especially with respect to appeals directly from the bankruptcy court to the court of appeals). Professor Gibson noted that bankruptcy appeals are relatively rare, and that it is thus a challenge to find practitioners who specialize in appellate bankruptcy practice. She reported that there have been two perspectives voiced during the deliberations thus far – that of practitioners who handle bankruptcy appeals only occasionally and who view the Part VIII Rules as difficult, and that of appellate specialists who would like the Part VIII Rules to more closely resemble the Appellate Rules.

Professor Gibson observed that the Bankruptcy Rules elsewhere incorporate by reference a number of Civil Rules. Thus, a question that arose early on was whether the Part VIII Rules should simply incorporate the Appellate Rules by reference. At the Standing Committee's January 2011 meeting, it became clear that the Standing Committee does not favor such an approach for the Part VIII Rules.

Professor Gibson suggested that it might be useful for the joint meeting to commence by discussing the possibility of incorporating into the national Rules a presumption of electronic filing and transmission. For example, how would such a change affect the rules concerning the submission of briefs, the form of briefs, and how the record is assembled? Professor Gibson noted that it would be particularly useful to learn about the experience in the Sixth Circuit; she observed that other courts, such as the Ninth Circuit Bankruptcy Appellate Panel ("BAP"), have also moved toward electronic filing. She pointed out that a key question is how to manage the

transition to electronic filing while also retaining paper filing where necessary. Judge Sutton responded that in the courts of appeals, there is a presumption that there will continue to be paper filings; the courts must accommodate filings by inmates, who will ordinarily file in paper form rather than electronically. Professor Gibson noted that in bankruptcy a similar accommodation must be made for paper filings by pro se debtors. A member of the Bankruptcy Rules Committee noted that the rates of paper filings vary by district but can be as high as 25 or 30 percent; this member noted that the court will scan paper filings into PDF format. Judge Wedoff noted that the requirement that attorneys file electronically has worked well. Mr. Green observed that while circuits other than the Sixth Circuit will accept electronic filings, those circuits also require paper copies. In courts within the Sixth Circuit, he reported, some 40 to 45 percent of the filings are paper filings by inmates; the court converts those filings to PDF format. The Sixth Circuit generally will not accept paper filings from attorneys and does not accept the appendix or record excerpts in paper form. Instead, the judges access the electronic record themselves. But the Sixth Circuit, he noted, is an outlier in this respect. Judge Wedoff asked whether the Sixth Circuit's system has worked well. Judge Sutton responded that it is the right approach, but that it took years for judges' chambers to adjust; the Sixth Circuit's system transfers the burden of printing to chambers. During the first year of electronic filing, Judge Sutton printed paper copies of briefs; now, he reads them on an iPad. Professor Gibson asked how the record is handled in the Sixth Circuit. Mr. Green responded that the electronic case filing architecture differs in the court of appeals, so the Clerk's Office must reach out and bring the electronic record from the court below into the court of appeals' system. The Clerk's Office is able to use that method to provide the court of appeals judges with electronic links to the record. Counsel identify for the court of appeals what the relevant portions of the record are. Judge Sutton noted that the Sixth Circuit used to include in the case schedule time to assemble the appendix; things move faster now because there is no need to allow time for putting the appendix together.

A participant asked whether bankruptcy judges like the system of electronic filing. Judge Wedoff responded that the system works well because the Clerk's Office provides whatever support the judges need. A key benefit is that a judge can work on the latest filings from anywhere, whether at home or during travel. And litigants, similarly, can file wherever and whenever they prefer. A bankruptcy judge from the Ninth Circuit agreed. In his district, each judge posts his or her policy concerning chambers copies. Another advantage of electronic filing is that emergency matters can be filed and accessed at any time. Electronic filing is particularly useful for the BAP because the Ninth Circuit spans such a large area. Judge Sutton asked what provisions the bankruptcy courts have made for situations in which the computer system crashes. Judge Wedoff responded that the courts have backup centers at other locations; backing up court files, he observed, is easier when those files are in electronic format.

Professor Gibson turned the Committees' attention to proposed Bankruptcy Rule 8006, which concerns the certification of a direct appeal to the court of appeals. Professor Gibson explained that the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") put in place for bankruptcy appeals a framework – in 28 U.S.C. § 158(d)(2) – for direct appeals by permission that is in some ways similar to, but in other ways quite distinct

from, the interlocutory-appeal framework set by 28 U.S.C. § 1292(b). Under Section 158(d)(2), a direct appeal from the bankruptcy court to the court of appeals requires a certification from a lower court and also requires permission from the court of appeals. Section 158(d)(2)'s criteria for the certification differ from those set by Section 1292(b) for interlocutory appeals from the district court to the court of appeals. Moreover, Section 158(d)(2) sets out a variety of means for certification. The certification may be made by the court on its own motion; by the court on a party's motion; by the court on request by a majority of the appellants and a majority of the appellees; or jointly by all the appellants and appellees. Three different courts can make the required certification in appropriate circumstances – the bankruptcy court, the BAP, or the district court. Proposed Rule 8006(d) provides that the certification is to be made by the court in which the matter is pending, and proposed Rule 8006(b) sets for the rule for determining in which court the matter is pending at a given time. Proposed Rule 8006(g) then sets a 30-day time limit for filing in the court of appeals a request for permission to take a direct appeal to the court of appeals.

Professor Gibson invited Professor Struve to discuss proposed new Appellate Rule 6(c), which would address the procedure for permissive direct appeals under Section 158(d)(2) subsequent to the filing in the court of appeals of the petition for leave to appeal. Proposed Rule 6(c)(1) provides that the Appellate Rules, with specified exceptions, govern such an appeal. Proposed Rule 6(c)(2) provides that Bankruptcy Rule 8009 and 8010 govern the designation and transmission of the record on appeal.

Professor Struve noted that it would be useful to obtain participants' views on whether proposed Appellate Rule 6(c), as drafted, appropriately addresses the procedure for direct appeals under Section 158(d)(2). As an example, she noted the question of stays pending appeal. The proposal as drafted would provide that Appellate Rule 8 would apply to direct appeals. That Rule's treatment of stays is basically similar to proposed Bankruptcy Rule 8007 (which addresses stays in the context of appeals from the bankruptcy court to the district court or BAP), but there is a question about Rule 8's provision for proceeding directly against a surety. Rule 8 provides that a surety's liability can be enforced on motion in the district court without the need for an independent action. If Rule 8 applies to bankruptcy direct appeals, then it would contemplate such a direct proceeding in the bankruptcy court. One question is whether such a proceeding would fall naturally within the existing jurisdiction of the bankruptcy court. Professor Gibson noted that Bankruptcy Rule 9025 currently provides that sureties submit to the jurisdiction of the bankruptcy court. Rule 9025, though, provides for the determination of the surety's liability in an adversary proceeding. This raises a question as to whether any provision for proceedings against the surety in the bankruptcy court should contemplate an adversary proceeding; perhaps proposed Appellate Rule 6(c) could be revised to incorporate by reference the terms of Bankruptcy Rule 9025. Professor Gibson asked whether any of the bankruptcy judges on the Committee wished to comment on their experiences with proceedings against sureties, but no members volunteered a response.

Professor Gibson asked whether participants in the meeting had experience with direct

appeals under Section 158(d)(2). Mr. Green reported that there have been few such direct appeals in the Sixth Circuit, and that there have been no problems with their processing. A bankruptcy judge observed that *Blausey v. United States Trustee*, 552 F.3d 1124 (9th Cir. 2009), illustrates the confusion that can arise concerning the appropriate procedure in connection with direct appeals under Section 158(d)(2). This judge observed that it would be salutary for the Rules to settle the question of the proper procedures on such appeals.

An attorney member of the Appellate Rules Committee observed that proposed Bankruptcy Rule 8006's certification provisions seem odd. Professor Gibson explained that those provisions are drawn from Section 158(d)(2). A participant questioned why Section 158(d)(2) provides for the four different means of certification noted previously. A bankruptcy judge member of the Bankruptcy Rules Committee observed that a Section 158(d)(2) certification can read in various ways; the bankruptcy judge can draft the certification with varying degrees of forcefulness. For example, if the judge is issuing the certification only because he or she is required to do so in response to a request by a majority of the appellants and a majority of the appellees, the judge may draft a certification that sounds equivocal.

Professor Struve noted that the joint Part VIII project also provides an occasion to address possible revisions to Appellate Rule 6(b), which concerns appeals from a district court or BAP exercising appellate jurisdiction in a bankruptcy case. One proposed amendment to Rule 6(b) would update a cross-reference to Appellate Rule 12. Another proposed amendment would revise Rule 6(b)(2)(A) to eliminate an ambiguity; a similar ambiguity in Appellate Rule 4(a)(4) was eliminated by a 2009 amendment.

Professor Struve observed that the Appellate Rules Committee is currently considering other possible changes to Appellate Rule 4(a)(4), stemming from the fact that the time to appeal after disposition of a tolling motion runs from entry of the order disposing of the last remaining tolling motion rather than from entry of any resulting altered or amended judgment. In some instances, there can be a time lag between the two events – as when the court grants a motion for remittitur and the plaintiff has a period of time within which to decide whether to accept the remitted amount. At the Appellate Rules Committee’s meeting the previous day, the Committee’s consensus was that the possibilities it had previously considered for addressing this issue were not worth proceeding with. Instead, the Committee has decided to consider a new suggestion by Mr. Taranto that takes a different approach. Mr. Taranto’s proposal addresses the timing question by extending Civil Rule 58's separate document requirement to the disposition of tolling motions. Such an extension would provide clarity concerning the point at which the appeal time resets under Appellate Rule 4(a)(4). The Committee has not yet had an opportunity to seek the views of the Civil Rules Committee or the Civil / Appellate Subcommittee. Professor Struve noted that this project, as it develops, may be of interest to the Bankruptcy Rules Committee for several reasons. First, Bankruptcy Rule 7058 incorporates by reference the terms of Civil Rule 58. Second, it would be useful for participants to consider whether the issue that gave rise to the Appellate Rule 4(a)(4) project is salient in the bankruptcy context. Is a similar time lag (between entry of an order disposing of the last remaining tolling motion under current

Bankruptcy Rule 8015 and entry of any resulting altered or amended judgment) a problem in bankruptcy practice? Professor Gibson noted an additional reason for coordination on this issue: Proposed Bankruptcy Rule 8002 includes a subdivision modeled on Appellate Rule 4(a)(4). As to Appellate Rule 6(b)(2)(A), Professor Gibson observed that this Rule may present fewer current problems than Appellate Rule 4(a)(4) because Appellate Rule 6(b)(2)(A) treats only one type of tolling motion (namely, rehearing motions). Professor Gibson observed that current Bankruptcy Rule 8015 might provide a useful model for resolving any timing issue that arises from the disposition of such motions.

Judge Sutton asked the meeting participants for their thoughts on Civil Rule 58's separate document requirement. A participant responded that in bankruptcy, the separate document requirement becomes a trap for the unwary. To impose the separate document requirement, this participant suggested, could in effect be to extend appeal time in the name of clarity. Professor Struve asked whether compliance with the separate document requirement might increase if the requirement applied across the board (in contrast to the present system, which exempts dispositions of tolling motions). A participant predicted that such a change would not result in greater compliance. This participant observed that there used to be a brighter line for the separate document requirement in bankruptcy, but now the rules only impose the separate document requirement in adversary proceedings and not in contested matters. Another participant observed that adversary proceedings are very like civil actions; contested matters, however, can be a hodgepodge, and the operation of the separate document requirement in that context could be confusing. A bankruptcy judge member expressed gratitude for the fact that the separate document requirement no longer applies in contested matters.

Professor Gibson noted that another point of intersection between the Bankruptcy Rules and the Appellate Rules concerns indicative rulings. Proposed Bankruptcy Rule 8008 is intended to serve two functions. With respect to appeals pending in the court of appeals, it is the equivalent of Civil Rule 62.1 – namely, it tells the trial court what to do if someone seeks relief that the trial court lacks authority to grant due to a pending appeal. Proposed Bankruptcy Rule 8008 is also designed to address the indicative-ruling procedure for the appellate court when the appellate court in question is a district court or a BAP. Professor Gibson noted a further issue: Should the procedures set out in proposed Bankruptcy Rule 8008 apply when an indicative ruling is sought in the bankruptcy court while a non-direct appeal is pending in the court of appeals under Section 158(d)(1)? A participant responded that she thought the Rule should apply in that context as well.

Professor Gibson raised a question concerning the source of the authority to promulgate local rules for BAPs. She noted that it would be useful to determine whether that authority resides in the court of appeals, in the circuit judicial council, or in the BAP. Perhaps, she suggested, it would make sense that the body that creates the BAP also has the authority to promulgate rules for the BAP. Mr. Green reported that the Sixth Circuit BAP relies on the circuit council for promulgation of its local rules; the proposed rules are sent out for comment during the development of the proposals, and are ultimately sent to the circuit judicial council for

approval. Another participant observed that in the Ninth Circuit, the Circuit's standing rules committee handles the task of obtaining public comment on proposed BAP rules; this participant noted the importance of public comment.

Professor Gibson noted that the Appellate Rules contain a high level of detail concerning briefs, and she stated that it would be useful to get a sense whether participants favor a similar approach for the Part VIII Rules. An attorney member of the Appellate Rules Committee noted that detailed rules are useful to practitioners because such rules provide guidance. On the other hand, this member questioned whether district judges really want to receive briefs that conform to the Appellate Rules. A participant responded that the district court cares less about formalities than about simplicity and speed; the goal is to get the briefs in and resolve the case quickly. A court of appeals judge stated that it would be useful for the rules to evolve so that they do not specify the colors of brief covers. Another participant noted that Mr. Brunstad had proposed setting a default rule for the color of brief covers when the briefs are filed in paper form.

Professor Gibson also noted the potential importance of maintaining similar length limits for briefs at both stages of the appellate process (in the district court or BAP, and in the court of appeals). A bankruptcy judge agreed, and observed that Mr. Brunstad had expressed concern with the "dumbbell problem" – namely, that if the district court's length limit is tighter than the one that applies in the court of appeals, a party may find it difficult to preserve adequately all the points that it wishes to argue on appeal. A bankruptcy judge member stated that he likes the idea of specific requirements because they provide attorneys with structure; and he favors ensuring that the length limits are consistent at the two levels of appeal. An attorney participant agreed that he favors consistency between the two levels of appeal.

A district judge member of the Appellate Rules Committee expressed agreement with the idea that detailed briefing rules make things fairer for the lawyers. He noted that his district has a local rule that imposes a low page limit. Another district judge observed that bankruptcy cases are sufficiently challenging to begin with, and that it would be helpful for the briefs to be consistent from case to case.

Professor Gibson drew the Committees' attention to proposed Bankruptcy Rule 8009(f), concerning the treatment of sealed documents on appeal. The Appellate Rules do not currently address that issue. Professor Struve noted that the local rules in some circuits do address some issues relating to sealed documents. She also observed that another question might be whether all the circuits are ready to handle sealed documents electronically. Mr. Green responded that some circuits are prepared but that others are not. Another participant observed that it would be a good idea to look into the way in which the CM/ECF system handles sealed documents; she noted that the relevant technology is changing. A bankruptcy judge suggested that the Rule be drafted so as to incorporate by reference whatever the current CM/ECF technology and practice are.

In closing, Professor Gibson predicted that the Bankruptcy Rules Committee would

discuss a portion of the project at its fall 2011 meeting and another portion at the spring 2012 meeting. In the meantime, the Bankruptcy Rules Committee's working group will further refine the proposals. She expressed the Bankruptcy Rules Committee's desire to continue coordinating efforts with the Appellate Rules Committee. Judge Sutton promised to appoint one or two members of the Appellate Rules Committee to the working group, and expressed commitment to coordinating the two Committees' work going forward.

Judge Sutton thanked Judge Wedoff and the Bankruptcy Rules Committee for inviting the Appellate Rules Committee to join them. Judge Sutton noted that this was Judge Rosenthal's last meeting with the Appellate Rules Committee. He thanked her for her prodigious efforts and superb work as Chair of the Standing Committee. He observed that during her time as Chair she has attended the meetings of the Advisory Committees and the Standing Committee and the Judicial Conference. Judge Rosenthal thanked the Advisory Committees for their thorough, thoughtful, and innovative work. Judge Wedoff thanked the Appellate Rules Committee for their participation in the joint meeting.

IX. Adjournment

The Appellate Rules Committee adjourned at 10:25 a.m. on April 7, 2011.

Respectfully submitted,

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Catherine T. Struve
Reporter