Minutes of Spring 2014 Meeting of
Advisory Committee on Appellate Rules
April 28 and 29, 2014
Newark, New Jersey

I. Introductions

Judge Steven M. Colloton called the meeting of the Advisory Committee on Appellate Rules to order on Monday, April 28, 2014, at 10:00 a.m. at the Seton Hall University School of Law. The following Advisory Committee members were present: Judge Michael A. Chagares, Justice Allison H. Eid,[1] Judge Peter T. Fay, Judge Richard G. Taranto, Professor Amy Coney Barrett, Mr. Gregory G. Katsas, Professor Neal K. Katyal, and Mr. Kevin C. Newsom. Mr. Douglas Letter, Director of the Appellate Staff of the Civil Division, U.S. Department of Justice ("DOJ"), was present representing the Solicitor General. Judge Jeffrey S. Sutton, Chair of the Standing Committee; Mr. Jonathan C. Rose, the Standing Committee's Secretary and Rules Committee officer; Mr. Gregory G. Garre, liaison from the Standing Committee; Ms. Julie Wilson, Attorney Advisor in the Administrative Office ("AO"); Mr. Michael Ellis Gans, liaison from the appellate clerks; and Ms. Marie Leary from the Federal Judicial Center ("FJC") were also present. Judge Adalberto Jordan, liaison from the Advisory Committee on Bankruptcy Rules, and Professor Daniel R. Coquillette, Reporter for the Standing Committee, participated in portions of the meeting by telephone.

Judge Colloton began by expressing thanks to Patrick E. Hobbs, the Dean of Seton Hall University School of Law, for hosting the Committee's meeting. Dean Hobbs in turn thanked Judge Chagares for suggesting that the meeting be held at Seton Hall, and noted that the Law School would welcome future visits from any of the Rules Committees.

Judge Colloton welcomed the Committee's newest member. Mr. Katsas, a partner at Jones Day, has a distinguished record of appellate arguments in every circuit as well as in the United States Supreme Court. Mr. Letter observed that during Mr. Katsas's service in senior positions in the DOJ, Mr. Katsas gained high regard among the career civil servants there.

II. Approval of Minutes of April 2013 Meeting

A motion was made and seconded to approve the minutes of the Committee's April 2013 meeting. The motion passed by voice vote without dissent.

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[1] Justice Eid attended the meeting on April 28 but not on April 29.

III. Report on January 2014 Meeting of Standing Committee

Judge Colloton noted that he had given a report on the activities of the Appellate Rules Committee at the Standing Committee's January 2014 meeting. Due to the cancellation of the Appellate Rules Committee's fall 2013 meeting, he observed, there were no Appellate Rules action items for the January 2014 Standing Committee meeting.

The Reporter reminded the Committee that amendments to Appellate Rules 13, 14, 24, 28, and 28.1, and to Form 4, had taken effect on December 1, 2013. The proposed amendments to Appellate Rule 6, concerning appeals in bankruptcy cases, have been adopted by the Supreme Court and submitted to Congress; absent any contrary action by Congress, those amendments will take effect on December 1, 2014.

Judge Sutton observed that some lawyers are slow to adjust to the requirements of amended Rule 28(a) concerning the "statement of the case." Mr. Gans reported that his office has been educating lawyers about the new rule.

IV. Action Items – For Publication

Judge Colloton recalled that the Committee's fall 2013 meeting had been cancelled due to the lapse in appropriations. During the year that passed between the spring 2013 and spring 2014 meetings, he asked members of the Committee to work with him and the Reporter on proposals to address a number of items on the Committee's agenda.

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

Judge Colloton reminded the Committee that Item No. 07-AP-I arises from a suggestion by Judge Diane Wood that courts have experienced difficulty in interpreting Rule 4(c)(1)'s inmate-filing provision. Some courts treat the question of prepayment of postage differently depending on whether the inmate uses an institution's legal mail system (in which event these courts do not require prepayment of postage) or an institution's general mail system (in which event prepayment of postage is a precondition for applying Rule 4(c)(1)'s inmate-filing provision). Questions also have arisen concerning the declaration mentioned by Rule 4(c)(1); is such a declaration necessary in cases where other evidence shows the timely deposit of the notice of appeal in the institution's mail system? And, when a declaration is required, must it be included with the notice of appeal or can the inmate supply the declaration later?

The working group that addressed these questions included Justice Eid, Professor Barrett, and Mr. Letter. The group took as a starting point Supreme Court Rule 29.2, which provides in part: "If submitted by an inmate confined in an institution, a document is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing and is accompanied by a notarized statement or declaration in compliance with 28 U.S.C. § 1746 setting out the date of deposit and stating that first-class postage has been prepaid."

The group set out to answer three policy questions: First, should Rule 4(c)(1) require prepayment of postage as a condition for the application of the provision's inmate-filing rule? The working group suggested that the rule should require prepayment of postage. Second, should the availability of Rule 4(c)(1)'s inmate-filing rule depend on the inmate's use of an institution's legal mail system? The working group suggested that the provision should not require the inmate to use a legal mail system. The input received from the federal Bureau of Prisons (BOP) indicates that the distinction between legal mail systems and general mail systems often serves other goals, such as assuring the privacy of legal mail. There does not appear to be any institutional interest that would be served by requiring the inmate to use the legal (as opposed to general) mail system. Third, how should Rule 4(c)(1) treat the role of the declaration? The proposal set forth in the agenda materials would provide that a filing is timely if it is timely deposited in the institution's mail system with postage prepaid and is accompanied by the declaration. If the inmate does not include the declaration with the initial filing and other evidence accompanying the filing does not show its timeliness, then the court would have discretion whether or not to permit the inmate to establish timeliness by belatedly filing the declaration.

Judge Colloton invited the Reporter to introduce, for comment by the Committee members, the proposed text of the amendment and the proposed Committee Note. The Reporter pointed out that two restyled options for the text of Rule 4(c) were set out in her April 25 memorandum to the Committee and that the proposed Committee Note was set out in her April 22 memorandum; although the April 25 memo did not include a draft of Rule 25(a)(2)(C), the Rule 25(a)(2)(C) proposal could be revised to track the approach selected for Rule 4(c)(1).

With respect to the second restyled draft of Rule 4(c)(1) in the April 25 memo, a member suggested reordering subparts (c)(1)(A)(i) and (ii) so that the Rule would refer to the contemporaneously-provided declaration before going on to discuss other evidence of timeliness or a later-filed declaration. This ordering is preferable, she explained, because it highlights the preferred course of action – namely, including the declaration along with the filing. An appellate judge member expressed agreement with this reordering. Another appellate judge member also agreed with this proposed reordering, and stated that, more generally, she supports the proposed amendments to Rule 4(c). The current Rule's reference to a "system designed for legal mail" is undesirable, she suggested, because the Rule does not make clear what qualifies as such a system. Mr. Letter agreed that the reference to a "system designed for legal mail" should be deleted. Informal consultations with Chris Vasil, the Chief Deputy Clerk of the U.S. Supreme Court, and with Kenneth Hyle, the Deputy General Counsel of the BOP, disclosed no reason for retaining the legal-mail-system provision. And, Mr. Letter suggested, it seems preferable for the Appellate Rules' inmate-filing provisions to track the U.S. Supreme Court's inmate-filing provision as closely as possible.

Judge Colloton observed that Supreme Court Rule 29.2, unlike current Appellate Rule 4(c)(1), appears to require that the declaration "accompan[y]" the document that is being filed. In practice, though, if an inmate files a document without the declaration or notarized statement,

the Supreme Court will return the document to the inmate but then will accept it as timely filed if the inmate refiles the document with a declaration stating that the original mailing was deposited in the prison mailbox before the last date for filing with postage prepaid. The proposed amendments to Appellate Rules 4(c)(1) and 25(a)(2)(C) take a similar approach: They provide that the document is timely if "accompanied by" a satisfactory declaration, but also give the courts of appeals discretion to permit the later filing of a declaration.

An attorney member expressed agreement with the substantive choices reflected in the proposed amendments. He raised a question about the second restyled version of Rule 4(c)(1); as set out in the April 25 memo, the restyled rule would offer two alternatives – subdivision (A) and subdivision (B) – for establishing timeliness under the inmate-filing provision. Subdivision (B) includes the term "such a declaration or notarized statement." To know which declaration or statement this refers to, the reader must turn to subdivision (A) – but it does not make sense to rely on a referent located in subdivision (A), because (A) and (B) are alternatives. The Reporter suggested that this difficulty could be addressed by revising subdivision (B) to refer to subdivision 4(c)(1)(A)(i).

An appellate judge member noted that the text of the proposed rule addresses three possible ways to show timeliness: by means of a declaration included with the filing; by means of other evidence that accompanies the filing; or by means of a later-filed declaration. He asked whether this rule text would accommodate an instance where evidence other than a declaration is proffered after the fact. It was suggested that, in such an instance, the inmate could append copies of the relevant evidence to a declaration. Turning to the proposed Form 7 – which shows the suggested contents of the declaration – the judge member noted that the Form states that "first-class postage is being prepaid either by me or by the institution on my behalf." The member asked whether "is being prepaid" should be placed in brackets and paired with another bracketed alternative, "was prepaid." The latter, he suggested, would be the appropriate choice if the inmate were to file the declaration belatedly. The Reporter responded that "is being prepaid" was designed to reflect the overall preference that the inmate include the declaration along with the initial filing.

The appellate judge member also asked whether the Form, when referring to payment of postage by the institution, should say something like "based on my understanding, postage is being paid by the institution on my behalf." Such a formulation, he suggested, might be preferable because an inmate might not know with certainty whether the institution will pay the postage. Other participants, though, suggested that an inmate would be justified in saying "is being prepaid" if he or she has a reasonable expectation (grounded in the institution's policy) that the institution will pay the postage.

Another appellate judge member noted that a few institutions have begun to allow inmates to file court papers electronically. Would an inmate in such an institution, he asked, have to comply with Rule 4(c)(1)'s requirements? Judge Colloton responded that Rule 4(c)(1) provides the inmate with an option for showing timely filing of the notice of appeal, but recourse

to Rule 4(c)(1) is not mandatory.

An appellate judge asked whether proposed subdivision (c)(1)(B) – concerning later-filed declarations – would tempt inmates to omit the declaration from their initial filing. In response, the Reporter undertook to propose revised language for subdivision (c)(1)(B) that would highlight the fact that the court of appeals would have discretion to reject (as well as accept) later-filed declarations.

An attorney participant asked whether there are real problems (with the inmate-filing provisions) that necessitate rule amendments. Judge Colloton responded that the amendments will be worthwhile if they clarify the inmate-filing rule's operation. Mr. Gans stated that the proposed amendments will greatly improve the rule. He stated that in 2013 he had surveyed his fellow circuit clerks. The clerks reported that they have developed ways of handling inmate filings under the current rule. Typically, they look at the filing and if there is evidence of timeliness they accept it – but if a filing seems obviously untimely (as, for instance, when the date next to the inmate's signature post-dates the due date), the clerk will flag the timeliness issue. In the Eighth Circuit, Mr. Gans observed, from 35 to 40 percent of the appeals involve pro se litigants.

After the first day of the meeting concluded, the Chair and Reporter prepared a revised draft of the proposed amendments. The revisions reordered the two subparts of Rule 4(c)(1)(A), and revised Rule 4(c)(1)(B) to underscore the court of appeals' discretion concerning whether to permit a later-filed declaration. On the second day of the meeting, copies of the revised drafts were circulated to Committee members. After the Reporter summarized the changes to the drafts, a member moved to approve for publication the proposed amendments to Rules 4(c)(1) and 25(a)(2)(C), the proposed amendments to Forms 1 and 5, and the proposed new Form 7, as shown in the revised drafts circulated to the Committee that morning. The motion was seconded and passed by voice vote without dissent.

B. Item No. 12-AP-E (length limits, including matters now governed by page limits)

Judge Colloton noted that Item No. 12-AP-E grew out of Professor Katyal's suggestion that the length limit for petitions for rehearing en banc be stated using type-volume limits rather than word limits. The project expanded to encompass other questions relating to length limits. One question is whether the Rules should be amended to ensure uniform treatment (across different types of documents) concerning items to be excluded when computing length. Another question relates to the choice – made in connection with the 1998 amendments that produced current Rule 32 – to replace the old 50-page brief length limit with a new 14,000-word type-volume limit. While deliberating over the formulae to use when converting existing page limits into type-volume limits, the Committee became aware that the premise of the 1998 amendments – namely, that one page was equivalent to 280 words – appears to have been mistaken. Based on earlier research by Mr. Letter on behalf of the D.C. Circuit's rules committee, a better estimate

appears to be 250 words per page, which would have translated into a brief length limit of 12,500 words.

The proposed amendments, as restyled by Professor Kimble, were set out in the Reporter's April 22 memorandum to the Committee. Judge Colloton explained that, for briefs prepared using a computer, the proposals would replace existing page limits in Rules 5, 21, 27, 35, and 40 with type-volume limits. For briefs prepared without the use of a computer, the proposals would retain the existing page limits set forth in Rules 5, 21, 27, 35, and 40. A new Rule 32(f) would set forth one globally-applicable list of items to be excluded when computing length. The new type-volume limits in Rules 5, 21, 27, 35, and 40 would reflect an assumption that one page is equivalent to 250 words or to 26 lines of text. The amendments would also shorten the type-volume briefing length limits currently set out in Rules 28.1(e)(2) and 32(a)(7)(B), to reflect the more realistic estimate of 250 words per page. The Reporter mentioned that the draft tentatively included, in Rules 5, 21, 27, 35, and 40, cross-references to new Rule 32(f)'s list of exclusions. Professor Kimble, however, has explained that these cross-references are unnecessary and undesirable.

Judge Colloton invited Professor Katyal to discuss the proposals. Professor Katyal thanked the Committee for its work on this topic. The shift from page limits to type-volume limits, he said, will helpfully remove an opportunity for gamesmanship by lawyers who sought to manipulate page limits. The distinction between briefs produced by computer and briefs produced without a computer is analogous, Professor Katyal suggested, to the distinction made in the U.S. Supreme Court's rules between documents set out on 8 ½ by 11 inch paper and documents printed in booklet format. Professor Katyal suggested deleting, from Rule 32(f)'s list of exclusions, the amicus-brief authorship-and-funding disclosure; omitting that item from the list of exclusions would ensure that the Appellate Rules continue to parallel the Supreme Court's Rules in this regard. Professor Katyal noted that proposed Rule 32(f) carries forward the exclusion (currently set out in Rule 32(a)(7)(B)(iii)) of any "addendum containing statutes, rules, or regulations." In contrast to Supreme Court Rule 33.1(d) – which excludes " verbatim quotations required under [Supreme Court] Rule 14.1(f) and Rule 24.1(f)" even when they are set out in the text of the brief rather than in an appendix – Rule 32 does not exclude statutory quotations when they are in the body of the brief.

Professor Katyal predicted that, in contrast to the salutary shift to type-volume limits, the proposed reduction in briefing length limits would be much more controversial. In complex cases, lawyers need the full 14,000 words, and a reduction to 12,500 would force lawyers to spend time trying to reduce the length yet further or seeking permission to file an over-length brief. Recently, Professor Katyal reported, he had been involved in briefing some appeals for which it was very difficult to stay within the 14,000-word limit. Another attorney participant, however, suggested that shortening the briefing length limits would be acceptable. Briefs, he stated, seem to have become longer in recent years. This participant suggested adding the cover page to Rule 32(f)'s list of items to be excluded when computing length. He also suggested revising the Committee Note's statement that the page limits in Rules 5, 21, 27, 35, and 40 had

been "subject to manipulation by lawyers."

An appellate judge member stated that she supported rationalizing the treatment of exclusions. Another appellate judge member stated that he supported shortening the length limits; he reported that briefs seem to be about 60 pages long now, and 50 pages would be preferable. Mr. Letter noted his belief that the choice of 280 words per page as the conversion formula in connection with the 1998 amendments had indeed been a mistake. On the other hand, he said, some cases really are complex. And a number of Assistant United States Attorneys have reported to him that some circuits are unwilling to grant permission to file an over-length brief; accordingly, the prospect of a reduction (of the briefing length limit) to 12,500 words worries those AUSAs. And, Mr. Letter suggested, traditionally the Rules Committees do not amend a rule unless there is a very good reason to do so. The more stringent the length limit, the more likely that a litigant might fail to brief an issue that the court believes should have been addressed.

As for changing the page limits in Rules 5, 21, 27, 35, and 40 to type-volume limits, Mr. Letter noted that he had not heard many complaints about the page limits, and he wondered whether the type-volume limits would be cumbersome for clerks' offices to administer. Mr. Gans acknowledged that it is easier to check for compliance with a page limit than for compliance with a word limit, but he stated that the type-volume limits are administrable so long as the document includes a certificate of compliance with the limit.

Reflecting on his analysis of a sample of briefs filed in 2008 (i.e., under the current type-volume limits), Mr. Gans noted that he had been surprised to see how many of those briefs would actually have complied with a 12,500-word limit. An appellate judge member reported a different experience; in the Eleventh Circuit, he said, lawyers tend to use all the space that is permitted to them. This judge member noted that the choice of length limit presents a tradeoff: One prefers shorter briefs when possible, but in complex cases one wants the briefs to help work out all the issues. An attorney member stated that he favored reducing the length limits of briefs.

An appellate judge member asked whether a circuit could adopt a local rule setting a more generous length limit than the Appellate Rules. The Reporter stated that Rule 32(e) authorizes local rules that would set longer limits than those in Rule 32(a). Although no similar provision exists in Rule 28.1, the Reporter suggested that a circuit that wished to accept longer briefs could, in practice, make clear that it was willing to do so. The judge member, noting that the proposed amendments distinguish between "handwritten or typewritten" papers and papers "produced using a computer," asked which of those categories would encompass a typewriter with memory. The Reporter observed that there is a California state court rule that distinguishes between briefs "produced on a computer" and briefs "produced on a typewriter"; it might be useful, she suggested, to investigate whether the relevant California courts have encountered issues with respect to the use of typewriters with memory.

An attorney member stated that he opposed the reduction in briefing length limits. If attorneys use the full permitted length, it is because the case requires it. An appellate judge member responded that things seemed to work well, prior to the 1998 amendments, under the shorter length limit. Another appellate judge member observed that the Eleventh Circuit is willing to permit over-length briefs in complex cases. An attorney member responded that he is generally hesitant to request such permission; another attorney member noted that he shares this reluctance. Mr. Letter noted that the circuits vary in their willingness to permit over-length briefs. An attorney member suggested that, since 1998, circumstances may have changed; perhaps the law is more complex, and perhaps lawyers are more prone to prolixity.

An appellate judge observed that the discussion evidenced a clear divide between the perspectives of judges and the perspectives of attorneys. His court, he observed, often asks the lawyers for further briefing on particular issues. He wondered whether the bar would be shocked by a proposal to reduce length limits to 12,500 words, and he asked whether it would be useful to publish alternative proposals for comment.

An appellate judge member suggested removing the cross-references to new Rule 32(f) in the rules that set specific length limits. The Reporter asked whether the Committee wished to include – among the items to be excluded when computing length – the Rule 35(b)(1) statement concerning the reasons for en banc hearing or rehearing. An attorney participant suggested that the statement should be excluded from the length limit because such statements tend to be short. An appellate judge member disagreed, explaining that this statement is the heart of the petition for en banc rehearing. Nothing, this judge member said, requires the statement to be formulaic; and excluding the statement from the length limit might tempt lawyers to expand the statement. Mr. Gans agreed with the appellate judge member's prediction. The Reporter, noting that the local-rule equivalent of this statement is excluded from the length limit in the Eleventh Circuit, asked whether lawyers in that circuit abuse that exclusion by expanding the statement. An appellate judge member said that they do not.

A motion was made to adopt the proposed amendments as set out in the Reporter's April 22 memorandum, but with revisions that would (1) delete the cross-references to Rule 32(f); (2) include the Rule 35(b)(1) statement when computing length; (3) add the cover page to Rule 32(f)'s list of excluded items; (4) omit the authorship-and-funding disclosure statement from Rule 32(f)'s list; (5) revise the reference to "rules" in Rule 32(f)'s final bullet point so as to encompass exclusions set out in local circuit rules; and (6) revise the Committee Notes' discussion of the disadvantages of page limits. The motion was seconded, and it passed by a vote of six to four. It was observed that, when the proposed amendments are published for comment, the transmittal memo could point out the possibility that a circuit has authority to expand the length limit if it wishes to do so. On the evening of April 28, the Chair and Reporter compiled a revised draft of the proposed amendments. The Committee reviewed the revised draft when it met the following morning.

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

Judge Colloton introduced Item No. 13-AP-B, which concerns amicus filings in connection with rehearing petitions. Mr. Roy T. Englert, Jr. has pointed out that the Appellate Rules currently do not provide guidance concerning the length or timing of such filings. Judge Colloton directed the Committee's attention to the proposed draft amendments set out in the Reporter's April 22 memorandum, and noted that the bracketed options in the draft highlighted choices for the Committee if it decided to proceed with the proposals.

The first and most basic choice, Judge Colloton noted, is whether there should be a national rule on this topic. If so, then should the rule provide that all amici need leave of court to file briefs at the rehearing stage, or should the rule take the same approach currently taken (for the merits-briefing stage) by Rule 29(a), which permits certain governmental amici to file without party consent or court leave? Judge Colloton pointed out that the proposed draft would re-number the existing portions of Rule 29 as Rule 29(a), and would add a new Rule 29(b) to address the rehearing stage. Proposed Rule 29(b) would merely set default rules, and would allow circuits to opt out of those default rules by local rule or order in a case.

An appellate judge member reported that the Eleventh Circuit's local rule on this topic works well. An attorney member underscored how important it is for practitioners to know what the rules are. Judge Colloton solicited the Committee's views on proposed Rule 29(b)(2), which would state when court leave is required for amicus filings at the rehearing stage. Mr. Letter stated that the rule should allow the United States to file amicus briefs without court leave or party consent. Such filings, he noted, would occur rarely, and only with the approval of the Solicitor General. Dispensing with the requirement of court leave will save the court's time (by avoiding the need for motions for leave) and would assist the government in situations where the need to file an amicus brief arises suddenly. An attorney member asked whether States would be treated the same as the United States in this respect. Judge Colloton responded that they would. An appellate judge stated that he favored extending to the rehearing stage the Rule 29(a) approach. Another appellate judge member agreed. A third appellate judge member concurred, noting that requiring court leave would not make a difference in practice because the court will always grant the government leave to make an amicus filing.

Judge Colloton next asked the Committee what the default length limit should be for amicus filings at the rehearing stage. An attorney member suggested that half of the party's length limit would be appropriate, and another attorney participant agreed. Half of 15 pages would be 7 ½ pages. Rounding up to 8 pages and multiplying by 250 words per page would yield a limit of 2,000 words. The Reporter asked whether it would be worthwhile to distinguish, in this provision, between typewritten briefs and briefs produced using a computer. The consensus was that it would not be worthwhile: Would-be amici will prepare their briefs using computers, and the access-to-court concerns that weigh in favor of setting page limits (in addition to type-volume limits) for parties' filings would not apply with the same force to amicus filings.

Judge Colloton asked Committee members for their views on the timing of amicus filings in support of a rehearing petition. A deadline of three days after the filing of the rehearing petition, he suggested, might be best because it provides the amicus with a time lag but the time lag is not so long that it will interfere with the processing of the petition. An appellate judge member agreed that a relatively short deadline is desirable; the Third Circuit, this judge observed, processes rehearing petitions expeditiously. Another appellate judge member noted that the practice in the Federal Circuit is somewhat different. A petition for rehearing in the Federal Circuit goes first to the panel that decided the appeal, and only after that to the en banc court. Thus, the Federal Circuit takes somewhat longer to process rehearing petitions. This appellate judge member also noted that amicus filings can serve a particularly important function when the party's rehearing petition is poorly done.

An appellate judge member asked whether amici and parties tend to coordinate with each other at this stage of the litigation. An attorney member responded that coordination is customary. This member observed that, in setting the timing for amicus briefs in support of the petition, it is important not to allow so much time to the amicus that the party opposing the petition will be rushed when preparing the response. Another attorney member agreed that, in a typical instance, the party opposing rehearing is more rushed than the party seeking rehearing. Judge Colloton asked whether, in that case, it would be preferable to require the amicus to file simultaneously with the party seeking rehearing. An attorney member said that simultaneous filing could result in amici needlessly duplicating arguments made in the rehearing petition. Another attorney member suggested that the three-day time lag made the most sense. Mr. Letter asked whether the Committee Note should urge would-be amici to coordinate, when possible, with the party seeking rehearing so as to be able to file the amicus brief simultaneously with the rehearing petition.

An attorney member noted that Supreme Court Rule 37.2 addresses the timing for amici supporting either side, and he asked whether proposed Rule 29(b) should likewise address the timing of an amicus filing in opposition to rehearing. Mr. Letter suggested that such filings should be due on the same date as any response.

By consensus, the Committee resolved to consider a revised draft of the proposed Rule 29 amendments and to vote on the proposal the next day. On the evening of April 28, the Chair and Reporter prepared a revised draft that reflected the Committee's choices concerning the default rules in proposed Rule 29(b). Those choices were to (1) track current Rule 29's approach to the question of when amicus filings are permitted; (2) set a type-volume limit of 2,000 words in proposed Rule 29(b)(4); and (3) revise the timing provision in proposed Rule 29(b)(5).

The Committee reviewed the revised proposal on the morning of April 29. After the Committee made a few style changes to proposed Rule 29(b)(5), a motion was made to approve the proposed amendments (as revised) for publication. The motion was seconded and passed by voice vote without dissent.

D. Item Nos. 08-AP-A, 08-AP-C, 11-AP-C, and 11-AP-D (possible amendments relating to electronic filing)

Judge Colloton invited Judge Chagares – who chairs the Standing Committee's CM/ECF Subcommittee – to introduce the topic of potential changes relating to electronic filing. Judge Chagares reported that the Subcommittee had asked the Reporters to the Advisory Committees to identify rules that might warrant amendment in the light of the shift to electronic filing. The Subcommittee also is moving forward with proposals to amend the "three-day rule" in each set of rules. The three-day rule in Appellate Rule 26(c) adds three days to a given period if that period is measured after service and service is accomplished electronically or by a non-electronic means that does not result in delivery on the date of service. The rules, Judge Chagares explained, should be amended to reflect the fact that the extra three days are no longer needed when service is accomplished electronically.

The Reporter asked the Committee members for their thoughts on the two possible alternatives – shown in the agenda materials – for amending Rule 26(c) to exclude electronic service from the three-day rule. The first approach would retain the structure of existing Rule 26(c). The current Rule makes the three extra days available "unless the paper is delivered on the date of service stated in the proof of service," and then explains that "a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service." To exclude electronic service from the compass of the three-day rule, one could simply delete "not," so that the Rule would specify that "a paper that is served electronically is treated as delivered on the date of service stated in the proof of service." The second approach would restructure the Rule to track the three-day rules in the other sets of Rules. Under the second approach, the Rule would state that "[w]hen a party may or must act within a specified time after being served and service is made under Rule 25(c)(1)(B) (mail) or (C) (third-party commercial carrier), 3 days are added after the period would otherwise expire under Rule 26(a)." The only downside to this approach, the Reporter suggested, would be the possibility that a party who is served might not always be able to distinguish readily between personal service (which would not trigger the three-day rule) and service by third-party commercial carrier (which would).

An attorney member suggested adopting the second approach; it would be very unlikely, he said, for confusion between personal service and service by a commercial carrier to cause a problem. An appellate judge member, however, expressed support for the first approach. Another attorney member stated that he favored the first approach because it is explicit. An appellate judge observed that the Committee might in future decide to make further changes to Rule 26(c); in the meantime, he suggested, the first approach might be appropriately incremental. A motion was made to approve the proposed amendment to Rule 26(c) as shown in the first approach (i.e., deleting the word "not"). The motion was seconded and passed by voice vote without opposition.

Mr. Letter noted that the DOJ does not oppose the deletion of electronic service from the types of service that trigger the three-day rule. He observed, however, that a problem does exist

when attorneys take unfair advantage of their opponents by serving papers electronically the last thing on a Friday night. An attorney member concurred, and expressed a broader concern that midnight deadlines for electronic filing are very unhealthy for the family life of lawyers and their staffs.

The Reporter observed that the CM/ECF Subcommittee may also consider, in future, whether to recommend eliminating the three-day rule entirely. Such a change, she suggested, might raise concerns with respect to cases involving pro se litigants, who typically serve papers by mail. Mr. Letter noted that the DOJ already experiences a significant time lag in processing papers served on it by mail, due to the need to screen the mail for security reasons.

Judge Chagares reported that the CM/ECF Subcommittee had asked Professor Capra to prepare a template for a rule that would provide two definitions designed to accommodate electronic methods. First, it would define references to writings so as to encompass electronically stored information. Second, it would define references to filing, sending, and similar actions so as to encompass instances when those actions are accomplished electronically.

The Subcommittee also has been considering whether a rule amendment would be warranted on the topic of electronically filed documents that include signatures by someone other than the electronic filer. The question arises in the bankruptcy context with respect to attorney filings containing debtors' signatures, but the issue is not limited to that context. The Bankruptcy Rules Committee, at its spring meeting, considered adopting a rule on electronic signatures but decided not to proceed with the proposal. Mr. Letter noted that problems arise with respect to fraudulent signatures on bankruptcy petitions. The FBI, he reported, requires an original signature for purposes of handwriting analysis.

Judge Chagares noted, as well, Mr. Rabiej's recent proposal that the requirement of proof of service be eliminated for instances when service is accomplished through CM/ECF. The Civil Rules Committee is considering a similar proposal.

Finally, Judge Chagares mentioned Item No. 13-AP-D, which concerns suggestions submitted by Judge S. Martin Teel, Jr., concerning Rules 6(b)(2)(B)(iii) and 3(d)(1). Judge Teel, a United States Bankruptcy Judge, suggests deleting Rule 6(b)(2)(B)(iii)'s reference to "a certified copy of the docket entries prepared by the clerk under Rule 3(d)" and inserting "the docket entries maintained by the clerk of the district court or bankruptcy appellate panel." Judge Teel explains that the reference to certification is unnecessary, that the lower-court clerk maintains rather than prepares the docket entries, and that the cross-reference to Appellate Rule 3(d) is superfluous. Judge Teel also questions why Rule 3(d) requires the lower-court clerk to transmit a copy of the docket entries to the court of appeals now that docket entries are available electronically. Judge Chagares suggested that there does not appear to be any current problem arising from these features of Rules 3 and 6. By consensus, the Committee decided to remove Item No. 13-AP-D from its study agenda.

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

Judge Colloton introduced Item No. 07-AP-E, which concerns whether to amend Rule 4(a)(4) to address a circuit split that has developed as to whether a motion filed within a purported extension of a non-extendable deadline under Civil Rules 50, 52, or 59 counts as "timely" under Rule 4(a)(4). A majority of the circuits to address this issue have concluded that such a motion does not count as timely; but the Sixth Circuit has held to the contrary.

Judge Colloton reviewed possible options for amending Rule 4(a)(4) to adopt either the majority or minority approach. To adopt the majority approach, one might simply revise the current rule to refer, not to timely motions, but to motions filed "within the time allowed by" the Federal Rules of Civil Procedure; this could be called the "concise" approach. Or one might retain the word "timely" and add a new subdivision to define what "timely" means (and does not mean); one could call this the "definitional" approach. Judge Colloton solicited the Committee's views on whether it would be worthwhile to amend Rule 4(a)(4) to clarify this question – and, if so, what position the Rule should be amended to take.

An appellate judge member stated that, among the options for implementing the majority view, he preferred the concise approach. The Reporter asked which approach would be most informative for lawyers with less experience in appellate practice. Another appellate judge member observed that it may be natural (though erroneous) for district judges to assume that they can extend the deadlines for motions under Civil Rules 50, 52, and 59. An attorney member agreed, and noted that in such instances it would also be natural for lawyers to assume that they could rely on such an extension. The appellate judge member suggested that a definitional approach would not be out of place in Rule 4(a); that rule already includes subdivision (a)(7), which defines entry of judgment.

It was suggested that the proposed Committee Note set forth on page 288 of the agenda book was too long, and that some of the Note could be replaced by a cite to the relevant Sixth Circuit decision. An appellate judge member suggested that the Committee amend the Rule to adopt the majority approach. The sense of the Committee proving to be in agreement with this suggestion, the Committee next turned to the choice between the "concise" and "definitional" approaches. A straw poll disclosed a vote of 7 to 2 in favor of the "concise" approach. One of the attorney members who voted in favor of the concise approach stated, however, that he wished to ensure that the Committee Note provided some instruction to lawyers about the problem of non-extendable deadlines.

On the evening of April 28, the Chair and Reporter revised the Committee Note to reflect the Committee's discussion. On the morning of April 29, the Committee reviewed the revised Committee Note. Professor Coquillette confirmed that, in this context, it was permissible for the Committee Note to cite a case (namely, the Sixth Circuit decision that the amendment is designed to reject). The Committee made one further change, to the Committee Note's characterization of the circuit split. A motion was made to approve the proposed amendment –

namely, the "concise" approach adopting the majority view of "timely" – and the revised Committee Note. The motion was seconded and passed by voice vote without opposition.

V. Discussion Items

A. Item Nos. 08-AP-J, 08-AP-R, and 09-AP-A (disclosure requirements)

Judge Colloton introduced these agenda items, which relate to disclosure requirements.

Item No. 08-AP-J concerns a 2008 suggestion by the Judicial Conference Committee on Codes of Conduct that the Rules Committees consider possible rule amendments having to do with conflict screening. Two of the three aspects of the Codes of Conduct Committee's inquiry focused on criminal and bankruptcy practice. Neither the Criminal Rules Committee nor the Bankruptcy Rules Committee proceeded with proposals in response to the Codes of Conduct Committee's suggestion, and those aspects of Item No. 08-AP-J thus present no issues for the Appellate Rules Committee. However, the Committee's inquiry also highlighted possible overlaps among Appellate Rule 26.1, local circuit provisions, and prompts in the CM/ECF system. That topic, Judge Colloton suggested, may be worth pursuing. Some circuits require disclosures beyond those mandated by the Appellate Rules. The Appellate Rules Committee, working with the Codes of Conduct Committee, may wish to consider whether any additional disclosures should be required by the Appellate Rules. Judges would like to be apprised of information that is relevant to a possible need to recuse from a case.

An attorney member agreed that this question is worth pursuing. Another attorney member suggested that, conversely, Appellate Rule 26.1's existing disclosure requirement may be overbroad. Rule 26.1 requires nongovernmental corporate parties to identify any parent corporation and any publicly held corporation that owns 10 percent or more of the party's stock. The attorney member asked why this requirement should encompass instances when an entity holds the stock in a beneficial capacity as trustee. Stock ownership frequently changes, the member observed, and the Rule could be read to require updates each time such changes put ownership above the 10 percent threshold.

The Reporter mentioned that Item Nos. 08-AP-R and 09-AP-A arise from comments submitted on a proposed amendment to Appellate Rule 29(c). The ABA Council of Appellate Lawyers suggested revisions to the portion of Rule 29(c) that requires corporate would-be amici to submit "a disclosure statement like that required of parties by Rule 26.1." The Council's suggestion appeared to proceed from the premise that the current language of Rule 29(c) could be read to permit "some degree of difference" between the Rule 29(c) corporate-disclosure statement and the Rule 26.1 corporate-disclosure statement. But it is difficult to imagine what sort of difference would arise. A corporate amicus should understand that its obligation is to (a) identify any parent corporation and any publicly held corporation that owns 10 % or more of its stock or (b) state there is no such corporation. The Council does not suggest any variations that would be likely to arise under the Rules' current language. The Reporter suggested that the

Committee consider removing Item 09-AP-A from its agenda.

Item No. 08-AP-R arises from suggestions made by Chief Judge Easterbrook. He points out that the term "corporation" in Rules 26.1 and 29(c) encompasses entities from which a disclosure is unnecessary because they do not have stock – such as the Catholic Bishop of Chicago. But while the Rule requires such entities to disclose that they have no stock and no parents, that is not necessarily a downside; by requiring that explicit statement, the Rule makes it easy to tell whether a corporate filer has complied with the disclosure requirement. The Reporter suggested that the Committee not proceed further with this aspect of Chief Judge Easterbrook's comments. Chief Judge Easterbrook's other critique is that the corporate-disclosure requirements in Rules 26.1 and 29(c) fail to elicit all of the information that would be relevant to a judge in considering whether to recuse. This aspect of Item No. 08-AP-R, the Reporter suggested, provides an apt vehicle for pursuing the sorts of inquiries Judge Colloton noted.

By consensus, the Committee removed Item Nos. 08-AP-J and 09-AP-A from, but retained Item No. 08-AP-R on, its agenda.

B. Item Nos. 09-AP-D & 11-AP-F (response to *Mohawk Industries*)

Judge Colloton reminded the Committee that Item Nos. 09-AP-D and 11-AP-F arise from the Supreme Court's decision in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009). In *Mohawk*, the Court held that a district court's order to disclose information that the producing party contends is protected by attorney-client privilege does not qualify for an immediate appeal under the collateral order doctrine. The *Mohawk* Court stated that choices concerning the appealability of interlocutory orders ideally should be made through the rulemaking process rather than by judicial decision – a point that echoed the Court's earlier, similar statement in *Swint v. Chambers County Commission*, 514 U.S. 35 (1995).

The Committee asked Andrea Kuperman to perform some initial research on the doctrinal landscape of the appealability of prejudgment orders. Judge Colloton observed that the agenda materials included a memorandum by Ms. Kuperman that surveys types of interlocutory decisions that are clearly appealable (or not appealable) under current Supreme Court caselaw, as well as types of interlocutory decisions the treatment of which has divided the lower courts. Judge Colloton expressed appreciation for Ms. Kuperman's hard work and helpful memorandum. The initial question for the Committee, he suggested, is whether a general overhaul of the treatment of interlocutory orders would be a manageable project for the Committee, or whether it would be wiser for the Committee to consider the appealability of particular types of interlocutory orders as and when a suggestion brings that specific type of order to the Committee's attention.

Judge Sutton recalled that the Committee has, in the past, noted complexities and difficulties in the treatment of decisions concerning qualified immunity. That appealability question, he noted, is presented in a case before the Supreme Court this Term (*Plumhoff v.*

Rickard (No. 12-1117)). An attorney member stated that it would be wildly unrealistic to attempt a global project to overhaul the treatment of appealability of interlocutory orders. Even a project focused solely on addressing the appealability of qualified-immunity rulings, he suggested, would take several years to complete.

An appellate judge member proposed removing this item from the Committee's agenda. Mr. Katsas, though, suggested that it would be useful for the Committee to discuss further the appealability of attorney-client privilege rulings. Mr. Letter agreed, noting that the Court in *Mohawk* had highlighted the possibility of rulemaking on the privilege-appeals topic. In response to an invitation by Judge Colloton, Mr. Katsas and Mr. Letter agreed to work with the Reporter on the topic of attorney-client-privilege appeals, with a view to presenting a report to the Committee at its fall 2014 meeting.

C. Item No. 12-AP-F (class action objector appeals)

Judge Colloton introduced this item, which concerns a proposal for addressing appeals by objectors to a class action settlement. He invited the Reporter to summarize briefly the Committee's research thus far. The Reporter noted that district judges may lack full information concerning the fairness of a proposed settlement, and that objectors can be a helpful source of such information. Civil Rule 23(e) is designed to promote careful scrutiny of a proposed class settlement; it requires notice, a hearing, and a finding that the proposed settlement is fair, reasonable, and adequate. Rule 23(e) authorizes objections by any class member, and requires court approval for the withdrawal of such an objection once it has been made.

Concerns have been raised that some objectors lodge objections for the purpose of extracting a side payment from class counsel in exchange for dropping the objection. Rule 23(e)'s requirement of court approval for the withdrawal of objections constrains such pay-offs while the case is in the trial court, but no rule imposes a similar constraint during an objector's appeal from a district court order approving the settlement. If an objector appeals but then drops the appeal in exchange for a side payment, two costs arise: First, the extraction of the side payment functions as a tax on class counsel and could be viewed as unseemly; and second, the discontinuance of an appeal that raised serious issues about the fairness of the class settlement deprives class members of the opportunity to benefit from the resolution of the merits of the appeal.

Various strategies have been proposed for addressing the problem. The objector-appellant's leverage for extracting a side payment arises from the fact that, in practice, such an appeal will often delay implementation of the settlement. Thus, one approach focuses on decreasing the objector-appellant's leverage by speeding the implementation of the settlement despite the pendency of the appeal. Quick-pay provisions (allowing for payment of some or all of class counsel's fees while the appeal is pending) provide an example of this approach.

Another approach would be to set hurdles that an objector must surmount in order to appeal. Some courts have, for example, required sizeable appeal bonds as a condition for taking such an appeal; but there are questions about whether the size of a bond for costs on appeal (under Appellate Rule 7) can be enlarged to take account of anticipated attorney fees and costs associated with delay in implementation of the settlement. At the Committee's spring 2013 meeting, Judge D. Brooks Smith and Professor John E. Lopatka presented their proposal for amendments to Appellate Rules 7 and 39 that would presumptively require objector-appellants to post a bond for costs on appeal that would include costs and attorney fees attributable to the pendency of the appeal (and that would presumptively require imposition of those fees and costs if the court of appeals affirms the order approving the settlement). An appellate judge member suggested that it would be worthwhile for the Committee to consider the appeal-bond possibility further; another appellate judge member noted the need to take care not to deter objector appeals that raise valid questions about a settlement's propriety.

Another way of setting a hurdle for objector appeals would be to impose a "certificate of appealability" ("COA") requirement – akin to that imposed on habeas petitioners, who must make "a substantial showing of the denial of a constitutional right" in order to obtain the COA that is a requisite for an appeal of the denial of a habeas petition. The Reporter questioned, however, whether a COA requirement could be imposed by rulemaking without an accompanying statutory change.

Judge Colloton observed that the Committee was indebted to Marie Leary for her painstaking and informative study concerning class-action-objector appeals. He invited Ms. Leary to summarize her findings for the Committee. Ms. Leary explained that she had searched the CM/ECF district court databases for cases (filed in 2008 or later) in the Second, Seventh, and Ninth Circuits in which an appeal was taken from an order approving a class settlement. Objector appeals tend to be relatively rare as a proportion of each circuit's overall appellate caseload; however, they are a significant feature in large multidistrict litigation and nationwide class actions.

Ms. Leary found that the trend concerning disposition of objector appeals in the Second Circuit differs from the trend concerning disposition of such appeals in the Seventh and Ninth Circuits. In the Seventh and Ninth Circuits, objector appeals tend to be voluntarily dismissed (under Appellate Rule 42(b)) within 200 days after the appeal was filed (and before the appellant files its brief). By contrast, in the Second Circuit a majority of terminated appeals were decided on the merits (by unpublished summary orders). Ms. Leary observed that the explanation for this difference is not clear; she wondered whether the Second Circuit puts the appeals on an expedited track for disposition.

Ms. Leary noted a feature of practice in the Ninth Circuit concerning Rule 7 cost bonds. In instances where the district court ordered the objector to post a cost bond but the objector failed to do so, the Ninth Circuit did not dismiss the appeal for failure to post the bond; rather, the court deferred (until the time of argument) its ruling on the consequences of the failure.

Although the Ninth Circuit thus appears not to have responded immediately to the failure to post the bond, that failure did not go unnoticed in the court below; in some cases, it was followed by contempt findings and the imposition of sanctions by the district court.

Judge Colloton reported that he had discussed with Ms. Leary, and with Judge Jeremy Fogel (the Director of the FJC), the possibility of conducting a survey of attorneys who practice in this field. Judge Fogel and others within the FJC had expressed concern about possible obstacles to conducting an effective survey study on the topic of class-action-objector appeals. Instead, Judge Fogel proposed that the Committee consider co-sponsoring (with the Civil Rules Committee) a mini-conference on class action practice. Such a mini-conference could bring together knowledgeable participants to discuss review of class settlements both in the district court and on appeal. Judge Sutton observed that the Civil Rules Committee has already discussed the possibility of planning a mini-conference on class action practice. Judge Colloton noted that the Appellate Rules Committee would be glad to work with Judge Robert Michael Dow, Jr. – the Chair of the Civil Rules Committee's Rule 23 Subcommittee – on the planning for such a mini-conference.

A member asked whether it would be useful for Ms. Leary to examine how objector appeals fare in other circuits, such as the Fifth Circuit. Judge Colloton invited Ms. Leary to discuss the methodology for her study, which has been, of necessity, very labor-intensive. Ms. Leary explained that there is no quick way to identify the relevant appeals using the CM/ECF databases at the level of the courts of appeals; thus, one must start by searching for class actions at the level of the district court and then identifying, within that pool of cases, the subset of cases that feature an appeal from a judgment approving a class settlement.

An appellate judge member asked whether it would be possible to address inappropriate objector appeals by sanctioning the objector's attorney. The Reporter noted reports that district judges tend not to want to spend time on such sanctions motions. Likewise, Professor Coquillette has observed a reluctance to pursue the possibility of attorney discipline under Model Rules 3.4 and 8.4.

Mr. Letter suggested that the general topic warranted further consideration by the Appellate Rules Committee, in conjunction with the Civil Rules Committee. By consensus, the Committee retained this item on its agenda.

D. Item No. 13-AP-C (*Chafin v. Chafin* / ICARA appeals)

Judge Colloton invited the Reporter to introduce Item No. 13-AP-C, which arose from the suggestion by three Justices, in *Chafin v. Chafin*, 133 S. Ct. 1017 (2013), that the Committee consider whether to propose rules to expedite appellate proceedings under the Hague Convention on the Civil Aspects of International Child Abduction (the "Convention"). The Convention requires courts in the United States to order a child returned to his or her country of habitual residence if the child has been wrongfully removed to the United States. In *Chafin*, the Court

held that an appeal from such an order did not become moot upon the child's return to the country of habitual residence. In response to concerns that being sent back and forth across national borders would harm the children involved, the *Chafin* Court observed that the goals of the Convention (and the federal legislation that implements it) could be served by a combination of expedited proceedings and (where appropriate) stays. Justice Ginsburg, joined by Justices Scalia and Breyer, concurred in *Chafin* and suggested that the rulemakers consider this topic.

The Civil and Appellate Rules Committees discussed the Justices' suggestion at their spring 2013 meetings, as did the Standing Committee at its June 2013 meeting. In September 2013, Judge Sutton wrote to Justice Ginsburg to thank her for her suggestion and to report the Committees' view that the best course, as an initial matter, would be to address the topic by judicial education rather than rulemaking. Many courts already do expedite child custody matters under the Convention, and Appellate Rule 2 gives courts of appeals the flexibility to do so. Judge Fogel has committed, on behalf of the FJC, to educating judges about the need, and existing tools, for expediting disposition of such matters. Judge Sutton reported that Justice Ginsburg had responded that she viewed this approach as a sound one and that she appreciated the Committees' attention to the matter.

By consensus, the Committee removed this item from its agenda.

VI. Additional Old Business and New Business

A. Item No. 13-AP-E (audiorecordings of appellate arguments)

Judge Colloton invited the Reporter to summarize her research concerning Item No. 13-AP-E, which arose from Mr. Garre's suggestion that the Committee consider adopting a rule concerning the release of audiorecordings of appellate arguments.

The Reporter noted that the circuits take widely differing approaches to the release of such audio, although the trend appears to be toward more and faster access. The Second and Eleventh Circuits provide the least access to audio recordings; they do not post audio online, though they permit attorneys to buy the audio on CDs. The Tenth Circuit posts online what appears to be audio of a few selected arguments; as to other arguments, one must make a motion to obtain the audio. At the other end of the spectrum are circuits that provide quick and full online access to argument audio. The DC Circuit and Eighth Circuits post the audio on the same day as the argument; the Ninth Circuit, on the day after argument; and the Fourth Circuit, two days after argument. The other six circuits make audio available online, but the Reporter had been unable to discern (from online sources) precisely how quick and how comprehensive their postings are.

An attorney member voiced support for a national rule requiring prompt posting of audio; the Second Circuit, he reported, had recently taken three weeks to provide an audio CD of a particular argument. Judge Chagares pointed out that the Third Circuit is currently studying

questions relating to videorecordings of court proceedings, and he expressed interest in hearing any views that participants might have on that topic.

An appellate judge member asked whether problems have arisen, in any cases, concerning references made during an argument to information that is subject to redaction requirements. The Reporter noted her tentative recollection that at least one circuit has a local provision setting out a procedure for seeking to have the audio sealed in such an instance.

Judge Sutton suggested that this matter seems to fall within the primary jurisdiction of the Judicial Conference Committee on Court Administration and Case Management ("CACM"). He observed that Judge Amy J. St. Eve, who now serves as a member of the Standing Committee, used to be a member of CACM.

By consensus, the Committee decided to remove this item from its study agenda, with the understanding that Judge Colloton would communicate to Judge Julie A. Robinson (the Chair of CACM) the interest in this topic that had been expressed by members of the Committee.

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

Judge Colloton introduced this item, which concerns the operation of Appellate Rule 41 in light of the Supreme Court's decisions in *Ryan v. Schad*, 133 S. Ct. 2548 (2013) (per curiam), and *Bell v. Thompson*, 545 U.S. 794 (2005). Rule 41(b) provides that "[t]he court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later," but also provides that "[t]he court may shorten or extend the time." Under Rule 41(d)(1), a timely rehearing petition or stay motion presumptively "stays the mandate until disposition of the petition or motion." A party can seek a stay pending the filing of a certiorari petition; if the court grants such a stay and the party who sought the stay files the certiorari petition, then Rule 41(d)(2)(B) provides that "the stay continues until the Supreme Court's final disposition." Rule 41(d)(2)(D) directs that "[t]he court of appeals must issue the mandate immediately when a copy of the Supreme Court order denying the petition for writ of certiorari is filed."

One question is whether Rule 41 requires the court of appeals to issue the mandate immediately after the filing of the Supreme Court's order denying a petition for a writ of certiorari. Does Rule 41(b) allow the court of appeals discretion to continue to stay the mandate even after the Supreme Court's denial of certiorari and rehearing? The Court did not decide this question in either *Bell* or *Schad*; it ruled that even if the court of appeals has authority to stay the mandate following the denial of certiorari, it could only do so if warranted by extraordinary cirumstances (which, the Court held, were not present in either *Bell* or *Schad*).

An attorney member asked why a court of appeals would ever extend the stay of the mandate after the Supreme Court has denied certiorari. The Reporter noted that both *Bell* and

Schad were death penalty cases. In *Bell*, the court of appeals had affirmed the denial of a death row prisoner's habeas petition, but later (having called for and examined the district court record) vacated and remanded for an evidentiary hearing. The problem was that, months before this vacatur, the Supreme Court had denied the inmate's petition for rehearing with respect to the Court's denial of the inmate's petition for certiorari. In the interim that followed the Supreme Court's final disposition of the petition for certiorari, the court of appeals had failed to notify the parties that it had stayed its mandate, and the state had proceeded in its preparations for the inmate's execution in reliance on its belief that the court of appeals was done with the case.

Judge Colloton noted that this fact pattern presents a second question – namely, whether a court of appeals can stay the issuance of the mandate, under Rule 41(b), merely through inaction, or whether the court must act affirmatively in order to accomplish such a stay. The original Rule 41 had provided that the mandate would issue 21 days after entry of the court of appeals' judgment "unless the time is shortened or enlarged by order." The words "by order" were deleted during the 1998 restyling of Rule 41. An appellate judge participant suggested that there may be a problematic lack of transparency in a case where the court of appeals stays the mandate without telling the parties that it is doing so. Another appellate judge responded that this particular issue could be addressed by "unstyling" Rule 41(b) – i.e., by returning to the Rule the "by order" that had been deleted during the restyling.

When considering whether to amend Rule 41 to remove the court of appeals' discretion to extend the stay of the mandate after the Supreme Court's final disposition of a certiorari petition, Judge Colloton noted, the Committee might also wish to consider the relevance of the caselaw recognizing an inherent authority, in the courts of appeals, to recall their mandates when warranted by extraordinary circumstances. Even if Rule 41 were amended to remove the court of appeals' discretion to *stay* the mandate after the Supreme Court's final disposition of a certiorari petition, presumably the courts of appeals would retain this inherent authority to recall the mandate in extraordinary circumstances. Are there reasons, Judge Colloton asked, to require a court of appeals to first issue and then recall its mandate in such circumstances (rather than permitting the court of appeals simply to stay the mandate)?

An appellate judge participant suggested that it is important for courts of appeals to retain some flexibility in these matters. An attorney member responded that he thought the court of appeals' discretion concerning stays of the mandate should be less after the Supreme Court has finished with the case than it is before the Supreme Court has ruled on the case. Another attorney member, though, wondered why the Court's denial of certiorari should mark a change in the scope of the court of appeals' discretion; this member noted that, as a formal matter, the denial of certiorari leaves the judgment below untouched.

The agenda materials mentioned, in addition, a quirk in the wording of Rule 41(d). Rule 41(d)(2)(B) provides that if the court grants a request for a stay pending the filing of a certiorari petition, the petition is filed, and appropriate notice is given to the circuit clerk, then "the stay continues until the Supreme Court's final disposition." Rule 41(d)(2)(D) directs that "[t]he court

of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed." When rehearing is sought in the Supreme Court after a denial of certiorari, the "Supreme Court's final disposition" can occur later than the date when "a copy of a Supreme Court order denying the petition for writ of certiorari is filed." An appellate judge member stated that the Committee should consider whether to adjust Rule 41(d)(2)(D)'s wording to fit more closely with that in Rule 41(d)(2)(B). This issue, he stated, had raised questions in cases that he had litigated before he became a judge.

An attorney member voiced support for considering ways to clarify Rule 41's operation. Another attorney member agreed, and suggested that the Rule should be revised so as to make clear that the court of appeals cannot stay a mandate through mere inaction.

C. Item No. 14-AP-A (FRAP 29(e) and timing of amicus briefs)

Judge Colloton invited the Reporter to introduce Item No. 14-AP-A, which arises from a suggestion by Dean Alan Morrison that Rule 29(e) be revised to set the time period for filing an amicus brief by reference to the due date, rather than the filing date, of the relevant party's brief and to permit extensions of the amicus-brief due date based on party consent. Rule 29(e)'s due date for amicus filings is "no later than 7 days after the principal brief of the party being supported is filed." Dean Morrison points out that if the party files its brief before the due date, the would-be amicus might find that its deadline is very short (or even that the deadline has already passed) by the time that the amicus becomes aware of the occasion for filing the brief. It would be better, Dean Morrison suggests, if the amicus could rely on having 7 days after the original due date for the party's brief, even if the party files its brief early.

The Reporter noted that pegging the amicus-brief deadline to the due date, rather than the filing date, of the party's brief might pose no problems in a case where the briefing schedule is set by scheduling order. In such a case, the early filing of the appellant's brief would not move up the due date for the appellee's brief, and so the appellee would have sufficient time to review any amicus briefs filed in support of the appellant before filing its own brief. However, in instances when no scheduling order sets the briefing schedule, Rule 31(a)(1) provides that the appellee's brief is due 30 days after service of the appellant's brief – which means that early filing of the appellant's brief moves up the deadline for the appellee's brief as well. In such instances, leaving the amicus-brief deadline at 7 days after the appellant's original filing deadline could leave the appellee with insufficient time to take account of the amicus filing when drafting its own brief.

Thus, the Reporter suggested, the proposal to peg the amicus-brief deadline to the due date for the party's brief seems unlikely to succeed. If the Committee were to agree with that view, that would leave for consideration the proposal to revise Rule 29(e) to allow the extension of the amicus-brief due date by consent of the parties.

An attorney member asked why a rule amendment on this topic is needed; under the

current Rule, a would-be amicus can ask the court to extend the deadline. It was also noted that a would-be amicus who is interested in a particular appeal can sign up to receive electronic notifications of docket activity in that appeal, and can obtain electronic copies of the parties' briefs.

Another attorney member asked whether there is any reason not to permit extensions of the Rule 29(e) deadline by party consent. The Reporter observed that, if all parties consent to the extension of the amicus-brief deadline, that would seem to address the concern that an extension of the amicus's deadline would disadvantage the appellee. She asked whether judges would object if extensions were available based on party consent without court leave. An appellate judge member responded that judges would have concerns with such an approach, because it is important to keep cases moving. Another appellate judge member expressed agreement with this view. Another appellate judge predicted that such extensions would generate motions by appellees seeking additional time to file their own briefs; Mr. Letter asked, however, whether a consented-to extension would be likely to throw off the parties' briefing schedule. Mr. Gans suggested that there would be complexities associated with changing Rule 29(e)'s timing provision.

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

D. Item No. 14-AP-B (standard for appellate review of sentencing errors)

Judge Colloton introduced this item, which arises from a suggestion by Judge Jon O. Newman that the Criminal Rules Committee and the Appellate Rules Committee consider a rule amendment to provide "that a sentencing error to which no objection was made in the district court should be corrected on appeal without regard to the requirements of 'plain error' review, unless the error was harmless." Judge Colloton voiced an expectation that the Criminal Rules Committee would take the lead in addressing this suggestion. Judge Reena Raggi, the Chair of the Criminal Rules Committee, has asked a subcommittee (headed by Judge Raymond M. Kethledge) to examine the proposal.

Mr. Letter agreed that it would make sense for the Appellate Rules Committee to wait and see what the Criminal Rules Committee decided with respect to Judge Newman's proposal. An appellate judge member suggested that the Committee not proceed with the proposal.

By consensus, the Committee decided to remove this item from its agenda. Judge Colloton undertook to write to Judge Newman about the Committee's discussion.

E. Information item (proposal by Lawyers for Civil Justice, et al., regarding Civil Rule 23(f))

Judge Colloton invited the Reporter to summarize this information item. The Reporter

explained that Lawyers for Civil Justice, Federation of Defense & Corporate Counsel, DRI – The Voice of the Defense Bar, and the International Association of Defense Counsel (collectively, "LCJ") had submitted a collection of class-action-related proposals to the Civil Rules Committee, and that the excerpt from those proposals that was included in the Appellate Rules Committee's agenda materials concerned appeals, under Civil Rule 23(f), from orders concerning class certification. LCJ states that the circuits vary widely in both the standards for granting permission to appeal under Civil Rule 23(f) and also the frequency with which they grant such permission. LCJ suggests that Civil Rule 23(f) be amended to authorize appeals as of right from class certification rulings.

The Reporter observed that she is skeptical about the desirability of such an amendment. Professors Cooper and Marcus have noted that a significant body of appellate caselaw concerning class certification has developed since the adoption of Civil Rule 23(f) in 1998. Other topics concerning class certification – such as the standards for certification of settlement classes, or the proper role of "issues" classes – seem like more productive targets for inquiry.

An appellate judge, however, observed that the low rate at which some circuits grant permission for Rule 23(f) appeals is noteworthy.

F. Information item (*Ray Haluch Gravel Co.*)

Judge Colloton invited the Reporter to summarize the Court's recent decision in *Ray Haluch Gravel Co. v. Central Pension Fund of International Union of Operating Engineers and Participating Employers*, 134 S. Ct. 773 (2014). The Reporter reminded the Committee that in *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988), the Court had held that a district court's decision on the merits of a case is final for purposes of 28 U.S.C. § 1291 even if the court has not yet ruled on a request for attorney's fees. In *Ray Haluch Gravel*, the Court held that the *Budinich* rule applies even if the basis for the request for attorney fees is contractual rather than statutory.

Responding to the argument that this ruling would result in piecemeal appeals in instances where it would be more desirable for the fee appeal and the merits appeal to be adjudicated together, the *Ray Haluch Gravel* Court reasoned that piecemeal appeals could be avoided, where necessary, by recourse to the Civil Rule 58(e) mechanism that permits a Civil Rule 54(d)(2) motion for attorney fees to be treated the same as a timely Civil Rule 59 motion for purposes of tolling the time to appeal. The Court noted the possibility that some contractual attorney fee requests might not qualify for this mechanism because Rule 54(d)(2) appears not to encompass attorney-fee claims that must, under the relevant substantive law, "be proved at trial as an element of damages." The Court did not seem concerned by the possibility that the Civil Rule 58(e) mechanism might be unavailable in some cases involving claims for contractual attorney fees. Nor has the Appellate Rules Committee received reports of problems arising from such a gap in Rule 58(e)'s coverage. Accordingly, the Reporter did not suggest that the Committee investigate this issue further, though it may be useful to monitor the caselaw for any

further developments.

VII. Adjournment

The Committee adjourned at 10:30 a.m. on April 29, 2014.

Respectfully submitted,

Catherine T. Struve
Reporter