ADVISORY COMMITTEE
ON
APPELLATE RULES

Asheville, NC
April 8-9, 2010

Agenda for Spring 2010 Meeting of
Advisory Committee on Appellate Rules
April 8-9, 2010
Asheville, North Carolina

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ADVISORY COMMITTEE ON APPELLATE RULES

Chair:	**Reporter:**
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ADVISORY COMMITTEE ON APPELLATE RULES (CONT'D.)

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Appellate:	
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Bankruptcy:	
Judge James A. Teilborg	(Standing Committee)
Civil:	
Judge Eugene R. Wedoff	(Bankruptcy Rules Committee)
Judge Diane P. Wood	(Standing Committee)
Criminal:	
Judge Reena Raggi	(Standing Committee)
Evidence:	
Judge Judith H. Wizmur	(Bankruptcy Rules Committee)
Judge Michael M. Baylson	(Civil Rules Committee)
Judge John F. Keenan	(Criminal Committee)
Judge Marilyn Huff	(Standing Committee)

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ADVISORY COMMITTEE ON APPELLATE RULES

Members	Position	District/Circuit	Start Date	End Date
Jeffrey S. Sutton	C	Sixth Circuit	Member: 2005	----
Chair			Chair: 2010	2013
James Forrest Bennett	ESQ	Missouri	2005	2011
Kermit Edward Bye	C	Eighth Circuit	2005	2011
Elena Kagan	DOJ	Washington, DC	2009	-----
Randy J. Holland	JUST	Delaware	2004	2010
Maureen E. Mahoney	ESQ	Washington, DC	2005	2011
Peter T. Fay	C	Florida	2010	2013
Richard G. Taranto	ESQ	Washington, DC	2010	2013
Stephen R. McAllister	ACAD	Kansas	2004	2010
Leonard Green	Clerk	Sixth Circuit	2010	2013
Catherine T. Struve	ACAD	Pennsylvania	2006	Open
Reporter				

Principal Staff:

Peter G. McCabe **(202) 502-1800**
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TAB 1-2

DRAFT

Minutes of Fall 2009 Meeting of
Advisory Committee on Appellate Rules
November 5 and 6, 2009
Seattle, Washington

I. Introductions

Judge Jeffrey S. Sutton called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, November 5, 2009, at 8:30 a.m. at the Fairmont Olympic Hotel in Seattle, Washington. The following Advisory Committee members were present: Judge Kermit E. Bye, Justice Randy J. Holland, Ms. Maureen E. Mahoney, Dean Stephen R. McAllister, and Mr. James F. Bennett. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice ("DOJ"), was present representing the Solicitor General. Also present were Judge Lee H. Rosenthal, the Chair of the Standing Committee; Judge Carl E. Stewart, the past Chair of the Appellate Rules Committee; Judge T.S. Ellis III, a past member of the Appellate Rules Committee; Judge Harris L Hartz, liaison from the Standing Committee; Professor Daniel R. Coquillette, Reporter to the Standing Committee; Mr. Peter G. McCabe, Secretary to the Standing Committee; Mr. Leonard Green, liaison from the appellate clerks; Mr. John K. Rabiej, Mr. James N. Ishida and Mr. Jeffrey N. Barr from the Administrative Office ("AO"); and Ms. Marie Leary from the Federal Judicial Center ("FJC"). Prof. Catherine T. Struve, the Reporter, took the minutes.

Judge Sutton welcomed the meeting participants and introduced Mr. Green. Judge Sutton noted that Mr. Fulbruge's contributions as clerk liaison to the Committee were irreplaceable but that the Committee is very fortunate to have, as Mr. Fulbruge's successor, someone as experienced as Mr. Green. Judge Sutton noted that the Committee will particularly benefit from Mr. Green's experience with the Sixth Circuit's transition to electronic filing.

Judge Sutton pointed out to the Committee the tribute to Mark I. Levy that was displayed in the meeting room. Judge Sutton recalled that at the first Appellate Rules Committee meeting he attended (in San Francisco in April 2006), Mr. Levy took the time to have lunch with him and other new participants and to make them feel welcome. He was a great friend and colleague and he made tremendous contributions to the work of the Committee. At Judge Sutton's suggestion, the Committee observed a moment of silence in memory of Mr. Levy.

During the meeting, Judge Sutton and Committee members presented tokens of appreciation to Judge Stewart for his service on the Committee from 2002 onward and for his leadership of the Committee from 2006 to 2009, and to Judge Ellis for his service as a member of the Committee from 2003 to 2009. Judge Sutton thanked Judge Stewart for his wise guidance

of the Committee's deliberations, and noted that Judge Stewart had provided a model for him to follow as the incoming Chair of the Committee. Judge Stewart said that he had greatly enjoyed serving as a member of the Committee and, later, as its Chair. He observed that he valued the Committee members' commitment and collegiality. He expressed appreciation to the Chief Justice for appointing him to serve and to Judge Rosenthal for her leadership of the parent Committee. He thanked the Reporter for her work, and he thanked Mr. McCabe, Mr. Rabiej, Mr. Ishida, Mr. Barr, and others at the AO who have done so much to keep the Committee working smoothly, and Ms. Leary whose research at the FJC has informed the Committee's assessment of many issues. Judge Sutton thanked Judge Ellis for providing such clear and thoughtful input during the Committee's meetings. Judge Ellis stated that he was honored to have had the opportunity to serve on the Committee, and he expressed his appreciation to all the participants in the Committee's work.

Judge Sutton observed that the camaraderie of the Appellate Rules Committee meetings over the years has produced a scholarly product in the form of the manuscript for a new textbook on state constitutional law co-authored by, inter alios, Justice Holland, Dean McAllister, and Judge Sutton.

II. Approval of Minutes of April 2009 Meeting

The minutes of the April 2009 meeting were approved subject to minor changes on pages 2 and 3.

III. Report on June 2009 meeting of Standing Committee

The Reporter briefly noted some relevant aspects of the Standing Committee's discussions at its June 2009 meeting. The Standing Committee gave final approval to the proposed amendments to Appellate Rules 1(b), 29(a), and 29(c) and Form 4. The Standing Committee also discussed the proposed amendment to Appellate Rule 40(a)(1) and remanded that proposal to the Appellate Rules Committee. During the summer, the Appellate Rules Committee and the Standing Committee approved, by email circulation, a proposed technical amendment to Appellate Rule 4(a)(7); this amendment conforms Rule 4(a)(7) to changes made during the 2007 restyling of the Civil Rules by replacing references to Civil Rule "58(a)(1)" with references to Civil Rule "58(a)." In September 2009 the Judicial Conference approved the package of amendments to Appellate Rules 1(b), 4, and 29, and Form 4.

IV. Other Information Items

The Supreme Court has approved a number of proposed amendments that are currently on track to take effect on December 1, 2009, assuming that Congress takes no contrary action. The amendments include the proposed clarifying amendment to Rule 26(c)'s three-day rule; new

Rule 12.1 (and new Civil Rule 62.1) concerning indicative rulings; an amendment that removes an ambiguity in Rule 4(a)(4)(B)(ii); an amendment to Rule 22 that parallels amendments to the habeas and Section 2255 rules; and the package of time-computation amendments.

The Sealing Subcommittee, chaired by Judge Hartz, has been working diligently to investigate concerns raised about the sealing of entire cases. The Subcommittee met in June 2009. It has formed two sub-subcommittees: One sub-subcommittee, on which Judge Ellis and Mr. Letter have participated, is investigating what, if any, substantive standards should govern the sealing of entire cases and who should make the decision to seal. The other sub-subcommittee, chaired by Judge Merryday, is considering what procedures, if any, should be followed in sealing entire cases.

The Privacy Subcommittee, on which Mr. Bennett serves as the representative of the Appellate Rules Committee, met in September 2009 and will meet again in January 2010. The Subcommittee is planning a conference in April 2010 at Fordham that will feature panels on cooperation agreements, transcripts, and other matters that raise privacy issues.

The Civil Rules Committee has organized a May 2010 conference, to be held at Duke, that will consider the challenges facing the civil justice system. Panels at the conference will discuss new empirical data and will focus on issues such as pleading, discovery (including electronic discovery), and judicial case management. The panels will incorporate perspectives from experienced practitioners, from state procedural systems, from bar association proposals, and from those experienced in the rulemaking process. Judge Rosenthal observed that a number of factors have combined to highlight the importance of the conference. There is a great deal of congressional interest in the question of pleading standards. The conference will make available new and better empirical data on questions such as the burdens of discovery. It will be invaluable to obtain real data with which to inform judgments about the system.

The House of Representatives held an oversight hearing concerning pleading standards, in anticipation of the introduction of a bill. S. 1504, the bill currently pending in the Senate, would provide that federal courts shall not dismiss complaints under Rule 12(b)(6) except under the standards set forth in Conley v. Gibson, 355 U.S. 41 (1957). The Civil Rules Committee and the Standing Committee – assisted by Judge Rosenthal's law clerk Andrea Kuperman – are carefully studying the effects of the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). That research focuses on all of the court of appeals opinions as well as some district court decisions that cite Iqbal. The results so far disclose that, overall, courts are applying Iqbal in a thoughtful, context-specific and nuanced way. The research also includes a hard look at the overall statistics that reflect what courts are doing – including the rate of motions, the rate of grants, rulings on requests for leave to amend, the success of such amendments, and the effect on particular types of cases (such as types of cases that tend to feature information asymmetries between the plaintiff and defendant). It is too early as yet to draw any conclusions about *Iqbal*'s effects. Judge Stewart observed that *Iqbal* itself was a very atypical case. Mr. Letter asked whether any cases can be found in which a court states that it would not have granted a particular motion to

dismiss under the pre-*Iqbal* standard, but that the post-*Iqbal* standard leads the court to dismiss. Judge Rosenthal responded that though some such cases do exist, many other opinions state that the motion would have been decided the same way under either standard.

V. Action Item

A. For publication

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

Judge Sutton invited the Reporter to introduce this item, which concerns the procedure for interlocutory tax appeals. As the Committee has previously discussed, in 1986 Congress enacted 26 U.S.C. § 7482(a)(2), which adopts for interlocutory appeals from the Tax Court a system similar to that provided by 28 U.S.C. § 1292(b) for interlocutory appeals from district courts. The Appellate Rules, however, were never amended to take account of Section 7482(a)(2)'s interlocutory-appeal mechanism. The Committee has discussed the possibility of amending Title III of the Appellate Rules to make clear that Appellate Rule 5 applies to interlocutory appeals under Section 7482(a)(2). Informal inquiries with Judge Holmes of the Tax Court indicate that such amendments would be useful even though the universe of affected appeals might be small.

The proposed amendments set forth in the agenda materials take the approach of distinguishing Tax Court "decisions" from Tax Court "orders" – an approach that would entail changes in Title III's heading, in Rule 13(d)(1), in the title of Rule 14, and in Rule 14(a). The proposal would then specify in a new Rule 14(b) the treatment of interlocutory appeals from Tax Court "orders." The Reporter noted, however, that an attorney member had made a very helpful suggestion in advance of the meeting concerning a possible alternative approach.

The member explained that the approach shown in the agenda materials places great weight on the technical distinction between a Tax Court "decision" and a Tax Court "order." She questioned whether all users would understand that this distinction is meant to express the difference between appeals as of right from final decisions and appeals by permission from interlocutory orders. She noted that interlocutory "orders" are often reviewed in the course of an appeal as of right from a final decision. She suggested that Title III's heading might be revised to refer to "Appeals From the United States Tax Court." Rule 13 could be revised to refer to "Appeals as of Right," and Rule 14 could be revised to treat "Appeals by Permission." Committee members agreed with this suggested approach.

The Reporter also raised some additional drafting choices. What provisions should be included for or excluded from application to tax appeals? And should the Rules contain a global definition that defines "district court" and "district clerk" to encompass the Tax Court and its clerk? There was consensus that a global definition would likely be useful. A member asked why the Title III rules refer to review of "decisions" rather than "judgments"; the Reporter said

that she would research this question.

Judge Rosenthal suggested that, prior to the Committee's spring meeting, it would be useful for the Committee to reach out to the tax bar and bench, as a way of obtaining advance comment on the proposals before deciding whether to seek permission to publish them officially for comment. The American Bar Association's Tax Section would be a useful resource, as would the judges on the Tax Court and Mr. Letter's colleagues in the DOJ. It is worth asking these groups whether the changes are needed and how the changes should be drafted.

By consensus, it was decided that the Reporter would prepare a proposed re-draft of the Title III rules, and that Judge Sutton would write to relevant constituencies to seek advance comment on the possible amendments.

VI. Discussion Items

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

Judge Sutton invited the Reporter to summarize the status of this item. This item originally concerned the DOJ's proposal for changes to both Rule 4(a)(1) and Rule 40(a)(1). After the Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007), the DOJ withdrew its proposal to amend Rule 4, but continued to support amending Rule 40. The proposed Rule 40 amendment received final approval at the Committee's fall 2008 meeting, and it was on the discussion agenda at the January 2009 Standing Committee meeting. Shortly thereafter, certiorari was granted in *United States ex rel. Eisenstein v. City of New York*, 129 S. Ct. 988 (2009) – a case that presented a question concerning the interpretation of Rule 4(a)(1)(B) and 28 U.S.C. § 2107 – and the DOJ suggested putting Item No. 03-09 on hold pending the outcome of *Eisenstein*. In June 2009, the Standing Committee remanded Item No. 03-09 to the Appellate Rules Committee for further consideration in the light of the expected decision in *Eisenstein*. The ensuing decision in *Eisenstein* held that the United States is not a "party" to a False Claims Act qui tam action, for purposes of applying Section 2107 and Rule 4(a)(1), unless the United States has intervened in the action.

The Reporter turned to Mr. Letter for his report on the views of the DOJ. Mr. Letter explained that the DOJ supports moving forward with the amendment to Rule 40. The Rule 40 issue frequently arises, in that the government regularly finds it has to seek extensions of the time to seek rehearing in cases that involve government employees sued in their individual capacity for acts in connection with federal duties. As to the possibility of amending Rule 4, Mr. Letter questioned whether a rulemaking change to Rule 4 would produce the desired effect in the absence of a similar legislative amendment to Section 2107. He noted that the DOJ might propose such a statutory change at some future point.

A member questioned whether it makes sense to amend Rule 40 without also amending

Rule 4. An attorney member expressed reluctance to recommend amending Rule 4; she noted that often private attorneys are retained to defend suits against federal officials. Those private attorneys might not be as well informed as DOJ lawyers would be, and they might rely on the text of such an amended Rule 4 without realizing the dangers of relying on a Rule 4 change that diverged from the text of Section 2107. This risk would also exist for the attorneys for other parties in such a case. A judge member agreed that it would be undesirable to have a rule that is inconsistent with the statute.

An appellate judge stated that he supports the Rule 40 proposal because it would eliminate a number of extension motions. Another appellate judge noted that his court receives many such extension requests, and typically grants them. Mr. Letter observed that even if the request is ultimately granted, that grant may not always occur promptly, and the delay before the grant can cause problems for the government's planning. Moreover, the additional time is not needed only for the Solicitor General to decide whether to seek rehearing; if the Solicitor General decides *not* to seek rehearing, the employee may need time to obtain private counsel for the purpose of seeking rehearing.

Judge Sutton noted that he sensed consensus that if Rule 4, Section 2107 and Rule 40 could all be amended to clarify the treatment of federal officers and employees sued in an individual capacity, that would be useful. Judge Rosenthal observed that on prior occasions the rulemakers have coordinated a rulemaking change with proposed legislation. It was suggested that amending Rule 40 without amending Rule 4 might "take care of the tail but not the dog." Professor Coquillette expressed optimism that a legislative amendment could be accomplished.

Members also discussed the wording of the Rule 40 proposal as approved at the fall 2008 meeting. A participant questioned whether the language "for an act or omission occurring in connection with duties performed on the United States' behalf" captured the sense that the Committee desires. One DOJ attorney had suggested to Mr. Letter that this language might lead to litigation over whether a particular act or omission did or did not qualify; this attorney had queried whether a better formulation might be one that captures cases in which "any party claims that the act or omission occurred in connection with [etc.]." The Reporter noted that the Committee had discussed a somewhat similar question at the fall 2008 meeting.

At the fall 2008 meeting, the Committee had before it comments from the Public Citizen Litigation Group ("Public Citizen"), expressing concern that the language in the proposed Rule 4 and Rule 40 amendments could be read to exclude instances when the court of appeals ultimately concluded that the federal officer's or employee's act did not occur "in connection with duties performed on the United States' behalf." Public Citizen argued that the wording should be changed to make clear that the extended time periods' availability turned on the nature of the act as alleged by the plaintiff rather than on the nature of the act as ultimately found by the court. Public Citizen suggested that this could be achieved by changing "an act or omission occurring in connection with" to read "an act or omission alleged to have occurred in connection with." At the meeting, however, a participant objected that the time period for rehearing should not turn on the way in which the complaint was framed. Also, it was pointed out that the uncertainty that

concerned Public Citizen would presumably be less in connection with Rule 40(a)(1) (compared to the concern over Rule 4(a) and appeal time) because where the question is the time to seek rehearing, there will already be a panel opinion which will indicate the panel's view of the facts. The Committee also noted that Public Citizen's proposed language would diverge from the language used in Civil Rule 12(a).

After this discussion was recapitulated, members at the fall 2009 meeting did not express an immediate inclination to alter the proposed language shown in the agenda materials. However, it was noted that if the DOJ wished to propose alternative language it could do so in advance of the spring 2010 meeting.

The Committee discussed the possible timing of a rule change and legislative proposal. Mr. McCabe noted that if the Committee were to conclude that no republication is needed, then the rules amendment could take effect (assuming approval at each relevant step) on December 1, 2011. Mr. Letter noted that he would not be in a position to vote to request legislation without first seeking authorization to do so. Mr. Rabiej noted that the rulemakers would need to obtain permission from the Judicial Conference in order to seek legislation. A participant wondered whether a proposed legislative amendment might become complicated through association with other questions relating to government litigation.

By consensus, the Committee decided to retain the matter on the agenda and to revisit these questions at the Committee's spring 2010 meeting.

B. Item No. 05-05 (FRAP 29(e) – timing of amicus filing)

Judge Sutton invited the Reporter to present this item, which had been pending for some years. Prior to 1998, the briefing deadlines for amici were the same as those for the party whom the amicus supported. In 1998, Rule 29 was amended to stagger those deadlines by placing the amicus's deadline 7 days after the filing of the brief of the party supported. The Public Citizen Litigation Group initially expressed concern about this 7-day stagger, noting that it shortened the time within which the appellant can review (and address in the reply brief) assertions made in briefs of amici supporting the appellee. The Committee discussed those concerns in fall 1999 but decided to take no action on them. In 2002, Rule 26(a)'s time-computation provision was amended to shift the trigger (for skipping intermediate weekends and holidays) from "less than 7 days" to "less than 11 days." In 2005, Public Citizen expressed concern that the 2002 time-computation change effectively lengthened the 7-day stagger, and suggested that Rule 29(e) be amended to refer to "7 calendar days." This proposal was considered by the Appellate Rules Committee's Deadlines Subcommittee, which expressed no view on whether the stagger should be retained but suggested that if the stagger were to be retained then the period should be amended to provide that the 7-day period should be counted on a days-are-days basis. In the meantime, Mr. Letter had consulted some 24 practitioners (including attorneys in various types of practice) concerning the possibility of amending Rule 29(e). He received ten responses, and the respondents unanimously opposed abandoning the stagger. They pointed out that the stagger

provides time for the potential amicus to decide whether to file at all, as well as to revise the amicus brief to avoid redundancy. Some noted that briefing in the court of appeals tends to be less coordinated than briefing in the Supreme Court. The respondents did differ somewhat on whether to adjust the length of the stagger.

The main concern expressed by Public Citizen in 2005 has now been addressed. Effective December 1, 2009 (assuming no contrary action by Congress), Rule 29(e)'s 7-day period will be computed on a days-are-days basis. This suggests that the main motivation for this agenda item has now been removed. There is, though, one additional concern expressed by Public Citizen: namely, that amicus deadlines run from the filing of the relevant brief, but the parties' deadlines run from the service of the relevant brief. Public Citizen suggested that this feature results in additional time pressure on the party responding to the amicus, and it proposed that Rule 29(e) should be amended to run the amicus deadline from service rather than filing, and also suggested that amici should be encouraged to serve their briefs electronically. The Reporter suggested that these additional concerns would be rendered largely moot by the advent of electronic filing.

Mr. Letter noted that in the time since Public Citizen first raised its concerns, the Supreme Court has amended its own rules to add a similar time stagger.

A motion was made to remove Item No. 05-05 from the Committee's agenda. The motion passed by voice vote without opposition. Judge Sutton stated that he would make sure a letter is written to Public Citizen to inform it of this disposition.

C. Civil Rules Committee – query concerning three-day rule

Committee members next discussed an inquiry received from the Civil Rules Committee. Under Appellate Rule 26(c), the "three-day rule" is a provision that 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. Similar provisions exist in the Civil, Criminal and Bankruptcy Rules. Some comments received during the time-computation project had suggested that the "three-day rule" should be altered or abolished in the light of changes such as the advent of electronic filing. The Appellate Rules Committee's Item No. 08-AP-C concerns the suggestion that Rule 26(c)'s three-day rule be amended; the Committee discussed that item at the fall 2008 meeting and decided to retain it on the study agenda while encouraging the other advisory committees to consider the question. Judge Kravitz and Professor Cooper have now reported that the Civil Rules Committee discussed the three-day rule at its fall 2009 meeting, and they have requested the views of the Appellate Rules Committee and the other advisory committees. Evidently, the discussion at the Civil Rules Committee meeting supported a wait-and-see approach to the matter at the current time.

Mr. Letter reported that he had polled his colleagues, who state that in their experience where the case management / electronic case filing ("CM / ECF") system is used to accomplish

service it is unproblematic, but that this is not yet true in all circuits. For example, the Second Circuit does not use the CM / ECF system to effect service. Instead, electronic service among parties litigating before the Second Circuit is accomplished by email. And there are many horror stories about glitches with email service.

Mr. Rabiej reported that several clerks have noted that the time-computation project strove to set time periods in multiples of seven so that the periods would not end on a weekend, and that adding three days at the end of such periods can frustrate that objective.

An attorney member suggested that the Appellate Rules Committee should wait to act on this matter until all the circuits use the CM/ ECF system to accomplish service. He suggested that when the Committee does turn to the question of eliminating the three-day rule, it should also consider whether to lengthen the deadlines for responding to motions.

Mr. Green reported that in the Sixth Circuit the clerk's office sees very few problems with electronically served documents bouncing back. He observed that the last circuits to go live on ECF are scheduled to do so in January 2010. Mr. Letter predicted that prisoner litigation will always involve paper filings.

Judge Rosenthal suggested that the issue of the three-day rule forms a part of a larger set of questions concerning the shift to electronic filing. Judge Sutton noted that the Bankruptcy Rules Committee's project to review Part VIII of the Bankruptcy Rules is motivated partly by a desire to take account of the switch to electronic filing. Over the coming years, the advisory committees are all likely to consider amendments to take account of this shift – probably through a coordinated, inter-committee project akin to the time-computation project.

The Committee directed the Reporter to convey the gist of the Committee's discussion to Judge Kravitz and Professor Cooper. In sum, the Appellate Rules Committee agrees with the Civil Rules Committee that this question will need to be addressed within the next few years but that, for the moment, it warrants a wait-and-see approach.

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

Judge Sutton invited the Reporter to summarize recent developments relating to *Bowles v. Russell*, 551 U.S. 205 (2007). The agenda materials attempt to give some sense of the effects of *Bowles* by examining selected post-*Bowles* decisions. The sample analyzed in the materials is not randomly selected, so it is important not to assume that the analysis is representative of the universe of cases as a whole. Out of a sample of 36 decisions, whether the relevant requirement was jurisdictional or non-jurisdictional affected the disposition of the appeal in 23 cases. Of those 23 cases, there was a fairly even split: in 11 cases the choice (jurisdictional or non-jurisdictional) resulted in the loss of appellate rights, while in another 9 the choice resulted in the preservation of appellate rights. (A couple of cases were more difficult to classify.)

The agenda materials also discuss whether courts are likely to make use of the clear statement rule set by *Arbaugh v. Y&H Corporation*, 546 U.S. 500 (2006), to help discern whether a statutory appeal requirement is jurisdictional. A Westlaw search for federal court opinions discussing that clear statement rule revealed no cases discussing appellate jurisdiction or procedure. There are roughly 20 federal court opinions that discuss both *Bowles* and *Arbaugh*. The pending case of *Reed Elsevier v. Muchnick* – which presents the question whether 17 U.S.C. § 411(a) restricts subject matter jurisdiction for copyright infringement actions – might offer the Supreme Court an opportunity to clarify when courts should apply *Arbaugh*'s clear statement rule. But it appears likely that most statutory appeal deadlines will be considered jurisdictional under *Bowles*.

Finally, the agenda materials consider whether authorities such as *Becker v. Montgomery*, 532 U.S. 757 (2001), might be employed to mitigate the effects of jurisdictional deadlines in cases where some document, filed within the appeal time, constitutes the substantial equivalent of a notice of appeal. Those authorities may well prove useful in that respect, but it should be noted that not all cases take the forgiving approach exemplified in *Becker*. A leading example of the alternative, unforgiving, approach is *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988). It should also be noted that even if a court is inclined to apply the *Becker* line of cases, those cases can only rescue an appeal if *some* document has been timely filed that could be considered the substantial equivalent of the notice of appeal.

The Committee took no action on this agenda item.

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

Judge Sutton noted that Judge Bye, Mr. Letter and Ms. Mahoney are serving as representatives of the Appellate Rules Committee on the joint Civil / Appellate Subcommittee. That Subcommittee is chaired by Judge Colloton; the other representatives of the Civil Rules Committee are Judge Walker and Mr. Keisler. The Subcommittee conferred by telephone over the summer and considered a number of possible amendments to Appellate Rule 4.

One set of proposed amendments – Item No. 08-AP-D – grows out of Peder Batalden's observation that under Rule 4(a)(4)(B) the time to appeal from an amended *judgment* runs from entry of the *order* disposing of the last remaining tolling motion. The proposal that the Subcommittee placed before the Appellate Rules Committee for discussion would amend Rule 4(a) so that the appeal time runs from the latest of entry of the order or entry of any amended judgment. A related proposal would clarify the operation of Civil Rule 58's separate document requirement. Currently, the Seventh Circuit reads Civil Rule 58(a)'s reference to an order "disposing of" certain post-judgment motions as meaning orders "denying" such motions. Professor Cooper has pointed out that there can sometimes be orders that grant a tolling motion without actually leading to an amended judgment. The proposal would revise Civil Rule 58 to state that a separate document is not required "when an order – without altering or amending the judgment – disposes of a motion [etc.]." As Judge Colloton pointed out during the

Subcommittee's discussions, the Civil Rule 58(a) proposal is conceptually separable from the Appellate Rule 4(a) proposal. But a majority of the subcommittee members appeared to think that it is worthwhile to move forward with both proposals.

An attorney member stated that it seems useful to clarify these provisions. A judge member agreed that even if cases that would be affected by this issue may be rare, the issue is very important when it does arise.

On a somewhat related matter, a participant recounted the practice of one district judge who has on occasion entered a judgment on a separate document before filing an opinion with respect to the judgment. In such instances, a footnote to the judgment states that the judge will later issue an opinion and that the judgment should not be considered a final appealable judgment until the opinion issues. A question has arisen as to whether the entry of the judgment starts the appeal time running. A district judge observed that there is no reason for the judge in question to enter judgment on a separate document at that point – why not just state the disposition but hold off on entering judgment on a separate document until after the opinion is ready to issue? It was also observed that if the appeal time starts to run and a notice of appeal is filed, then the pendency of the appeal may call into question the district judge's authority, at that point, to provide new reasoning in support of the judgment that is on appeal.

The Committee next discussed another set of proposals – Item Nos. 08-AP-E and 08-AP-F – that had also been considered by the Civil / Appellate Subcommittee. These items concern suggestions by Public Citizen and by the Seventh Circuit Bar Association Rules and Practice Committee that Rule 4(a) be amended so that an original notice of appeal encompasses appeals from orders disposing of tolling motions. Such an approach, if adopted, would parallel the approach currently taken by Rule 4(b)(3)(C) for criminal appeals. But as the Subcommittee discussed, any such amendment to Rule 4(a) would face significant drafting problems. One difficulty is that under current law, not every notice of appeal encompasses every *previously*-resolved issue. In particular, under the expressio unius canon a notice of appeal that specifies particular orders can be read to exclude by implication any orders not mentioned. If the rule is to be amended to provide that a previously filed notice encompasses challenges to later dispositions of tolling motions, should such a provision encompass all notices or should it exclude notices that specify only one or more specific prior orders? There are also questions as to how one would treat actions involving multiple parties. In any event, apart from these drafting difficulties, Subcommittee members did not discern a need for such an amendment.

By consensus, the Committee decided to remove Item Nos. 08-AP-E and 08-AP-F from its study agenda.

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

Judge Sutton invited the Reporter to provide an update on her research relating to this Item, which concerns the possibility of revising Form 4 in various ways. The Reporter

recounted that her most recent research was designed to investigate suggestions that Form 4's Questions 10 and 11 seek information that might be protected by work product protection. Question 10 asks those applying to proceed in forma pauperis whether they have paid or will pay an attorney for services in connection with the case, and if so, asks how much and whom. Question 11 requests similar information concerning payments to anyone other than an attorney.

To the extent that Question 11 might be read to encompass payments to investigators or experts (especially non-testifying experts), it seems to raise questions about work product protection. And because many of those who seek to appeal in forma pauperis will be proceeding pro se, it makes sense to consider in particular the scope of work product protection for pro se litigants. Cases concerning protection for the work product of pro se litigants are sparse. But it does appear that pro se litigants' work product should be viewed as falling within the scope of work product protection. Civil Rule 26(b)(3)(A) refers to materials prepared "by or for [a] party or its representative." This dates back to the 1970 amendments to Rule 26, which clarified that work product protection extends beyond lawyers' work. Those who prepared the 1970 amendments appear to have been intending to cover the work of non-lawyer investigators; but the existing language does extend more broadly and appears to cover the work product of pro se litigants.

A district judge asked why the court of appeals needs the answers to Questions 10 and 11 – or, for that matter, a number of other questions in Form 4 – when deciding whether to permit the applicant to appeal in forma pauperis. He suggested that Questions 10 and 11 could be eliminated. What the judge wants to know, he stated, is how much money the applicant has, not what he or she spends it on. An attorney member asked whether any judge is known to have denied a motion for i.f.p. status based on information elicited by Questions 10 and 11. An appellate judge suggested that Questions 10 and 11 can elicit information germane to the question of i.f.p. status, in the sense that a judge might wish to know how much money the applicant is spending on matters relating directly to the litigation itself. An attorney member suggested that perhaps instead of Questions 10 and 11 one could substitute the following simpler formula proposed by certain pro se staff attorneys: "whether funds have been or will be used in the prosecution of the litigation for costs or attorney's fees."

Members discussed the fact that one of the pieces of information that might be disclosed in response to Question 10 is whether the applicant has obtained legal assistance for certain parts of the litigation, even if the applicant is not formally represented by the lawyer in question. This connects to a broader debate over the "unbundling" of legal services. Professor Coquillette observed that the topic of "unbundling" has been the subject of much discussion in the American Bar Association. A district judge stated that if an applicant is receiving any assistance from a lawyer with respect to the litigation, the judge wants to know of the lawyer's involvement because the lawyer should be subject to the discipline of the court.

A judge member asked whether the information elicited by Form 4 is shared with the applicant's opponent. Mr. Green stated that in the Sixth Circuit that information is not provided to the opponent, but he also stated that the practice on this question varies from circuit to circuit.

Mr. Green observed that in cases where an application for i.f.p. status is coupled with a motion for appointment of counsel – either Criminal Justice Act ("C.J.A.") counsel or pro bono counsel – the information elicited by Questions 10 and 11 could be relevant to the latter. A participant stated that the C.J.A. form is not put into the court record, but he expressed uncertainty as to whether the C.J.A. form is shared with the DOJ. Mr. Letter undertook to obtain the answer to this question.

An attorney member stated that it would be advisable to find out more about the Supreme Court's practice on i.f.p. applications. Applicants seeking i.f.p. status before the Supreme Court are directed to employ Form 4. Members agreed that it is important to obtain more information about practice in the Supreme Court. Would practice in the Supreme Court be adversely affected if Questions 10 and 11 were replaced with the briefer question "whether funds have been or will be used in the prosecution of the litigation for costs or attorney's fees"? Is the detail currently sought in Form 4 necessary for the review of i.f.p. applications in the Supreme Court? The possibility was noted that one could propose the adoption of different forms for use in the Supreme Court and in the lower courts.

G. Item No. 08-AP-L (FRAP 6(b)(2)(A) / Sorensen issue)

Judge Sutton invited the Reporter to introduce this item, which concerns an ambiguity in Rule 6(b)(2)(A)(ii). The relevant language is similar to that in Rule 4(a)(4)(B)(ii). In both instances, the rules refer to challenges to "a judgment altered or amended" upon a post-judgment motion (or "an altered or amended judgment") – when they should instead refer to challenges to the alterations or amendments. An amendment designed to remove this ambiguity from Rule 4(a)(4)(B)(ii) is on track to take effect December 1, 2009 (absent contrary action by Congress). At the fall 2008 meeting, the Committee discussed the possibility of making a similar change to Appellate Rule 6(b)(2)(A)(ii). The Committee decided to seek guidance from the Bankruptcy Rules Committee. The Bankruptcy Rules Committee referred the question to its Subcommittee on Privacy, Public Access and Appeals. That Subcommittee reviewed the proposal, concluded that the proposed amendment would be useful, and suggested refinements to the wording of the proposed amendment. The Bankruptcy Rules Committee adopted the views of its Subcommittee.

The Reporter noted that the Bankruptcy Rules Committee's refinement of the proposal is very constructive. The Reporter suggested that it will be important to coordinate the Appellate Rule 6 amendment with the possible amendments to Appellate Rule 4 and Bankruptcy Rule 8015. If the Bankruptcy Rules Committee's Part VIII revision project moves forward, then Bankruptcy Rule 8015 may be renumbered – a change that would necessitate a conforming change to Appellate Rule 6. It is also worth noting that both Bankruptcy Rule 8015 and Appellate Rule 6 address the question of the timing of an appeal after disposition of a timely rehearing motion, and that these rules do so in inconsistent ways. And it may be useful to consider whether Rule 6(b) should conform to the approach currently proposed for Rule 4(a)(4) by the Civil / Appellate Subcommittee – i.e., specifying that when a timely rehearing motion is

made the time to appeal runs from the latest of the entry of the order disposing of the last such remaining motion or entry of any altered or amended judgment. The Bankruptcy Rules Committee has not yet had an opportunity to consider that point. For all these reasons, it may make sense for any proposed change to Rule 6 to proceed in tandem with the Part VIII revision project, and for the Appellate Rules Committee to seek the Bankruptcy Rules Committee's guidance on the additional questions mentioned here.

Mr. Letter reported that he had discussed the Rule 6 proposal with Christopher Kohn, the DOJ's longtime representative on the Bankruptcy Rules Committee, and that Mr. Kohn had stated that the suggestion concerning Rule 6 looked right to him. By consensus, the Committee retained this item on the study agenda and resolved to seek further input from the Bankruptcy Rules Committee.

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

Judge Sutton invited the Reporter to introduce this item, which arose from Mr. Batalden's suggestion that Rule 32 should be amended to provide for 1.5-spaced instead of double-spaced briefs. At the spring 2009 meeting, members also discussed the possibility of permitting briefs to be printed double-sided. Members expressed diverse views; much discussion centered on the potential significance of the ongoing shift to electronic filing. After the spring 2009 meeting, Mr. Rabiej had asked Mr. Ishida to review the history of prior proposals to amend Rule 32 to provide for double-sided briefs. The agenda materials include Mr. Ishida's very helpful memo detailing that history, as well as excerpts from a 1995 Appellate Rules Committee report that summarized the comments submitted on the double-sided printing proposal.

An attorney member stated that she would like to hear from the judge members of the Committee what they thought about the proposal. Justice Holland noted that the Delaware Supreme Court permits double-sided (but double-spaced) printing for printed briefs, and that two-sided printing has not been a problem; he also noted that the lawyers are required to provide hard copies for all the justices and their clerks. A district judge asked whether the shift to electronic filing would moot the question. Mr. Green noted that even with the shift to e-filing, all circuits other than the Sixth Circuit still require the submission of hard copies of briefs. An appellate judge noted that once a brief is electronically filed, each judge can have it printed precisely the way he or she prefers. Another appellate judge noted that the problem of eye strain is likely to prevent judges from simply reading briefs on-screen without printing them. He stated that judges on the Fifth Circuit generally want to receive hard copies of the briefs. Another appellate judge agreed that many judges are likely to continue to want hard copies, though their law clerks may read the briefs on the screen; he noted that the need to print out electronically filed briefs has created a great deal of work for the judicial assistants. Another appellate judge noted that the Eighth Circuit was an early adopter of electronic filing. He stated that his assistant prints out copies of the electronically filed briefs for him; he prefers single-sided printing, though his clerks do not.

An appellate judge suggested that as time progresses, this item might usefully be addressed as part of the set of issues that relate to electronic filing. An attorney member questioned whether line-spacing really will become moot with the shift to electronic filing; she noted that if a judge chooses to have electronic double-spaced briefs printed out with 1.5 or single line spacing, the brief's internal page references will no longer make sense. But it was noted that the question of line-spacing does relate to the question of double-sided printing, and the latter question does appear to be shifting in valence with the adoption of electronic filing.

By consensus, the Committee resolved to keep this item on its study agenda.

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

Judge Sutton invited the Reporter to introduce this item, which concerns Daniel Rey-Bear's suggestion that the term "state" be defined, for purposes of the Appellate Rules, to include federally recognized Native American tribes. There are two possible ways to proceed with this suggestion: one option would be to consider a global definition of the type proposed by Mr. Rey-Bear; a second option would be to examine each Appellate Rule in which the term "state" appears and to consider how to treat Native American tribes for purposes of each such rule.

If one considers the question on a rule-by-rule basis, some rules appear to present more significant issues than others. Mr. Rey-Bear states that there are no federal courthouses that are located within federally recognized Indian reservations; assuming this to be the case, it would appear to make no practical difference whether Native American tribes are treated the same as states for purposes of applying the definition of legal holidays in Rule 26(a)'s time-computation provisions. Mr. Rey-Bear also states that tribal courts' attorney admission standards typically require admission to practice before the bar of a state's highest court, and he suggests that therefore treating tribes as states for purposes of Rule 46 would not change current practice. Professor Coquillette stated that Mr. Rey-Bear's assessment is an accurate description of current practice, but he noted that tribal practices might change; he also observed that admission to practice before the federal courts of appeals (under Rule 46) also has implications for practice in other jurisdictions. Treating tribes the same as states for purposes of Rule 22's certificate-of-appealability provisions could result in a change in current law. Federal habeas review for persons detained by a Native American tribe is governed by a distinct statutory framework and it is not at all clear that this framework requires a petitioner who has lost in the district court to obtain a certificate of appealability in order to appeal. As to Rule 44, it seems eminently sensible to require that a tribe be notified of litigation in which the validity of the tribe's laws is at stake; but Rule 44 is drafted in terms of challenges to the *constitutionality* of a law, and that language seems like a poor fit as to tribal laws, given that the federal-law constraints on tribal authority appear to be more in the nature of federal common law than federal constitutional law.

Rule-by-rule consideration of Mr. Rey-Bear's suggestion also may be useful because Mr. Rey-Bear's concern appears to center on the operation of Rule 29's provisions for amicus filings.

Mr. Rey-Bear argues that tribes should not be required to seek party consent or court leave in order to file an amicus brief, and he also objects to the inclusion of tribes within the proposed new authorship-and-funding disclosure requirement that is currently on track to take effect December 1, 2010 (if it is approved by the Supreme Court and Congress takes no action to the contrary).

An attorney member stated that if the Committee is considering whether to treat tribes the same as states for purposes of amicus filings, the Committee should expand its focus to consider cities and towns as well. She noted that the U.S. Supreme Court's amicus-filing rule – Rule 37 – permits amicus filings (without court leave or party consent) by federal, state and municipal governments but not by tribes. She wondered how often a tribe's request to file an amicus brief is denied. Ms. Leary stated that it would be possible to study this question empirically. A member questioned whether all Native American tribes would actually want to be included within the definition of "state"; tribes and states are different entities with different histories. This member stated that he can see merit in the arguments for treating tribes the same as states for purposes of Rule 29. He also agreed that it is worthwhile to consider whether to treat municipal governments the same as states, because all government entities are distinguishable from private litigants. He suggested that the real issue here is the importance of according tribes as much dignity as states. A participant suggested that the equal-dignity rationale is potentially very expansive in its application, reaching well beyond questions of amicus filing and, indeed, beyond questions pertaining merely to the Appellate Rules.

A district judge noted that there is no Civil Rule governing amicus filings in the district court; requests to file amicus briefs in the district court are made, and often denied. He stated that it seems incorrect to define tribes as states. According the same treatment to tribes as to states may make sense for purposes of amicus filing, but he noted as well that as to a number of tribes there are disputes as to tribal recognition, and that tribes vary greatly in their size and characteristics. (It was noted that Mr. Rey-Bear's proposal would cover only federally-recognized tribes.)

Mr. Letter reported that he has not yet been able to ascertain the DOJ's position on this item. He noted that the dignity rationale is likely to be of considerable importance to the government. Concerning the question of whether tribes are denied leave to file amicus briefs, Mr. Letter recounted that a colleague of his in the environmental division of the DOJ has told him that tribes make a significant number of amicus filings. The courts generally permit such filings, though on some occasions some courts (it was not clear whether these were district courts or courts of appeals) have denied leave to file. Mr. Letter noted that though there is no rule governing amicus filings in the district court, there is a statute – 28 U.S.C. § 517 – that could be argued to authorize the United States to make amicus filings without court permission.

An attorney member suggested that all parties should be treated the same before the court, though he recognized that the United States has an institutional interest when federal statutes are under challenge. An appellate judge stated that courts should be receptive to tribes' amicus filings in cases that implicate tribal sovereignty or other issues of Indian law. Another

participant asked whether tribes should be seen as more analogous to states or to foreign nations, for purposes of the amicus-filing question. The Reporter noted that Native American tribes may often have much more at stake in federal court litigation than a foreign nation would have, because the U.S. Supreme Court has made clear that the outer bounds of tribal authority are set by federal law. An attorney member noted, however, that denying a foreign nation leave to file an amicus brief might have foreign relations implications. A participant noted that states, the United States and foreign states are not persons for purposes of the Due Process Clause; he asked whether Native American tribes are persons for that purpose. The Reporter agreed to research this question.

Members discussed the fact that the authorship-and-funding disclosure requirement that is slated to take effect in 2010 as a new Rule 29(c)(5) links the application of that disclosure requirement to whether the litigant is permitted to make an amicus filing without party consent or court permission under Rule 29(a).

There was consensus among the meeting participants that the focus, going forward, should be on Rule 29's amicus-filing provisions rather than on the possibility of globally defining "state" to include Native American tribes. And the inquiry now encompasses whether to include municipal governments as well as tribal governments. Mr. Letter will continue his efforts to gather information within the DOJ. Dean McAllister undertook to research the history of the U.S. Supreme Court's amicus rule, with a view to determining why Native American tribes are not treated the same as states by that rule. Ms. Leary will study amicus filings in the courts of appeals (over the past five or ten years) to determine whether and how often Native American tribes are denied leave to file amicus briefs. One way to focus the search might be to select courts in areas where numerous tribes are located. She will also research the nature of amicus-filing practices in some of the largest tribal courts.

VII. Additional Old Business and New Business

A. Item No. 09-AP-C (matters relating to the Bankruptcy Rules Committee's project to revise Part VIII of the Bankruptcy Rules)

Judge Sutton invited the Reporter to introduce this item. The Bankruptcy Rules Committee is considering a project to update Part VIII of the Bankruptcy Rules, which addresses appeals from bankruptcy court to district courts and bankruptcy appellate panels. One impetus for the project was the desire to update the Part VIII rules to take account of changes in the Appellate Rules on which they were modeled. But as the project has progressed, participants have also noted the need to update the Part VIII rules to take account of the shift to electronic filing. The Bankruptcy Rules Committee's Subcommittee on Privacy, Public Access and Appeals held an open subcommittee meeting to discuss the project in Boston in September 2009. It seems likely that the earliest that the project would be sent out for public comment – assuming that it progresses – would be the summer of 2011.

The Part VIII rules project seems likely to provide the Appellate Rules Committee with a useful model for adjusting the rules to the practice of electronic filing. In addition, the project provides a good opportunity to address the rules governing permissive direct appeals from bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2). Interim procedures for those appeals were originally provided by a part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) that is set forth as a note to Section 158. The BAPCPA section setting forth those interim procedures specifies that its provisions apply until a rule relating to the relevant provision is promulgated through the rulemaking process. Such a rule – Bankruptcy Rule 8001(f) – did take effect in December 2008, and thus BAPCPA's interim procedures no longer apply as to matters covered in Bankruptcy Rule 8001(f). But though Bankruptcy Rule 8001(f) sets a 30-day deadline for petitions for permission to appeal, it does not otherwise address procedure in the court of appeals, except to direct the application of Appellate Rule 5. The Part VIII project contemplates putting in place Part VIII rules that would address appeals under Section 158(d)(2), and it thus seems advisable for the two advisory committees to consider jointly what changes, if any, might be appropriate for Appellate Rules 5 and 6. It also would be useful to consider how (and where) to address the compilation of the record for direct appeals. An interesting twist on this question is that in the first level of appeals from bankruptcy court to the district court or BAP, it may be possible to think of the record as simply consisting of a series of online links to the electronic components of the record. Overall, direct bankruptcy appeals present interesting complexities due to the multiple levels of courts – bankruptcy court, district court or bankruptcy appellate panel, and court of appeals – that may be involved at various steps in the process.

A participant asked how frequently direct appeals are taken under Section 158(d)(2). The Reporter noted that research on that question is currently ongoing.

By consensus, the Committee retained this item on its study agenda and resolved to coordinate its efforts with those of the Bankruptcy Rules Committee.

B. Proposed Criminal Rule concerning indicative rulings

Judge Sutton suggested that the Reporter describe the Criminal Rules Committee's work on a proposed new Criminal Rule concerning indicative rulings. The proposed new rule, which was approved for publication this fall by the Criminal Rules Committee, is largely modeled on Civil Rule 62.1 and is designed to dovetail with Appellate Rule 12.1. Presumably because the DOJ has expressed concern about the possible misuse of the indicative-ruling procedure in connection with Section 2255 proceedings, the Criminal Rules Committee modified the Note of the proposed new Criminal Rule to state that "[t]he Committee anticipates that this rule will be used primarily if not exclusively for newly discovered evidence motions under Rule 33(b)(1) (see *United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984)), reduced sentence motions under Rule 35(b), and motions under 18 U.S.C. 3582(c). This rule applies to motions 'that the court lacks authority to grant,' and therefore does not apply to motions under 28 U.S.C. 2255."

VIII. Schedule Date and Location of Spring 2010 Meeting

The Committee tentatively discussed two possible dates for the spring 2010 meeting – April 8 and 9, 2010, and May 13 and 14, 2010.

IX. Adjournment

The Committee adjourned at 9:21 a.m. on November 6, 2009.

Respectfully submitted,

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Catherine T. Struve
Reporter

TAB 3

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 7-8, 2010
Phoenix, Arizona
Draft Minutes

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ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Phoenix, Arizona, on Thursday and Friday, January 7 and 8, 2010. All the members were present:

Judge Lee H. Rosenthal, Chair
Dean C. Colson, Esquire
Douglas R. Cox, Esquire
Judge Harris L Hartz
Judge Marilyn L. Huff
John G. Kester, Esquire
Dean David F. Levi
William J. Maledon, Esquire
Deputy Attorney General David W. Ogden
Judge Reena Raggi
Judge James A. Teilborg
Judge Diane P. Wood

In addition, the Department of Justice was represented by Karen Temple Clagget and S. Elizabeth Shapiro.

Also participating in the meeting were Judge Anthony J. Scirica, former chair of the committee and current chair of the Judicial Conference's Executive Committee; committee consultants Joseph F. Spaniol, Jr. and Professor Geoffrey C. Hazard, Jr.; and committee guests Professor Robert G. Bone, Dean Paul Schiff Berman, Dean Georgene M. Vairo, and Professor Todd D. Rakoff.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Peter G. McCabe	The committee's secretary
John K. Rabiej	Chief, Rules Committee Support Office
James N. Ishida	Senior attorney, Administrative Office
Jeffrey N. Barr	Senior attorney, Administrative Office
Joe Cecil	Research Division, Federal Judicial Center
Tim Reagan	Research Division, Federal Judicial Center
Andrea Kuperman	Judge Rosenthal's rules law clerk

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Jeffrey S. Sutton, Chair
Professor Catherine T. Struve, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Laura Taylor Swain, Chair
Professor S. Elizabeth Gibson, Reporter
Advisory Committee on Civil Rules —
Judge Mark R. Kravitz, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Richard C. Tallman, Chair
Professor Sara Sun Beale, Reporter
Advisory Committee on Evidence Rules —
Judge Robert L. Hinkle, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Rosenthal welcomed the committee members and guests.

Judge Scirica reported that all the rule changes recommended by the committee had been approved without discussion by the Judicial Conference at its September 2009 session. The fact that rule amendments are so well received, he said, is a sign of the great esteem that the Conference has for the thorough and thoughtful work of the rules committees.

Judge Rosenthal added that the rules approved by the Conference in September 2009 included: (1) important changes to FED. R. CIV. P. 26 (disclosure and discovery) that make draft reports of expert witnesses and conversations between lawyers and their experts generally not discoverable; (2) a major rewriting of FED. R. CIV. P. 56 (summary judgment); and (3) amendments to FED. R. CRIM. P. 15 (depositions) that would allow, under carefully limited conditions, a deposition to be taken of a witness outside the United States and outside the physical presence of the defendant. She explained that the advisory committees had reached out specially to the bar for additional input on these amendments and had crafted them very carefully.

Judge Rosenthal reported that the Judicial Conference also approved proposed guidelines giving advice to the courts on what matters are appropriate for inclusion in standing orders vis a vis local rules of court. Professor Capra, she noted, deserved a great deal of thanks for his work on the guidelines.

She noted that several new rules had taken effect by operation of law on December 1, 2009, most of them part of the comprehensive package of time-computation amendments. She thanked Judges Kravitz and Huff and Professor Struve for their extensive work in this area.

Judge Rosenthal pointed out that the agendas for the January meetings of the Standing Committee are customarily lighter than those for the June meetings because most amendments are presented for publication or final approval in June, given the cycle prescribed by the Rules Enabling Act. The January meetings, therefore, give the committee an opportunity: (1) to discuss upcoming amendments that the advisory committees believe merit additional discussion before being formally presented for publication or approval; and (2) to consider a range of other matters and issues that may impact the federal rules or the rule-making process.

Judge Rosenthal also noted that Mr. McCabe had just reached the milestone of 40 years of service with the Administrative Office, including 27 years as assistant director and 18 as secretary to the rules committees.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of the last meeting, held on June 1-2, 2009.

LEGISLATIVE REPORT

Adjustment of Legislative Responsibilities

Judge Rosenthal reported that the Director of the Administrative Office had assigned Mr. Rabiej to take a more visible and extensive role in coordinating legislative matters that affect the federal rules. She explained that Congress appears to be taking greater interest in, and giving greater scrutiny to, the federal rules. She noted that most of the bills in Congress that would affect the rules involve difficult and technical issues. For that reason, it is essential that the Administrative Office coordinate its communications with Congressional staff through a lawyer who has a deep, substantive knowledge of the rules themselves, of the rule-making process, and of the agendas of the rules committees.

She noted that communications between the rules committees and Congress are different in several respects from those of other Judicial Conference committees. The rules committees, she noted, do not approach Congress to seek funding or to advance the needs of the judiciary, but to explain rule amendments that benefit the legal system as a whole. As a structural matter, she said, it is better to separate the staff who present bread and butter matters to Congress from those who explain rules matters. She pointed out that the new arrangements are working very well.

Proposed Sunshine in Litigation Act

Judge Rosenthal reported that the proposed Sunshine in Litigation Act would prohibit sealed settlements in civil cases and impose substantial restrictions on a court issuing protective orders under FED. R. CIV. P. 26(c). Under the legislation, a judge could issue a protective order only if the judge first finds that the information to be protected by the order would not affect public health or safety. That provision, she said, has been introduced in every Congress since 1991, and Judge Kravitz testified against the legislation at hearings in 2008 and 2009. But, she added, there had been little activity on the legislation for the last several months.

Judge Rosenthal explained that the Judicial Conference opposed the legislation because it would amend Rule 26 without following the Rules Enabling Act process. Moreover, the legislation: (1) lacks empirical support; (2) would be very disruptive to the

civil litigation process; and (3) is unworkable because it would require a judge to make important findings of fact without the assistance of counsel and before any discovery has taken place in a case.

Judge Kravitz added that Congressional staff now appear to understand the serious problems that the bill would create. But, he noted, it is the members of Congress who vote, not the staff, and it is difficult for members to oppose any bill that carries the label "sunshine." He noted that he had presented Congress with a superb, comprehensive memorandum prepared by Ms. Kuperman detailing the case law on protective orders in each federal circuit and demonstrating that trial judges act appropriately whenever there is a question of public health or safety.

Congressional Activity on the Rules that Took Effect on December 1, 2009

Judge Rosenthal pointed out that there has been increased Congressional scrutiny of the rule-making process. The rules committees, she said, have taken pains to make sure that Congress knows what actions the committees are contemplating early in the rules process, especially on proposals that may have political overtones or affect special interest groups.

She noted that Congressional staff in late 2009 had voiced two separate sets of concerns over the rule amendments scheduled to take effect on December 1, 2009, and they had suggested that implementation of the rules be delayed until their concerns were resolved. Staff asserted, for example, that some of the bankruptcy rules in the package of time-computation amendments might create a trap for unwary bankruptcy debtors and lawyers by reducing certain deadlines from 15 days to 14 days.

Judge Swain explained that it is common for debtors to file only a skeleton petition at the commencement of a bankruptcy case. The rules currently give debtors 15 additional days to file the required financial schedules and statements. The amended rules, though, would reduce that period to 14 days. Some bankruptcy lawyers may not be aware of the shortened deadline and may fail to file their clients' documents on time.

She said that the Advisory Committee on Bankruptcy Rules had persuaded the legislative staff to allow the rules to take effect as planned on December 1, 2009, by taking two visible steps to assist attorneys who may not be aware that they will have one day less to meet certain deadlines. First, the committee wrote to all bankruptcy courts to inform them of the committee's position that, during the first six months under the revised rules, missing any of the shortened time deadlines should be considered as "excusable neglect" that justifies relief. Second, the committee recommended adding a notice to CM/ECF and asking the courts to add language to their respective web sites warning the bar of the revised deadlines in the rules. Letters were sent to Congress documenting these steps.

Judge Rosenthal reported that the second set of concerns voiced by Congressional staff focused on proposed new Rule 11 of the Rules Governing Section 2254 Cases and a companion new Rule 11 of the Rules Governing Section 2255 Proceedings. The new rules require a district court to issue or deny a certificate of appealability at the same time that it files the final order disposing of the petition or motion on the merits. The concern expressed through staff related to two sentences of the new rules, stating that: (1) denial of a certificate of appealability by a district court is not separately appealable; and (2) motions for reconsideration of the denial of a certificate of appealability do not extend the time for the petitioner to file an appeal from the underlying judgment of conviction.

The new rules, Judge Tallman said, were relatively minor in scope and designed to avoid a trap for the unwary in habeas corpus cases brought by pro se plaintiffs. Perfecting a challenge to a conviction is a byzantine process, and petitioners will lose appeals if they do not understand the complicated provisions.

By statute, a petitioner may not appeal to a court of appeals from a final order of the district court denying habeas corpus relief without first filing a certificate of appealability. Even if the district court denies the certificate of appealability, the court of appeals may grant it. Separately, the petitioner must also file a notice of appeal from the final order denying habeas corpus relief within the deadlines set in FED. R. APP. P. 4(a). So, in order for an appellate court to have jurisdiction over an appeal, the petitioner must have both: (1) filed a timely notice of appeal; and (2) received a certificate of appealability from either the district court or the court of appeals.

The trap for the petitioner occurs because once a district judge denies the habeas corpus petition itself, the clock begins to run on the time to file a notice of appeal, regardless of any action on the certificate of appealability. The accompanying committee note explains to petitioners that the grant of a certificate of appealability does not eliminate their need to file a notice of appeal.

Judge Tallman pointed out that the concerns brought to Congressional staff were misplaced. He explained in a memorandum for them that the new rules do not in any way alter the current legal landscape regarding the tolling effect of motions for reconsideration or the deadlines for filing a notice of appeal challenging the underlying judgment. All that they do, he noted, is codify and explain the existing law for the benefit of petitioners in response to reports received by the advisory committee that many forfeit their right to appeal, especially pro se filers, because they unwittingly file their appeals too late.

Judge Rosenthal emphasized the importance of the advisory committees: (1) reaching out to affected groups to give them a full opportunity to provide input on proposed rules; and (2) fully documenting on the record how their concerns have been

addressed. Some committee members suggested that the recent communications from Congressional staff on the 2009 rules may portend new challenges in the rules process. Last-minute communications with Hill staff, they said, may become a new strategy for parties whose views are not adopted on the merits through the rule-making process. A participant added that it is particularly difficult to predict problems of this sort in advance because staff may be hearing from their friends or from individuals in an organization, rather than the organization itself.

Civil Pleading Standards

Judge Rosenthal reported that legislation had been introduced in each house of Congress to restore pleading standards in civil cases to those in effect before the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007), and *Ashcroft v. Iqbal,* 556 U.S. ___, 129 S. Ct. 1937 (2009). The Senate and House bills are phrased differently, but both attempt to legislatively supersede the two decisions and return the law on pleading to that in effect on May 20, 2007. But, she said, the drafting problems to accomplish that objective are truly daunting, and both bills have serious flaws. Both would impose an interim pleading standard that would remain in place until superseded by another statute or by a federal rule promulgated under the Rules Enabling Act process.

The short-term challenge, she suggested, was to identify the proper approach for the rules committees in light of the pending legislation, recognizing that much of the discussion in Congress is intensely political. She reported that she and Judge Kravitz had written a carefully drafted letter to Congress that avoids dragging the committees into the political fray, but accepting the committees' obligation to consider appropriate amendments to the rules. She added that the letter had provided a link to Ms. Kuperman's excellent memorandum documenting the extensive case law developed in the wake of *Twombly* and *Iqbal.* The memorandum, she said, is continually being updated, and it shows that the courts have responded very responsibly in applying the two decisions.

The letter also provided a link to Administrative Office statistical data on the number of motions to dismiss filed before and after *Twombly* and *Iqbal*, the disposition of those dismissal motions, and the breakdown of the statistics by category of civil suit. But no data were available to detail whether the motions to dismiss had been granted with prejudice or with leave to amend and whether superseding complaints were filed. That information will be gathered by staff of the Federal Judicial Center, who will read the docket sheets and case papers and prepare a report for the May 2010 civil rules conference at Duke Law School.

Judge Rosenthal noted that the Advisory Committee on Civil Rules was closely monitoring the intensive political fight taking place in Congress, the substantive debate

unfolding among academics and within the courts, and the actions of practicing lawyers in response to *Twombly* and *Iqbal.* She predicted that there will be a substantial effort in Congress to get the legislation enacted in the current Congress, and a number of organizations have made it a top priority. The rules committees, she said, have two goals: (1) to protect institutional interests under the Rules Enabling Act rule-making process; and (2) to fulfill their ongoing obligation under the Act to monitor the operation and effect of the rules and recommend changes in the rules, as appropriate. She suggested that Congress is likely to leave the eventual solution to the pleading controversy up to the rules process. Therefore, the Advisory Committee on Civil Rules will have to decide whether the current pleading standard in the rules is fair and should be continued or changed.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Sutton and Professor Struve presented the report of the advisory committee, as set forth in Judge Sutton's memorandum and attachments of December 7, 2009 (Agenda Item 6). Judge Sutton reported that the advisory committee had no action items to present.

Informational Items

FED. R. APP. P. 4(a)(1) and 40(a)

Judge Sutton reported that the advisory committee had been considering proposed amendments requested by the Department of Justice to FED. R. APP. P. 4(a)(1) (time to file an appeal in a civil case) and FED. R. APP. P. 40(a) (time to file a petition for panel rehearing). Both rules provide extra time in cases where the United States or its officer or agency is a party. The proposed amendments would make it clear that additional time is also provided when a federal officer or employee is sued in his or her individual capacity for an act or omission occurring in connection with official duties.

The advisory committee, he said, had presented proposed amendments to the Standing Committee. But the Standing Committee returned them for further consideration in light of the Supreme Court's recent decision in *United States ex rel. Eisenstein v. City of New York,* 129 S. Ct. 988 (2009). The problem is that the time limits in FED. R. APP. P. 4(a)(1) are fixed by statute, 28 U.S.C. § 2107, and therefore may be jurisdictional for the court of appeals under *Bowles v. Russell,* 551 U.S. 205 (2007).

The Department of Justice recommended proceeding with the proposed amendment to Rule 40, but deferring action on Rule 4 because of the *Bowles* problem. The advisory committee, however, was reluctant to seek a change in one rule without a corresponding change in the other, since both use the exact same language. Therefore, it is considering a

coordinated package of amendments to the two rules and a companion proposal for a statutory amendment to 28 U.S.C. § 2107. A decision on pursuing that approach has been deferred to the committee's April 2010 meeting in order to give the Department of Justice time to decide whether seeking legislation is advisable. Judge Rosenthal pointed out that the recent time-computation package of coordinated rule amendments and statutory changes provides relevant precedent for the suggested approach.

INTERLOCUTORY APPEALS FROM THE TAX COURT

Judge Sutton reported that the advisory committee was considering a proposal to amend the rules to address interlocutory appeals from decisions of the Tax Court. A 1986 statute, he explained, had authorized interlocutory appeals, but the Federal Rules of Appellate Procedure have never been amended to take account of such appeals. Permissive interlocutory appeals from the Tax Court appear to be very few in number. The advisory committee, he said, will informally solicit the views of the judges of the Tax Court, the tax bar, and others regarding proposed amendments.

OTHER ITEMS

Judge Sutton reported that the advisory committee had deferred action on suggestions to eliminate the three-day rule in FED. R. APP. P. 26(c) (computing and extending time) that gives a party an additional three days to act after a paper is served on it by means other than in-hand service.

The committee had received suggestions to require that briefs be printed on both sides. But, Judge Sutton said, there are strong differences of opinion on the subject, and courts are divided on whether to allow double-sided printing of briefs. As the courts continue to move away from paper filings, he said, time may overtake the suggestions.

Judge Sutton reported that the advisory committee was responding to a suggestion that Indian tribes be added to the definition of a "state" in some of the rules, particularly Appellate Rule 29 (amicus briefs), and the committee is researching how the state courts are handling amicus filings by Indian tribes.

Finally, Judge Sutton reported that the advisory committee was collaborating with the Advisory Committee on Bankruptcy Rules on the bankruptcy appellate rules project and with the Advisory Committee on Civil Rules on overlapping issues that affect both the appellate and civil rules.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Swain and Professor Gibson presented the report of the advisory committee, as set out in Judge Swain's memorandum and attachment of December 7, 2009 (Agenda Item 9). Judge Swain reported that the advisory committee had no action items to present.

Informational Items

HEARING ON PUBLISHED RULES

Professor Gibson reported that three of the rules published for comment in August 2009 had attracted substantial public interest and several requests had been received to testify at the hearing scheduled in New York in February 2010.

The proposed amendments to FED. R. BANKR. P. 3001 (proof of claim) and new FED. R. BANKR. P. 3002.1 (notice relating to claims secured by a security interest in the debtor's principal residence) would, among other things: (1) prescribe in greater detail the supporting documentation that must accompany certain proofs of claim; and (2) require a holder of a home mortgage claim in a chapter 13 case to provide additional notice of post-petition fees, expenses, and charges assessed against a debtor.

The proposed amendments to FED. R. BANKR. P. 2019 (disclosure) would require committees and other representatives of creditors and equity security holders to disclose additional information about their economic interests in chapter 9 and chapter 11 cases.

She added that many of the persons requesting to testify represent organizations that purchase consumer debt in bulk and are opposed to the additional disclosures.

BANKRUPTCY APPELLATE RULES

Professor Gibson said that the advisory committee had conducted two very successful conferences with members of the bench, bar, and academia to discuss whether Part VIII of the bankruptcy rules needs comprehensive revision. (Part VIII governs appeals from a bankruptcy judge to the district court or a bankruptcy appellate panel.)

She reported that the committee had decided to move forward on the project with two principal goals in mind: (1) to make the Part VIII rules conform more closely to the Federal Rules of Appellate Procedure; and (2) to recognize more explicitly that records in bankruptcy cases are now generally filed and maintained electronically. She said that the committee would work closely on the project with the Advisory Committee on Appellate Rules and would like to work with the other advisory committees in considering the impact of the new electronic environment on the rules.

BANKRUPTCY FORMS MODERNIZATION

Judge Swain reported that the advisory committee's other large project is to modernize the bankruptcy forms. It had created a joint working group of members and others: (1) to examine all the bankruptcy forms for their substance and effectiveness; and (2) to consider how the forms might be adapted to the highly technological environment of the bankruptcy system. She explained that, unlike the illustrative civil forms appended to the civil rules, the bankruptcy official forms are mandatory and must be used in bankruptcy cases under FED. R. BANKR. P. 9009 (forms).

She noted that the working group had started reviewing the forms in January 2008 and had retained a nationally recognized forms-design expert as a special consultant. The focus of the group's initial efforts has been on improving the petition, schedules, and statements filed by an individual debtor at the outset of a case. The consultant, she said, has substantial experience in designing forms used by the general public and has really opened up the eyes of the judges and lawyers on ways that the bankruptcy forms could be simplified, rephrased, and reordered to elicit more accurate information from the public.

Judge Swain reported that the forms working group was also examining trends in technology and how they affect the way that lawyers, debtors, creditors, trustees, judges, clerks, and others use the bankruptcy forms and the pieces of information contained in them. To that end, she said, the Federal Judicial Center had drafted a survey for the committee to send to lawyers and the courts. In addition, the working group was working closely with both the Court Administration and Case Management Committee of the Judicial Conference and the functional-requirement groups designing the "Next Generation" replacement project for CM/ECF (the courts' electronic files and case management system).

Judge Swain noted that the advisory committee had recommended that the Next Generation CM/ECF system be capable of accepting bankruptcy forms, not just as PDF images, but as a stream of data elements that can be manipulated and distributed. The new electronic system must be capable of providing different levels of access to different users in order to guard privacy and security concerns. She noted that the working group would meet again in Washington in January 2010.

FORM 240A

Professor Gibson reported that, in addition to drafting the official, mandatory bankruptcy forms, the advisory committee assists the Administrative Office in preparing optional "Director's Forms." One of the most important of these optional forms, she said, is Form 240A – which includes the reaffirmation agreement and related documents. Among other things, it sets forth the disclosures explicitly required by the Bankruptcy Code. During the course of the forms modernization project, a number of judges commented on the need to revise Form 240A, which is organized in a manner that makes it difficult for a court to find the most important information it needs to review a reaffirmation agreement.

Therefore, the advisory committee worked with the Administrative Office to revise Form 240A and make it more user-friendly. In December 2009, a revised form was posted on the Internet. Professor Gibson said that some lawyers have suggested that the revised form is deficient because it rewords some of the disclosures required by the statute. She said, however, that the advisory committee had recommended the revisions to improve clarity, and she noted that the statute itself permits rewording and re-ordering of most of the required disclosures as long as the meaning is not changed. She added that the advisory committee was taking the suggestions seriously, though, and it would recommend further changes if it determines that the revised form is unclear or inaccurate.

After the meeting, the advisory committee recommended some modest changes to the December 2009 version of Form 240A. It also recommended that the January 2007 version of the form be retained as an alternative version to provide statutory disclosures for those parties that elect to use their own reaffirmation agreement – a practice that the statute allows. The advisory committee concluded that an alternate version of the form was necessary because the December 2009 version was designed as an integrated set of documents that could not be used as a "wrap around" to provide all the necessary disclosures if the parties decide to use their own reaffirmation agreement.

AUTHORITATIVE VERSION OF THE BANKRUPTCY RULES

Judge Swain reported that there has never been an official version of the Federal Rules of Bankruptcy Procedure. The Administrative Office, however, had just succeeded in creating an authoritative version of the rules after months of intensive effort by interns under the leadership of Mr. Ishida. They compared the different commercial versions on the market and researched the original source documents, including rules committee minutes and reports, Supreme Court orders, and legislation to verify the accuracy of each rule. The new, authoritative rules, she said, would be posted shortly on the federal courts' Internet web site.

MASTERS

Professor Gibson noted that FED. R. BANKR. P. 9031 (masters not authorized) makes FED. R. CIV. P. 53 (masters) inapplicable in bankruptcy cases. She reported that the advisory committee had recently received suggestions to abrogate Rule 9031 and allow the appointment of masters in appropriate bankruptcy cases. The committee, she said, had reviewed and rejected the same suggestion on several occasions in the past. After careful deliberation, it decided again that the case had not been made to change its policy on the matter. Among other things, the committee was concerned about adding another level of review to the bankruptcy system, which already has several levels of review.

A member asked whether bankruptcy judges use other bankruptcy judges to assist them in huge cases. Judge Swain responded that judges usually have excellent lawyers and thorough support in large cases, and other judges frequently volunteer to help in various settlement matters. Professor Gibson added that the Bankruptcy Code authorizes the appointment of examiners in appropriate cases. Unlike masters, though, examiners are not authorized to make judicial recommendations.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Kravitz and Professor Cooper presented the report of the advisory committee, as set out in Judge Kravitz's memorandum and attachment of December 8, 2009 (Agenda Item 5). Judge Kravitz reported that the advisory committee had no action items to present.

Informational Items

MAY 2010 CIVIL LITIGATION REVIEW CONFERENCE

Judge Kravitz reported that after completing work on the proposed amendments to FED. R. CIV. P. 26 (disclosure and discovery) and FED. R. CIV. P. 56 (summary judgment), the advisory committee decided to step back and take a hard look at civil litigation in the federal courts generally and to ask the bench and bar how well it is working and how it might be improved. About the same time, the Supreme Court rendered its decisions in *Twombly* and *Iqbal* regarding notice pleading, and bills were introduced in Congress to overturn those decisions.

The advisory committee agreed that the most productive way to have a dialogue with the bar and other users of the system would be to conduct a major conference and invite a broad, representative range of lawyers, litigants, law professors, and judges. Judge Kravitz noted that Judge John G. Koeltl, a member of the advisory committee, had

taken charge of arranging the conference, scheduled for Duke Law School in May 2010, and he was doing a remarkable job.

Judge Kravitz reported that the conference will rely heavily on empirical data to provide an accurate picture of what is happening in the federal litigation system. In addition, the committee wants to elicit the practical insights of the bar. To that end, it had asked the Federal Judicial Center to send detailed surveys to lawyers for both plaintiffs and defendants in all federal civil cases closed in the last quarter of 2008. The response level to the survey, he said, has been high, and the information produced is very revealing. In addition, Center staff has been conducting follow-up interviews with lawyers who responded to the surveys.

Additional data will be produced for the conference by the American College of Trial Lawyers and the Institute for the Advancement of the American Legal System. RAND, Fortune 200 companies, and some bar groups, such as the National Employment Lawyers Association, may also submit data. Among other things, the data may provide insight on whether new computer applications and techniques might be able to drive down the cost of discovery.

Judge Kravitz noted that the majority opinion in *Twombly* had cited a 1989 law review article by Judge Frank H. Easterbrook, based on anecdotal evidence, arguing that discovery costs are out of line and that district judges are not attempting to rein them in. The preliminary survey results from the Federal Judicial Center, however, show that little discovery occurs in the great majority of federal civil cases, and the discovery in those cases does not appear to be excessively costly, with the exception of 5% to 10% of the cases. That result, he said, is surprising to lawyers, but not to judges. Nevertheless, the extensive discovery in a minority of federal civil cases has caused serious discovery problems. The biggest frustration for lawyers, he said, occurs when they are unable to get the attention of a judge to resolve discovery issues quickly.

Judge Kravitz noted that Judge Koeltl had gathered an impressive array of topics and panelists for the conference, and several of the panelists have already written papers for the event. He said that the conference will hear from bar associations and from groups and corporations that litigate in the federal system. It will also examine the different approaches that states such as Arizona and Oregon take in civil litigation, as well as recent reform efforts in other countries, including Australia and the United Kingdom. The conference's proceedings will be recorded and streamed live, and the Duke Law Journal will publish the papers.

He added that enormous interest had been expressed by bench and bar in participating in the conference, and more than 300 people have asked to attend. Space, though, is limited, and the formal invitation list is still a work in progress. A web site has

been created for the conference, but is not yet available to the general public because several papers are still in draft form.

Judge Kravitz predicted that the conference will elicit a number of proposals for change that will be a part of the agenda for the Advisory Committee on Civil Rules for years to come. One cross-cutting issue, for example, is whether the civil rules should continue to adhere to the fundamental principle of trans-substantivity. He noted that several participants have suggested that different rules, or variations of the rules, should apply in different categories of civil cases. In addition, he said, the advisory committee may resurrect its work on a set of simplified procedures that could be used in appropriate civil cases.

PLEADING STANDARDS FOLLOWING *TWOMBLY* AND *IQBAL*

Judge Kravitz noted that pleading standards have been on the advisory committee's study agenda for many years. The committee, however, started looking at notice pleading much more closely after *Twombly* and *Iqbal.* At its October 2009 meeting, moreover, it considered a suggestion to expedite the normal rules process and prepare appropriate rule amendments in light of pending legislative efforts. Nevertheless, the committee decided that it was essential to take the time necessary to see how the two Supreme Court decisions play out in practice before considering any rule amendments. Therefore, it has been monitoring the case law closely, reaching out to affected parties for their views, and working with the Federal Judicial Center, the Administrative Office, and others to develop needed empirical data.

He reported that the statistics gathered by the Administrative Office show that there has been no substantial increase since *Twombly* and *Iqbal* in the number of motions to dismiss filed in the district courts or in the percentage of dismissal motions granted by the courts. He added that the motions data, though relevant, are not determinative, and the Federal Judicial Center will examine the cases individually.

In addition, Judge Kravitz noted that every circuit had now weighed in with in-depth analysis on what the Supreme Court cases mean. A review of court opinions shows that the case law is nuanced. Few decisions state explicitly that a particular case would have survived a motion to dismiss under *Conley v. Gibson,* but not under *Iqbal.* What is clearly important, he said, are the context and substance of each case.

There is the possibility, he suggested, that through the normal development of the common law, the courts will retain those elements of *Twombly* that work well in practice and modify those that do not. Accordingly, decisional law, including future Supreme Court decisions, may produce a pleading system that works very well in practice. By way of example, he noted that *Conley* by itself was not really the pleading standard

before *Twombly*. It had to be read in conjunction with 50 years of later case law development.

For the short term, he said, the committee cannot presently determine, and the Federal Judicial Center's research will not be able to show, whether people who would have filed a civil case in a federal court before *Twombly* are not doing so now. For example, it would be helpful to know from the plaintiffs' bar whether they are leaving the federal courts for the state courts or adapting their federal practices to survive motions to dismiss.

Judge Kravitz said that members of Congress and others involved in the pending legislation had expressed universally favorable comments about the rules process. Moreover, several members of the academy have argued pointedly that the Supreme Court did not respect the rule-making process in *Twombly* and *Iqbal*. Nonetheless, despite their support for the rules process, they are concerned that the process is too slow and that some people will be hurt by the heightened pleading standards in the next few years while appropriate rule amendments are being considered.

A member added that even though the great body of case law demonstrates that the courts are adapting very reasonably to *Twombly* and *Iqbal* and are protecting access to the courts, it will always be possible to find language in individual decisions that can be extracted to argue that immediate change is necessary. Even one bad case, he said, in an area such as civil rights, could be used to justify immediate action.

Judge Kravitz explained that the pleading problems tend to arise in cases where there is disparity of knowledge between the parties. The plaintiff simply does not have the facts, and the defendant does not make them available before discovery. As a result, he said, he and other judges in appropriate cases permit limited discovery and allow plaintiffs to amend their complaints.

Judge Kravitz stated that drafting appropriate legislation in this area is very difficult. Legislation, moreover, is likely to inject additional uncertainty and actually do more harm than good. All the bills proposed to date, he said, have enormous flaws and are likely to create additional litigation as to what the new standard means.

Judge Scirica expressed his thanks on behalf of the Executive Committee to Judges Rosenthal and Kravitz for handling a very difficult and delicate problem for the rules process. He said that what they have been doing is institutionally important to the judiciary, and they have acted with great intelligence, tact, and foresight.

PROFESSOR BONE'S COMMENTARY ON *TWOMBLY* AND *IQBAL*

Professor Bone was invited to provide his insights on the meaning of *Twombly* and *Iqbal* and his recommendations on what the rules committees should do regarding pleading standards. His presentation consisted of three parts: (1) a review of the two cases; (2) a discussion of the broader, complex normative issues raised in the cases; and (3) a discussion of whether, when, and how the rules process should be employed.

He explained that both *Twombly* and *Iqbal* adopted a plausibility standard. Both require merits screening of cases, and both question the efficacy of case management to control discovery costs. But, he said, there are significant differences between the two cases. *Twombly's* version of plausibility, he said, is workable on a trans-substantive basis, but *Iqbal's* is not.

Twombly, he suggested, had made only a minor change in the law of pleading, requiring only a slight increase in the plaintiff's burden. The allegations in the complaint in *Twombly* had merely described normal behavior. Under the rules, however, the plaintiff must tell a story showing that the defendant deviated in some way from the accepted baseline of normal behavior.

Twombly applied a "thin" screening model that does not require a high standard of pleading and calls for a limited inquiry by the court. Essentially, the purpose of the court's review is to screen out frivolous cases by asking the judge to interpret the complaint as a whole to see whether it is plausible and may have merit. *Twombly* did not adopt a two-pronged approach to the screening process, even though the opinion in *Iqbal* states that it did. In screening under *Twombly,* judges do not have to discard legal allegations in the complaint. Rather, the conclusory nature of any allegations is taken as part of the court's larger, gestalt review of the total contents of the complaint.

Iqbal, on the other hand, adopted a more substantial, "thick" pleading standard. The allegations in the *Iqbal* complaint did in fact tell a story of behavior that deviated from the accepted baseline conduct. The context of the complaint, taken as a whole, supported that conclusion. Yet *Iqbal* turned the plausibility standard into a broader test – not just to identify objectively those suits that lack merit, but also to screen out potentially meritorious suits that are weak.

Professor Bone asserted that *Iqbal's* two-pronged approach – of excluding legal conclusions from the complaint and then looking at the plausibility of the rest of the complaint – does not make sense. The real inquiry for the court has to be whether the allegations in the complaint, taken as a whole, support a plausible inference of wrongdoing.

He added that much of the academic analysis of the cases has been shallow and polarized. Many critics, for example, have framed the normative issues as a mere test between efficiency on the one hand and fairness and access rights on the other – weighing the potential costs of litigation against the need to maintain access to the courts. This analysis, however, is too simplistic. It does not work because economists, in fact, care deeply about fairness, and rights-based or fairness advocates care about litigation costs and fairness to defendants. It is really a balance between the two in either event.

As a matter of process, plaintiffs have a right of access to the courts that is not dependent on outcome. The "thin" *Twombly* screening process can be justified on moral grounds, as it requires the court to apply a moral balance between protecting court access for plaintiffs and considering fairness to defendants in having to defend against the allegations. The approach of *Iqbal,* on the other hand, is based on outcome and whether a case is strong or weak.

Professor Bone said that a normative analysis should be grounded in explaining why plaintiffs file non-meritorious suits. In reality, he said, this occurs in large measure because of the asymmetric availability of information between the parties. That asymmetry causes the problem that the stricter *Iqbal* standard of review is trying to address.

Professor Bone suggested that the central substantive question for the rules committees will be to specify how much screening a court must apply in order to dismiss non-meritorious suits at the pleading stage. Procedurally, he said, the committees need to address three key questions: (1) whether to get involved; (2) when to do so; and (3) how to do so.

The first question, he said, had already been decided, for the rules committees are already deeply involved in the pleading dispute. Indeed, he said, they should be involved forcefully – with or without Congressional action. And they should be prepared to confront political interest groups on the merits, if necessary. On the other hand, they also have to be pragmatic in protecting the integrity of the rules process itself, and they need to take the time necessary to achieve the right results.

Professor Bone emphasized that it was important to gather as much empirical information as possible. But considerable care and insight must be given to interpretation of the data. Even if the statistics reveal no significant change in dismissal rates since *Twombly* and *Iqbal,* the numbers are not definitive if they do not show whether plaintiffs are discouraged from filing cases in the first place. The ultimate metric for judging whether a pleading standard is working well is whether case outcomes are fair and appropriate, not whether the judges and lawyers are pleased.

He added that the Advisory Committee on Civil Rules should seriously consider deviating from the traditional trans-substantive approach of the rules in drafting a revised pleading standard. A revised rule, for example, might exclude certain kinds of cases, such as civil rights cases, from any kind of "thick" screening standard. It might also focus specifically on complex cases, or enumerate facts that courts should consider, such as informational asymmetry and the stakes and costs of litigation. In addition, the committee should use the committee notes more aggressively and cite examples to explain how and why the rule is being amended. It should not, however, try to develop pleading forms.

COMMITTEE DISCUSSION OF *TWOMBLY* AND *IQBAL*

Judge Kravitz pointed out that trans-substantivity has been a basic foundation of the Federal Rules of Civil Procedure for more than 70 years. Deviating from it would upset current expectations and entail serious political complications. Interest groups that use the federal courts, he said, have polar opposite views on certain issues. Some plaintiffs believe that the rules currently favor defendants, while some defendants believe that they are forced to settle meritless suits that should be dismissed on the pleadings. He added that the whole discussion is influenced in large part by discovery costs, and he noted that some corporations have designed their computer systems to accommodate potential discovery needs, rather than to address core business needs.

A participant agreed that it would be extremely difficult to deviate from trans-substantivity and to specify different rules for different categories of cases. For one thing, it is not always clear cut what category a case falls into. A more fruitful approach, he suggested, would be for a rule to focus on the parties' relative access to information, rather than on the subject nature of a case. Fundamental differences exist, he said, between those cases where the litigants have equal access to information and those where the plaintiff does not have access to the facts necessary to plead adequately. He suggested that this asymmetry prevails in many civil rights and employment discrimination cases. It also occurs in antitrust cases where the plaintiff alleges, but does not know for sure, that the defendant has engaged in a conspiracy or agreement. The plaintiff knows only that the defendants' behavior suggests it.

In addition, he said, it is difficult to isolate pleading from other aspects of a civil case – such as discovery, summary judgment, and judicial case management. The civil rules are linked as a whole, and if the pleading rules are changed, it may affect the application of several other rules. Another approach that the committee could consider in addressing information asymmetry would be to link pleading with preliminary discovery. Thus, in appropriate cases, the court could permit the plaintiff to frame a proper pleading by allowing some sort of preliminary inquiry into information that only the defendant possesses.

A lawyer member said that one of the great strengths of the rules process is that the advisory committees rely strongly on empirical evidence. He reported that he had not detected any changes or problems in practice as a result of *Twombly* and *Iqbal,* even though many interesting intellectual issues have been raised in the ensuing debates. A reasonable judge, he said, can almost always detect a frivolous case. Therefore, before proceeding with potential rule adjustments, the committee should obtain sound empirical data to ascertain whether any real problems have in fact been created by *Twombly* and *Iqbal*. Judge Kravitz added that the advisory committee needs to hear from lawyers directly, especially plaintiffs' lawyers, about any changes in their practice. For example, it would be relevant to know whether they have declined any cases that they would have taken before *Twombly* and *Iqbal* and whether they now must devote more pre-pleading work to cases.

A judge member concurred that, despite perceptions, there did not appear to have been much change since *Twombly* and *Iqbal,* except that the civil process may well turn out to be more candid. The trans-substantive nature of the civil rules, he said, is beneficial and allows for appropriate variation from case to case. The context of each case is the key. Thus, a plaintiff may have to plead more in an antitrust case than in a prisoner case. Instead of mandating different types of pleadings for different cases, the trans-substantive rules – which now incorporate an overarching plausibility standard – can be applied effectively by the courts in different types of cases. The bottom line, he suggested, is that even though plaintiffs may be concerned about *Twombly* and *Iqbal*, they are really not going to suffer.

Another member suggested, though, that the two Supreme Court opinions had in fact changed the outcome of some civil cases and may well affect the outcome of future cases. Use of the term "plausibility," moreover, is troubling because it borders on "believability" – which lies within the province of the jury. It may be that FED. R. CIV. P. 8 will become more like FED. R. CIV. P. 56, where practice in the courts has developed so far that it bears little resemblance to the actual language of the national rule. Procedural rules, she said, are sometimes made by Congress or the Supreme Court. But the rules committees are the appropriate forum to draft rules because the committees demand a solid empirical basis for amendments, seek public comments from all sides, and give all proposals careful and objective deliberation. Therefore, the Advisory Committee on Civil Rules should proceed to gather the empirical information necessary to support any change in the pleading rules.

Mr. Ogden reported that the Department of Justice had not taken a position on the debate, but it is very interested in the matter and has unique perspectives to offer since it acts as both plaintiff and defendant. In addition, he said, important government policies may be at stake.

A judge member suggested that a number of federal civil cases, especially *pro se* cases, are clearly without merit and do not state a federal claim. But where there is a genuine imbalance of information, dismissal of the case should be addressed at the summary judgment phase. The problem is that a dismissal motion normally occurs before any discovery takes place. Accordingly, a revised rule might borrow a procedure from summary judgment practice to specify that plaintiffs who oppose a motion to dismiss be allowed to explain why they cannot supply the missing allegations in the complaint and to seek some discovery to respond to the motion.

Other participants concurred in the suggestion. One recommended that a procedure be adapted from FED. R. CIV. P. 11(b)(3), which specifies that an attorney may certify to the best of his or her knowledge that the allegations in a pleading "will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." That standard might be borrowed for use in dealing with motions to dismiss. A participant added, however, that the same suggestion had been made by the court of appeals in *Iqbal* and was rejected by the Supreme Court.

A lawyer member explained that, in current practice, plaintiffs confronting a motion to dismiss use the summary judgment mechanism and submit an affidavit to the court specifying what evidence they have and what they need. For many defendants, winning the motion to dismiss is really the entire ball game – not because of the merits of the case, but because the potential costs of discovery often exceed the value of the case to them. Therefore, if a dismissal motion is denied, a quick settlement of the case usually follows. This practical reality, he said, will not appear in the statistics. He concluded that the two Supreme Court decisions have not made a change in the law. Nor, he said, will allowing plaintiffs additional discovery make a difference.

Another lawyer member concurred that the two decisions had not affected his practice. The principal danger, he warned, is that Congress has already injected itself into the dispute and will likely try to resolve the matter politically at the behest of special interest groups. He asked what the committees' strategy should be if Congress were to enact a statute in the next month or so.

Judge Rosenthal explained that the committees have been concentrating on providing factual information to Congress, including statistical information on dismissal motions. She noted that the committees and staff have been working hard in examining the case law and statistics to ascertain whether there has been an impact since *Twombly* and *Iqbal*. The research to date, she said, shows that there has been little measurable change, even in civil rights cases. In addition, the committees have been commenting informally on proposed legislation and exploring less risky legislative alternatives, without getting involved in the politics. The central message to Congress, she said, has been to seek appropriate solutions through the rules process.

Judge Kravitz added that the rules committees cannot suggest appropriate legislation, even though they have been asked to do so, because they simply do not know what problems Congress is trying to solve. Interestingly, lawyers and other proponents of legislation have professed great confidence in the rules process and are urging action in part because they assert that the Supreme Court was not sufficiently deferential to the process. At the same time, though, they do not want to wait three years or more for the rules process to play out. They want to turn the clock back immediately while the rules process unfolds in a deliberate manner. He added that the committees have been reaching out to bar groups and others for several years, and the outreach efforts have been very beneficial for the rules process.

A participant reported that when the Private Securities Litigation Reform Act was being developed a few years ago, the rules committees decided that the most important interest was to protect the Rules Enabling Act process. Therefore, they chose not to participate, at least in a public way, with any statement or position on the proposed legislation. Instead, they concluded that it was an area of substantive law that Congress was determined to address, and anything the committees would say would not be given much weight. Moreover, any statement or position taken by the judiciary would likely be used by one side or the other in the political debate to their advantage, and to the ultimate detriment of the judiciary. In fact, he said, Congress did change the pleading standard in securities cases by legislation. In retrospect, the sky did not fall. Securities cases are still being filed and won, but now the pleadings contain more information.

Mr. Cecil reported that the research being conducted by the Federal Judicial Center will provide the committees with needed empirical structure, rather than anecdotal advice, in a very complex area. He said that Center staff are examining motions to dismiss filed from September to December during each of the last five years, *i.e.*, before and after *Twombly* and *Iqbal.* They are examining the text of the docket sheets and the text of the case documents themselves. They will look at whether dismissal motions were granted with leave to amend, whether the plaintiffs in fact amended the complaints, and whether the cases were terminated soon afterwards. Unfortunately, though, it may be impossible to ascertain some types of relevant information, such as whether there was differential access to information in a particular case, whether cases have shifted to the state courts, or whether the heightened pleading standards have discouraged filings.

FED. R. CIV. P. 45

Judge Kravitz reported that the advisory committee was considering several suggestions from the bar to revise FED. R. CIV. P. 45 (subpoenas). He noted that a subcommittee had been appointed to address the suggestions, chaired by Judge David G. Campbell and with Professor Richard L. Marcus as reporter.

Judge Kravitz said that the subcommittee had considered many different topics, but is focusing on four potential approaches. First, the subcommittee is considering completely reconfiguring Rule 45 to make it simpler and easier to use. It is a dense rule that is not well understood. Second, the subcommittee is examining a series of notice issues because the current notice requirements in the rule are often ignored. Third, it is exploring important issues concerning the proper allocation of jurisdiction between the court that has issued a subpoena and the court where a case is pending. Fourth, it is considering whether courts can use Rule 45 to compel parties or employees of parties to attend a trial, even though they are more than 100 miles from the courthouse.

On the other hand, there are two other issues that the committee probably will not address: (1) the cost of producing documents and sharing of production costs; and (2) whether service of the subpoena should continue to be limited to personal service or be broadened to be more like the service arrangements permitted under FED. R. CIV. P. 4 (service).

Judge Kravitz explained that if the committee decides to reconfigure the whole rule, it will not have a draft ready to be presented to the Standing Committee at the June 2010 meeting. But if it decides to address only a limited number of discrete issues, it might have a proposal ready by that time for publication.

Professor Cooper added that Rule 45 is too long and difficult to read. Moreover, it specifies that the full text of Rule 45(c) and (d) be reproduced on the face of the subpoena form. The advisory committee, he said, should at least attempt to simplify the language of the rule, and in doing so it will focus on three key issues: (1) which court should issue the subpoena – the district where it is to be executed or the court having jurisdiction over the case; (2) which court should handle issues of compliance with the subpoena; and (3) where the subpoena should be enforced when there is a dispute. He suggested that the rule might also contain a better transfer mechanism, such as one that would consider the convenience of parties.

A member stated that the rule needs a good deal of attention because substantial satellite litigation arises over these issues, especially in complex cases. In addition, the advisory committee should focus on notice issues. Under the current rule, he explained, subpoenas must be noticed to the other party. In practice, though, they are generally issued without notice to the other party, and there is no notice that the documents have been produced. He concluded that the advisory committee should take all the time it needs to revise this important rule carefully and deliberately.

OTHER ITEMS

Judge Kravitz reported that the advisory committee had formed an ad hoc joint subcommittee with the Advisory Committee on Appellate Rules, chaired by Judge Steven M. Colloton, to deal with common issues affecting the two committees.

He noted that the advisory committee was looking to see whether FED. R. CIV. P. 26(c) (protective orders) needs changes. He noted that the courts appear to be handling protective orders very well. Nevertheless, the text of the rule itself might need to be amended to catch up with actual practice, as with FED. R. CIV. P. 56 (summary judgment).

He reported that the advisory committee was considering whether to eliminate the provision in FED. R. CIV. P. 6(d) that gives a party an extra three days to act after receipt of service by mail and certain other means. The committee has decided, though, to let the new time-computation rules be digested before hitting the bar with another rule change that affects timing.

Finally, he said, the advisory committee was re-examining its role in drafting illustrative forms under authority of FED. R. CIV. P. 84 (forms), especially since the illustrative forms are generally not used by the bar. It might decide to reduce the number of illustrative forms, or it might turn over the forms to the Administrative Office to issue under its own authority. He cautioned, though, that any change in the pleading forms at this juncture might send a wrong signal in light of the *Twombly-Iqbal* controversy.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Tallman and Professor Beale presented the report of the advisory committee, as set forth in Judge Tallman's memorandum and attachment of December 11, 2009 (Agenda Item 8). Judge Tallman reported that the advisory committee had no action items to present.

Informational Items

FED. R. CRIM. P. 16 – BRADY MATERIALS

Judge Tallman reported that the advisory committee had wrestled for more than 40 years with a variety of proposals to expand discovery in criminal cases. Most recently, in 2007, it had recommended, on a split vote, an amendment to FED. R. CRIM. P. 16 (discovery and inspection). The proposal, based on a suggestion from the American College of Trial Lawyers, would have codified the prosecution's obligations to disclose to the defendant all exculpatory and impeaching information in its possession.

He explained that the Department of Justice does not appear to have serious difficulty with a rule that would merely codify its obligations under *Brady v. Maryland,* 373 U.S. 83 (1963) – but only if the proposed rule were limited to exculpatory information and if it contained a materiality standard. On the other hand, the Department objects strongly to codifying disclosure of impeachment materials under *Giglio v. United States,* 405 U.S. 150 (1972). He added that a counter-proposal had been made within the advisory committee to limit disclosure under the proposed amendment to "material" information, but it failed to carry.

Judge Tallman reported that in 2007 the Standing Committee had received a lengthy letter from then-Deputy Attorney General Paul J. McNulty objecting to the rule proposed by the advisory committee. The Standing Committee, he said, recommitted the proposed amendment to the advisory committee on the explicit assurance from the Department of Justice that it would strengthen the advice it gives to prosecutors in the U.S. Attorneys' Manual regarding their *Brady-Giglio* obligations and undertake additional training of prosecutors. The Standing Committee believed that the Department would need time to assess the effectiveness of these measures, so it remanded the amendment to the advisory committee with a broad directive to continue monitoring the situation.

Not long afterwards, the celebrated case against Senator Theodore F. Stevens unfolded. It was alleged that a key prosecution witness in the case had changed his story. But the defense had not been notified of that fact, and it moved for a new trial. In early 2009, the new Attorney General, Eric H. Holder, Jr., authorized the prosecutor to move to dismiss the case because of the failure to disclose. He also directed that a working group be established within the Department of Justice to review fully what had happened in the Stevens case and whether the Department had faithfully carried out the promises made to the Standing Committee in 2007. In addition, Judge Emmet G. Sullivan, the trial judge in the Stevens case, wrote to the advisory committee and urged it to resubmit the proposed amendment to FED. R. CRIM. P. 16 that had been deferred by the Standing Committee.

Judge Tallman reported that the written results of the Department's review had just been made available. They include a comprehensive program of training and operational initiatives designed to enhance awareness and enforcement of *Brady-Giglio* obligations. He commended the Department and Deputy Attorney General Ogden for their enormous efforts on the project and the breadth of the proposed remedial measures. He emphasized that the proposed amendments to FED. R. CRIM. P. 16 would make a major change in criminal discovery, and he pointed out that criminal discovery poses very different concerns from civil discovery. Among other things, criminal discovery implicates serious issues involving on-going investigations, victims' rights, security of witnesses, and national security.

Deputy Attorney General Ogden thanked the committee for its careful and measured approach and explained that the Department continues to oppose any rule that

goes beyond *Brady* and the requirements of the Constitution. He assured the committee that the Department and its leadership are very serious about disclosure and have made it a matter of high priority. He pointed out that after the Stevens violations had been uncovered, the Department moved to dismiss the case, even though that was not an easy decision for it to make. It also convened a high-level working group of senior prosecutors and members of the Attorney General's team to study the Department's practices and make recommendations to minimize *Brady* violations going forward.

The group, he said, had met frequently and surveyed the U.S. attorneys on a regular basis. It endeavored to pinpoint the scope of the problem and measure the state of compliance. In so doing, it asked the Office of Professional Responsibility to examine not only those cases brought to its attention, but also to search for potential issues of non-compliance. The results of the Department-wide study, he said, reveal that there are no rampant violations or serious problems with compliance. The Office, for example, reported that there had been findings of violations in only 15 instances out of 680,000 criminal cases filed by the Department over nine years – an average of only one or two a year out of the thousands of cases prosecuted. The numbers, he said, put the scope of the problem in proper perspective.

Mr. Ogden said that the Department believes that the violations reflect a handful of aberrational occurrences that could not be averted by a new federal rule. Instead, a more comprehensive approach should be taken, including strict compliance with the existing rules, enhanced training of prosecutors and staff, and a number of other efforts. In addition, the Department will strive for greater uniformity in disclosure practices among the districts.

Training, he said, is extraordinarily important. Until recently, he noted, the U.S. Attorneys' Manual had not included instructions on *Brady* and *Giglio*, nor had *Brady* and *Giglio* obligations been included specifically in the Department's training. In 2006, however, the Department substantially revised the manual to address disclosure of both exculpatory and impeaching materials. In addition, a comprehensive new training program is now in place that requires all prosecutors to attend a seminar on *Brady* and *Giglio*. To date, 5,300 prosecutors have been trained in the new curriculum, and every prosecutor will be required to attend a refresher program every year.

Mr. Ogden reported that the Department had just sent detailed guidance to all prosecutors on disclosure obligations and procedures. It is also developing a central repository of information for all U.S. attorneys and a new disclosure manual that will incorporate lessons learned and inform prosecutors on what kinds of information they must disclose, what they must not disclose, and what they should bring to the attention of the court. A single official will be appointed permanently to administer the disclosure program on a national basis. At the local level, the Department has mandated that each U.S. attorney focus personally on the importance of the issue, designate a criminal

disclosure expert to answer questions and serve as a point of contact with Department headquarters, and develop a district-wide plan to implement the Department's national plan and adapt it to local circumstances. Other plans include training of paralegals and law enforcement officers and developing a case management process that incorporates disclosure. The Department is also speaking with the American Bar Association about ways to promote additional transparency.

A member suggested that the Department might also want to consider pulling some U.S. attorney files randomly for review, following the standard practice that many hospitals have in place. That step, he said, would provide a positive motivation for U.S. attorneys' offices to comply with their disclosure obligations.

Another member asked whether the Department's plan specifies the nature of the discipline that will be applied to prosecutors who violate *Brady* and *Giglio* obligations. Thus, if assistant U.S. attorneys know clearly that they could be terminated for violations, it could have a real impact on deterring inappropriate behavior.

Mr. Ogden said that in considering impeachment information under *Giglio*, it is essential to balance the value of disclosing the particular information in a case to the defense against the impact that disclosure may have on the privacy and security needs of witnesses. In many situations, he said, the information is dangerous or very embarrassing to a potential witness, and it is not central to the outcome of the case. It should not be disclosed because turning it over would chill witnesses from giving information in the future. The prosecutor, he said, is the appropriate officer to make the disclosure decision.

Judge Tallman reported that the advisory committee had met most recently in October 2009. At the meeting, Assistant Attorney General Lanny A. Breuer presented a preview of the Department's comprehensive program. The committee decided that it should also reach out and solicit the views and experiences of interested parties. To that end, it will convene an informal discussion session in Houston in February 2010 with a small group of U.S. attorneys and other Department of Justice officials, a representative of crime victims' rights groups, the president of the National Association of Criminal Defense Lawyers, a federal public defender, and other lawyers having substantial practical experience with *Brady* issues.

Judge Tallman said that one of the key questions for the participants at the session will be whether a change in the federal rules is needed, or indeed would be effective in preventing abuses. He noted that any rule change would have to be carefully drafted to be consistent with the Jencks Act, the Crime Victims' Rights Act, and statutes protecting juvenile records and police misconduct records.

Another important issue to be discussed at the session will be whether discovery should be required at an earlier stage of the process. In addition, he reported, the advisory

committee will continue to conduct empirical research by surveying practitioners and examining the procedures in those districts that have expanded disclosure practice on a local basis.

FED. R. CRIM. P. 5 - VICTIMS' RIGHTS

Judge Tallman reported that the advisory committee was continuing to make sure that the rights of victims are addressed on a regular, ongoing basis. He noted that he had reported to the Standing Committee in June 2009 that there was no need to recommend amending FED. R. CRIM. P. 5 (initial appearance) to specify that a magistrate judge take into account a victim's safety at a bail hearing because that requirement is already set forth in the governing statute and followed faithfully by judges. Nevertheless, he said, the advisory committee continues to be sensitive to the interests of the victims and will continue to reach out to them. Among other things, it has invited a victims' representative to participate in its upcoming Houston session on disclosure.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Hinkle and Professor Capra presented the report of the advisory committee, as set forth in Judge Hinkle's memorandum and attachment of December 14, 2009 (Agenda Item 7). Judge Hinkle reported that the advisory committee had no action items to present.

Informational Items

RESTYLED EVIDENCE RULES

Judge Hinkle reported that the advisory committee's major initiative was to complete work on restyling the Federal Rules of Evidence. The revised rules, he said, had been published, and the deadline for comments is in February 2010. Written comments had been received, including very helpful suggestions from the American College of Trial Lawyers. But only one witness had asked to appear at the scheduled public hearing. Therefore, the hearing will likely be cancelled and the witness heard by teleconference. He added that the Style Subcommittee has been doing an excellent job, and it has been working closely with the advisory committee on the revised rules.

The advisory committee, he explained, plans to complete the full package of style amendments at its April 2010 meeting and bring the package forward for approval at the June 2010 Standing Committee meeting. Judge Rosenthal added that the restyled evidence rules will be circulated to the Standing Committee in advance of the rest of the agenda book to give the members additional time to review the full package. Judge Hinkle recommended that if any member of the committee identifies an issue or a problem

with any rule, the member should let the advisory committee know right away so the issue may be addressed and resolved before the Standing Committee meeting.

CRAWFORD V. WASHINGTON

Judge Hinkle added that the advisory committee was continuing to monitor developments in the wake of the Supreme Court's decision in *Crawford v. Washington,* 541 U.S. 36 (2004), dealing with the admissibility of out-of-court "testimonial" statements under the Confrontation Clause of the Constitution. The case law, he said, is continuing to develop.

REPORT OF THE SEALING SUBCOMMITTEE

Judge Hartz, chair of the subcommittee, explained that the Federal Judicial Center had just filed its final report on sealed cases in the federal courts, written by Mr. Reagan. The report, he said, was excellent, and he recommended that all participants read it. At the subcommittee's request, the Center had examined all cases filed in the federal courts in 2006, and it identified and analyzed all cases that had been fully sealed by a court. The subcommittee members, he said, had reviewed the report carefully, and they take comfort in the fact that it reveals that there are very few instances in which a court appears to have made a questionable decision to seal a case. Nevertheless, he said, any error at all in improperly sealing a case is a concern to the judiciary.

He reported that the subcommittee was now moving quickly to have a report ready to present to the Standing Committee in June 2010. It will focus on several issues. First, he said, it will discuss whether there are cases in which sealing was improper. He noted that there appear to have been fewer than a dozen such cases nationally among hundreds of thousands of cases filed in 2006. Second, it will address whether sealing an entire case was overkill in a particular case, even though there may have been a need to seal certain documents in the case, such as a cooperation agreement with a criminal defendant. He noted, too, that in some districts juvenile cases are not sealed, but the juvenile is simply listed by initials. Third, the report will discuss cases in which sealing a case was entirely proper at an early stage of the proceedings, such as in a qui tam action or a criminal case with an outstanding warrant, but the court did not get around to unsealing the case later.

The subcommittee, he said, will not likely recommend changes in the rules, but it may use Professor Capra's recent report and guidelines on standing orders as a model to propose that the Judicial Conference provide guidance to the courts on sealing cases. For example, guidelines might specify that sealing an entire case should be a last resort. Courts should first consider lesser courses of action. Guidelines might also recommend developing technical assistance for the courts, such as prompts from the courts' electronic case management system to provide judges and courts with periodic notices of sealed

cases pending on their dockets. Guidelines might also recommend a procedure for unsealing executed warrants.

In addition, he said, there should be some type of court oversight over the sealing process. For example, no case should be sealed without an order from a judge. In addition, procedures might be established for notifying the chief judge, or all the judges, of a court of all sealed cases.

Judge Rosenthal added that the sealing subcommittee and the privacy subcommittee have been working very well together. Both, she said, are deeply concerned about protecting public access to court records, while also guarding appropriate security and privacy interests. She expressed thanks, on behalf of all the rules committees, to the Federal Judicial Center for excellent research efforts across the board that have provided solid empirical support for proposed rule amendments.

REPORT OF THE PRIVACY SUBCOMMITTEE

Judge Raggi, chair of the privacy subcommittee, reported that the subcommittee had been asked a year ago to review whether the 2007 privacy rules are working well, whether they are protecting the privacy concerns that they identify, and whether additional privacy concerns are being addressed by the courts on a local basis. In conducting that inquiry, she said, the subcommittee's first task had been to gather as much information as possible from the experiences of the 94 federal district courts. Therefore, it had asked the Federal Judicial Center to survey judges and clerks, and the Department of Justice to survey U.S. attorneys' offices.

She reported that the subcommittee had received superb staff assistance from Mr. Cecil and Meghan Dunn of the Federal Judicial Center in preparing and executing the surveys, Heather Williams of the Administrative Office in collecting all the local rules of the courts and comparing them to the national rules, and Mr. Rabiej of the Administrative Office in coordinating these efforts. In addition, she thanked Professor Capra for serving very effectively as the subcommittee's reporter.

Judge Raggi reported that the preliminary results obtained from the survey reveal that there have been no serious compliance problems with the new privacy rules, although there may be a need to undertake additional education efforts and to tweak some local rules and practices. But the subcommittee sees little need for major changes in the national rules.

Nevertheless, she said, two concerns have emerged. First, there are serious issues involving cooperating witnesses in criminal cases, and the courts have widely different views and practices on how to treat them. Some courts, for example, do not file

cooperation agreements, which do not appear on the public records. Others make them all public, at least in redacted form. Since the courts feel so strongly about the matter, she said, it seems unlikely that the subcommittee will recommend a specific course of action. But the subcommittee may at least identify the issues and provide the courts information about what other courts are doing.

Second, there are concerns about juror privacy. For example, the current national rule requires redaction of jurors' addresses from documents filed with the courts, but not redaction of jurors' names. Therefore, their names are available widely on the Internet. She noted that the courts themselves are responsible for protecting jurors, while the Department of Justice is responsible for the safety and privacy of cooperating witnesses.

Judge Raggi pointed out that the privacy subcommittee includes three members from the Judicial Conference's Court Administration and Case Management Committee, and the joint effort has proved to be very constructive. Some of the matters being examined by the subcommittee, she said, may be directed to the rules committees, while others may be handled by the court administration committee. The subcommittee, she said, plans to write a single report and is not concerned at this point about specific committee responsibilities.

She added that the subcommittee wants to hear directly from people who have given serious thought to the privacy rules and related issues. Public hearings, she said, are not necessary, but the subcommittee will conduct a conference at Fordham Law School in April 2010 with a representative group of knowledgeable law professors, practicing lawyers, and other court users. After hearing from the participants, she said, the subcommittee will be better able to report on the issues that need to be pursued.

PANEL DISCUSSION ON LEGAL EDUCATION

Dean Levi of Duke Law School moderated a panel discussion on trends in legal education and the legal economy, how they may affect the judiciary, and how academia and the judiciary may help one another. The panel included Professor Coquillette of Boston College, Dean Berman of Arizona State, Dean Vairo of Loyola Los Angeles, and Professor Rakoff of Harvard.

Professor Coquillette stated that it is not possible to have a first-class justice system without good legal education. He pointed out that many changes have occurred in law schools over the last several years. He noted that Max Weber, the great prophet of legal education who died in 1920, had made three predictions that have come to pass. First, he proclaimed that the world of law, driven by simple economic necessity, would shift over time from a system of local law to a system of state law, then to a national system of law, and then to an even broader system of international law.

Second, he suggested that legal systems would become less formal, as people will resort more to systems of private mediation and informal dispute resolution or negotiation. Students now engage in more hands-on application of law, not only with moot court competitions, but also in negotiation and dispute resolution classes and competitions.

Third, the law would become more specialized. It would also lose its sacredness of content, as lawyers and judges will come to be seen more as political actors, rather than priests of a sacred order. In a sense, he anticipated the critical legal studies movement, as law schools today are more infused with critical legal studies and with "law and economics" approaches.

He noted that at Boston College Law School, five of the last seven faculty appointments had been given to experts in international law. Most of them, he said, have foreign law degrees and bring an international perspective to the academy. In addition, the school has established programs in London and Brussels.

Professor Berman reported that a series of new initiatives have been undertaken at Arizona State University Law School. The core of the new efforts consists of three parts.

First, the model of what counts as legal education has been expanded greatly. The law school obviously has to train lawyers to practice law, but it also deals with many students who are not going to become lawyers but want to know about the law. To that end, the school is teaching law to non-lawyers, undergraduates, and foreign students. A full B.A. program in law is being developed for undergraduates and will be administered by the law school. In the past, he said, undergraduate courses in law had generally been taught by professors in other disciplines, but they are now being taught by lawyers.

Second, he said, the school wants to focus more on public policy and what it can do to contribute to the world. The law school, he suggested, should be a major player in public policy, and it is working with other faculties on joint programs to help train students to be players in public-policy debates. It has created a campus in Washington, D.C., and is creating think-tank experiences in which ten or so students work with a faculty member and focus on some aspect of public policy. In addition, he said, lawyers will benefit in their eventual legal careers by receiving training in statistics and data analysis. The law school is looking to participate in conducting university research on public policy areas for others, and it is asking companies and other organizations for modest funds to underwrite university research for them that the companies would not undertake on their own.

Third, the school is focusing on bridging the gap from law school to law practice. The students help start-up enterprises to incorporate, and they work with other parts of the university, including social work students, to help people with their legal problems. The law school, he said, has a large number of clinics, a legal advocacy program with dispute-resolution components, and a professional development training course that includes networking, starting up a law practice, performing non-legal work, and training in a variety of other areas that may be helpful to a student's career path. The school plans to do more to connect third-year students directly with members of the legal profession, such as by giving the students writing projects and having lawyers critique them. The school has added post-graduate fellowships and gives students a stipend to serve as fellows or volunteer interns to get a foot in the door of a legal career. It is also considering developing an apprentice model, where recent graduates do specific work in internships to develop their skills.

Dean Vairo reported that the Socratic model is still very much in place and dominant, at least in the first year of law school. She emphasized that the changes taking place in the legal profession and the economy will affect law schools. Most importantly, she said, law school is very expensive, and some commentators advocate moving toward an accelerated two-year program for economic reasons. Her school, she added, has a core social justice mission and is placing graduates in public service jobs. The traditional big-firm model, she said, is starting to collapse, as many students go into solo practice and are doing well at it.

The law school curriculum, she said, is changing, and the school has three main goals – to improve the legal experience, to improve the students' job prospects, and to cope with the costs of legal education. Like other schools, it is looking at de-emphasizing traditional courses to devote more time to problem solving, legislation, and regulation. She said that the faculty sees students engage in social networking every day in the classroom and should take advantage of the practice to keep students' attention in the current, wired world.

The law school will focus more on trans-national and international matters and on cross-disciplinary courses. It has been hiring more combination J.D.-Ph.D.s as faculty and will offer more advanced courses. The students, she said, particularly like the kinds of simulations that are offered in the third-year curriculum, where they are called upon to act as lawyers and represent clients. For the future, she suggested, the schools also need to consider what role distance-learning may play as part of the law school model, and whether schools can continue to pay law professors what they are currently being paid.

Professor Rakoff reported that the atmosphere at Harvard is less uncomfortable for students than it used to be. The school also offers new required courses and workshops in international law, legislation and regulation, and problem solving. In the latter, the students deal with factual patterns that mirror what happens when a matter first comes to a lawyer's attention. The focus is not just on knowing the law, but also on appreciating the practical restraints imposed on a lawyer and the institutions that may deal with a problem.

In short, the substance and doctrines of the law, which were central to the Langdellian system, are emphasized less now. Moreover, students are now absorbed with being on line. They do not look at books, but instead conduct legal research completely on line. Word searches, though, only supply a compilation of facts and results. They do not provide the conceptual structure emphasized in the past – when treatises were consulted and legal problems researched through analysis of issues and analogy. Nevertheless, he said, much of the core curriculum remains, such as basic courses in contracts, torts, and civil procedure. About two-thirds of a student's first year experience would be about the same as in the old days.

Dean Levi suggested that the several themes mentioned by the panel keep arising in discussions on law school reform – problem solving, working in teams, knowing international law, being ready to practice on Day One, building leadership skills, having a comfort level in other disciplines, and understanding business and public policy. All have been around in one form or another for generations. Yet teaching students to be analytical thinkers and to identify issues remains the core school function, and it continues to be difficult to accomplish.

He observed that the traditional role of a trial lawyer and the courtroom experience now have far less relevance to students. Moreover, the dominance of court actions and judicial decisions in the curriculum has decreased over the years.

A member asked the panel whether the legal profession will be able to absorb all the law school graduates being produced, or whether the number of schools and graduates will shrink. A panelist suggested that some law schools may well close or merge, and there will be fewer positions available for law professors. Some schools already are receiving fewer applications and are in serious financial trouble.

Nevertheless, many people in the community continue to be under-served by lawyers, and there is more need for legal services as a whole. Therefore, more lawyers in the future may serve in small units, rather than in traditional firms. A panelist added that it is not a bad idea for law students to strike out alone or in smaller units, rather than in large firms. He said that many law-firm associates are unhappy people.

A professor added that the current business model of many law schools will have to change. There will be fewer legal jobs available, but no less need for lawyers. Students are already changing their expectations of what they will get out of law school and how they will practice. There is likely to be more emphasis on public service.

A lawyer member observed that he is not sure that the young lawyers today think the way that older lawyers do. Experienced lawyers, he said, have been ingrained with substantive law and doctrines. But the newer attorneys have grown up with computers. They are skilled at finding cases on line, but they do not necessarily know what to do with all the information they succeed in compiling. A professor added that it is getting tougher to teach legal doctrines and analysis. He agreed that students generally are great at gathering piles of information quickly, but not in putting it all together or conducting deep analysis. Another added that some students now have a different view of what constitutes relevant knowledge. They do not draw as sharp a distinction between the legal rule and the rest of the world. This is clearly a different approach, but not necessarily a worse one.

A member asked how students can be encouraged to have a passion for the law. A panelist responded that her school encourages externships with local judges. The students are really enthusiastic about these experiences, and the schools need to expand them to include similar experiences with law firms. Law schools, moreover, should decrease the emphasis placed on monetary rewards.

A professor pointed out that judges provide a huge educational service through law clerkships. Law clerks, he said, generally perform better than non-clerks when they enter the legal world. Nevertheless, there is a disturbing trend towards hiring permanent law clerks in the judiciary, thereby reducing the clerkship opportunities for law school graduates.

A judge explained that he has to rely on his law clerks to keep up with his heavy docket. He expressed concern that since many law school reforms have lessened the emphasis on doctrinal law and critical analysis, judges may not be able to obtain the quality of law clerks they need to deal effectively with the cases before them. He noted that federal judges are hiring more permanent clerks today because they are a known quantity, and they know how to apply the law to cases.

A panelist said that many judges are now hiring law clerks who have a few years of law practice, and that is a good development. Another added that judges should

participate actively with law school groups to let them know how well they are doing in training new lawyers.

A professor said that the benefits to the judiciary from law clerks are enormous. Among other things, law clerks provide a large pool of talented lawyers who understand and admire judges because they have worked for them. Another added that law schools need the federal judiciary to serve this important educational function. But the judiciary also benefits greatly because the law clerks are life-long friends who understand the courts and are important, natural political allies.

A member argued that the practice of law has really changed, and students' law school expectations are not being met. There are far fewer trials than in the past, and far fewer opportunities for lawyers to develop their courtroom skills. Young lawyers, moreover, are generally not allowed by courts to practice on their own.

A member said that the changes in the law school curriculum are beneficial. But the schools should be urged to continue to teach the law with rigor and offer a wide variety of high-content classes. The law requires a good lawyer to be able to analyze across different areas of the law. Thus, students who have taken soft courses or only a particular line of courses, do not have the same ability to analogize as students who have had a more rounded, rigorous curriculum.

Other members cautioned against reducing the substantive content of law school classes, and especially opposed the suggestion to move to a two-year law school curriculum for financial reasons. They said that it is essential to have three years of critical thinking and substantive courses in law school. A panelist added that his school was creating more mini-courses of one credit each rather than full semester three-credit courses.

In addition, many very bright judges' law clerks want to teach, without first ever having practiced law. Many professors may have Ph.D. degrees and other educational achievements, but too many lack actual practice experience.

A panelist added that many of the faculty assigned to hire new law professors have an ingrained prejudice against practitioners. Interviewees with practical legal experience, he said, just do not sound like scholars to them. Many law schools, he added, are now introducing fellowships and visiting professorships for practitioners.

NEXT MEETING

The members agreed to hold the next meeting in June 2010. By e-mail exchange after the meeting, the committee fixed the dates as Monday and Tuesday, June 14-15, 2010. The meeting will be held in Washington, D.C.

Respectfully submitted,

Peter G. McCabe,
Secretary

TAB 4

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

PRELIMINARY REPORT
JUDICIAL CONFERENCE ACTIONS
September 15, 2009

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All the following matters requiring the expenditure of funds were approved by the Judicial Conference *subject to the availability of funds* and to whatever priorities the Conference might establish for the use of available resources.

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At its September 15, 2009 session, the Judicial Conference of the United States —

EXECUTIVE COMMITTEE

Approved a resolution in recognition of the substantial contributions made by the Judicial Conference committee chairs whose terms of service end in 2009.

COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM

Authorized the transfer of the official duty station for the vacant bankruptcy judgeship position in the Eastern District of California from Bakersfield to Sacramento.

COMMITTEE ON THE BUDGET

Approved the Budget Committee's budget request for fiscal year 2011, subject to amendments necessary as a result of (a) new legislation, (b) actions of the Judicial Conference, or (c) any other reason the Executive Committee considers necessary and appropriate.

COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT

Adopted a courtroom sharing policy for magistrate judges in new courthouse and courtroom construction, to be included in the *U.S. Courts Design Guide*.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Approved proposed amendments to Appellate Rules 1, 4, and 29 and Form 4 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

With regard to bankruptcy procedures:

a. Approved proposed amendments to Bankruptcy Rules 1007, 1014, 1015, 1018, 1019, 4001, 4004, 5009, 7001, and 9001, and new Rule 5012 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and

b. Approved proposed revisions of Exhibit D to Official Form 1 and of Official Form 23, to take effect on December 1, 2009.

Approved proposed amendments to Civil Rules 8(c), 26, and 56 and Illustrative Form 52 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Criminal Rules 12.3, 15, 21, and 32.1 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Evidence Rule 804(b)(3) and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed *Guidelines for Distinguishing Between Matters Appropriate for Standing Orders and Matters Appropriate for Local Rules and for Posting Standing Orders on a Court's Web Site* and agreed to transmit them, along with an explanatory report, to the courts.

Advisory Committee on Appellate Rules
Table of Agenda Items — March 2010

FRAP Item	Proposal	Source	Current Status
03-09	Amend FRAP 4(a)(1)(B) & 40(a)(1) to clarify treatment of U.S. officer or employee sued in individual capacity.	Solicitor General	Discussed and retained on agenda 11/03; awaiting revised proposal from Department of Justice Tentative draft approved 04/04 Revised draft approved 11/04 for submission to Standing Committee Approved for publication by Standing Committee 06/07 Published for comment 08/07 Discussed and retained on agenda 04/08 FRAP 40(a)(1) amendment approved 11/08 for submission to Standing Committee FRAP 40(a)(1) proposal remanded to Advisory Committee 06/09 Discussed and retained on agenda 11/09
05-01	Amend FRAP 21 & 27(c) to conform to Justice for All Act of 2004.	Advisory Committee	Discussed and retained on agenda 04/05; awaiting proposal from Department of Justice Discussed and retained on agenda 04/06; Department of Justice will monitor practice under the Act
06-04	Amend FRAP 29 to require that amicus briefs indicate whether counsel for a party authored brief and to identify persons who contributed monetarily to preparation or submission of brief.	Hon. Paul R. Michel (C.J., Fed. Cir.) and Hon. Timothy B. Dyk (Fed. Cir.)	Discussed and retained on agenda 11/06 Draft approved 04/07 for submission to Standing Committee Remanded by Standing Committee for consideration of new developments, 06/07 Draft approved 11/07 for submission to Standing Committee Approved for publication by Standing Committee 01/08 Published for comment 08/08 Revised draft approved 04/09 for submission to Standing Committee Approved by Standing Committee 06/09 Approved by Judicial Conference 09/09

FRAP Item	Proposal	Source	Current Status
07-AP-D	Amend FRAP to define the term "state."	Time-computation Subcommittee 3/07	Discussed and retained on agenda 04/07 Tentative draft approved 11/07 Drafts approved 04/08 for submission to Standing Committee Approved for publication by Standing Committee 06/08 Published for comment 08/08 Approved 04/09 for submission to Standing Committee Approved by Standing Committee 06/09 Approved by Judicial Conference 09/09
07-AP-E	Consider possible FRAP amendments in response to Bowles v. Russell (2007).	Mark Levy, Esq.	Discussed and retained on agenda 11/07 Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09
07-AP-G	Amend FRAP Form 4 to conform to privacy requirements.	Forms Working Group, chaired by Hon. Harvey E. Schlesinger	Discussed and retained on agenda 11/07 Draft approved 04/08 for submission to Standing Committee Approved for publication by Standing Committee 06/08 Published for comment 08/08 Approved 04/09 for submission to Standing Committee Approved by Standing Committee 06/09 Approved by Judicial Conference 09/09
07-AP-H	Consider issues raised by Warren v. American Bankers Insurance of Florida, 2007 WL 3151884 (10th Cir. 2007), concerning the operation of the separate document rule.	Appellate Rules Committee	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08
07-AP-I	Consider amending FRAP 4(c)(1) to clarify the effect of failure to prepay first-class postage.	Hon. Diane Wood	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal.	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08
08-AP-C	Abolish FRAP 26(c)'s three-day rule.	Hon. Frank H. Easterbrook	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09
08-AP-D	Delete reference to judgment's alteration or amendment from FRAP 4(a)(4)(B)(ii)	Peder K. Batalden, Esq.	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09

FRAP Item	Proposal	Source	Current Status
08-AP-G	Consider substantive and style changes to FRAP Form 4	Appellate Rules Committee	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09
08-AP-H	Consider issues of "manufactured finality" and appealability	Mark Levy, Esq.	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09
08-AP-J	Consider FRAP implications of conflict screening	Committee on Codes of Conduct	Discussed and retained on agenda 11/08
08-AP-K	Consider privacy issues relating to alien registration numbers	Public.Resource.Org	Discussed and retained on agenda 11/08
08-AP-L	Amend FRAP 6(b)(2)(A)(ii) to remove ambiguity	Reporter	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09
08-AP-M	Consider FRAP implications of interlocutory appeals in tax cases	Reporter	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09
08-AP-N	Amend FRAP 5 to allow parties to submit an appendix of key documents from the record along with petitions and answers	Peder K. Batalden, Esq.	Discussed and retained on agenda 04/09
08-AP-P	Amend FRAP 32 to change from double line-spacing to 1.5 line-spacing for briefs	Peder K. Batalden, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09
08-AP-Q	Consider amending FRAP 10(b) to permit the use of digital audio recordings in place of written transcripts	Hon. Michael M. Baylson	Discussed and retained on agenda 04/09
08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 04/09
09-AP-A	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	ABA Council of Appellate Lawyers	Discussed and retained on agenda 04/09
09-AP-B	Amend FRAP 1(b) to include federally recognized Indian tribes within the definition of "state"	Daniel I.S.J. Rey-Bear, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09
09-AP-C	Consider possible FRAP amendments in the light of project to revise Part VIII of the Bankruptcy Rules	Bankruptcy Rules Committee	Discussed and retained on agenda 11/09

FRAP Item	Proposal	Source	Current Status
09-AP-D	Consider implications of Mohawk Industries, Inc. v. Carpenter	John Kester, Esq.	Awaiting initial discussion
10-AP-A	Consider treatment of premature notices of appeal under FRAP 4(a)(2)	Hon. Jeffrey S. Sutton	Awaiting initial discussion
10-AP-B	Consider FRAP 28's treatment of statements of the case and of the facts	Hon. Jeffrey S. Sutton	Awaiting initial discussion
10-AP-C	Consider reply brief word limits in light of recent change to Supreme Court Rule 33	Douglas Letter, Esq.	Awaiting initial discussion

TAB 5A

MEMORANDUM

DATE: March 13, 2010

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 03-09

At the Committee's fall 2009 meeting, there seemed to be consensus that if Appellate Rule 4, 28 U.S.C. § 2107 and Appellate Rule 40 could all be amended to clarify the treatment of federal officers and employees sued in an individual capacity, that would be useful. It now appears that the Department of Justice is inclined to support proposed legislation that would amend Section 2107 in line with the Rule 4 and Rule 40 proposals. Part I of this memo discusses the drafting of the Rule 4 and Rule 40 amendments. Part II discusses the possible form of proposed legislation amending Section 2107.

I. Proposed language for the Rule 4 and Rule 40 amendments

To provide a basis for the Committee's consideration of the Rule 4 and 40 proposals, Part I.A. sets out the proposals as published for comment. Part I.B. describes the comments that the Committee received on the published proposals. Part I.C. summarizes the Committee's consideration of the proposals, with a particular focus on the Committee's discussion of possible wording changes. And Part I.D. highlights a few remaining issues that the Committee may wish to consider with respect to that wording.

A. The proposed amendments as published for comment in August 2007

Here is the language of the proposed Rule 4 and Rule 40 amendments as they were published for comment in August 2007:

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from ~~is entered~~.

(B) ~~When the United States or its officer or agency is a party, t~~The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from ~~is entered.~~ if one of the parties is:

(i) the United States;

(ii) a United States agency;

(iii) a United States officer or employee sued in an official capacity; or

(iv) a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf.

* * * * *

Committee Note

Subdivision (a)(1)(B). Rule 4(a)(1)(B) has been amended to make clear that the 60-day appeal period applies in cases in which an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States. (A concurrent amendment to Rule 40(a)(1) makes clear that the 45-day period to file a petition for panel rehearing also applies in such cases.) The amendment to Rule 4(a)(1)(B) is consistent with a 2000 amendment to Civil Rule 12(a)(3)(B), which specified an

extended 60-day period to respond to complaints in such cases. The Committee Note to the 2000 amendment explained: "Time is needed for the United States to determine whether to provide representation to the defendant officer or employee. If the United States provides representation, the need for an extended answer period is the same as in actions against the United States, a United States agency, or a United States officer sued in an official capacity." The same reasons justify providing additional time to the Solicitor General to decide whether to file an appeal.

Rule 40. Petition for Panel Rehearing

(a) Time to File; Contents; Answer; Action by the Court if Granted.

(1) **Time.** Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment. But in a civil case, ~~if the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment,~~ unless an order shortens or extends the time, the petition may be filed by any party within 45 days after entry of judgment if one of the parties is:

(A) the United States;

(B) a United States agency;

(C) a United States officer or employee sued in an official capacity; or

(D) a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf.

* * * * *

Committee Note

Subdivision (a)(1). Rule 40(a)(1) has been amended to make clear that the

45-day period to file a petition for panel rehearing applies in cases in which an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States. (A concurrent amendment to Rule 4(a)(1)(B) makes clear that the 60-day period to file an appeal also applies in such cases.) In such cases, the Solicitor General needs adequate time to review the merits of the panel decision and decide whether to seek rehearing, just as the Solicitor General does when an appeal involves the United States, a United States agency, or a United States officer or employee sued in an official capacity.

B. Public comment on the proposals

Here are summaries of the public comments on the proposals:[1]

07-AP-003; 07-BR-015; 07-CR-003; 07-CV-003: Chief Judge Frank H. Easterbrook. Chief Judge Easterbrook assailed the proposals' "stylistic backsliding." He asserted that "[t]reating a proper noun as an adjective ('a United States agency') is not correct; it is an example of noun plague." Instead, he suggested, "[f]ederal agency' is better, using a real adjective as an adjective. If you have some compelling need to used 'United States,' then say 'agency of the United States' (etc.)."

07-AP-011: Public Citizen Litigation Group. Brian Wolfman wrote on behalf of Public Citizen Litigation Group to express general support for the proposed amendments, but to suggest one change. Public Citizen was concerned that proposed Rule 4(a)(1)(B)(iv) and proposed Rule 40(a)(1)(D) could be read to exclude instances when the court of appeals ultimately concludes that the federal officer's or employee's act did *not* occur "in connection with duties performed on the United States' behalf." Public Citizen argued that this possibility creates a risk that appellants might rely on the longer appeal time only to have their appeals dismissed due to a ruling by the court of appeals on this factual question. Public Citizen argued that the wording should be changed to make clear that the extended time periods' availability (under 4(a)(1)(B)(iv) and 40(a)(1)(D)) turns on the nature of the act *as alleged by the plaintiff* rather than on the nature of the act *as ultimately found by the court.* Public Citizen suggested that this could be achieved by changing "an act or omission occurring in connection with" to read "an act or omission alleged to have occurred in connection with."

07-AP-014: United States Solicitor General. United States Solicitor General Paul D. Clement wrote in support of the proposed amendments to Rules 4(a)(1) and 40(a)(1). He argued that

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[1] Copies of those comments are enclosed.

these amendments "would be consistent with the rules governing the district courts, and will serve important policy interests."

C. Discussions of the proposals from spring 2008 through fall 2009

At the spring 2008 meeting, members discussed both the public comments and the possible implications of *Bowles v. Russell*, 551 U.S. 205 (2007), for the Rule 4 proposal. The *Bowles*-related question was whether the proposed amendment to Rule 4(a)(1)(B) would enlarge the availability of the 60-day period beyond what is permitted by the relevant statute – 28 U.S.C. § 2107. I summarized my research suggesting that the statutory term "officer" may not include all federal "employees." I noted that the lower-court caselaw varied concerning Section 2107(b)'s applicability to individual-capacity suits: on that question I found a circuit split, with the Second Circuit taking a narrow view and the Fourth, Fifth and Ninth Circuits taking a broader view.

The spring 2008 minutes also detail the Committee's discussion of the language of the proposed amendments:

> Members discussed various aspects of the proposed formulation. A judge asked whether there might be an alternative to referring to individual-capacity suits for acts or omissions occurring in connection with duties performed on the United States' behalf. Would a more functional approach be better – for example, to draw the line at whether the United States is representing the defendant? It was suggested, though, that such a formulation might not capture all the instances in which the extra time might be useful to the government. A member suggested that when revising the proposal, one should also think about mentioning *former* officers and employees. That member also stated that the Reporter's suggested formulation for determining whether an individual-capacity suit qualifies for the longer periods[2] is flawed because it specifies that the allegations in question must be "colorable"; such an invitation to the court to second-guess the factual

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[2] My March 14, 2008 memo had suggested that

> as a policy matter it would be useful to (1) make clear that the longer periods apply to federal officers *and employees*; (2) make clear that the longer periods apply to *individual-capacity suits arising from acts or omissions alleged to have occurred while the federal officer or employee was acting on the United States' behalf*; and (3) make clear that the relevant question for purposes of (2) is *whether there is a colorable allegation* that the acts or omissions occurred while the person was acting on the United States' behalf – not whether the court of appeals ultimately determines that the acts or omissions occurred in such a context.

The memo observed that "Goals (1) and (2) are served by the proposed amendments as published. Goal (3) would require some alteration of the amendments' text and Notes."

validity of the allegations would give rise to uncertainty concerning the applicability of the longer period. A member suggested that a better formulation would be to ask whether a defendant claims that the act occurred in connection with federal duties. A member suggested that where there is ambiguity concerning the scope of the statute's 60-day period, it might be appropriate for the rulemakers to amend Rule 4 to clarify that ambiguity.

At the fall 2008 meeting, the DOJ withdrew its proposal to amend Rule 4(a)(1)(B), citing concerns relating to *Bowles*. However, the DOJ argued in favor of pressing forward with the Rule 40(a)(1) amendment, which did not raise similar concerns. After discussion, the Committee voted to give final approval to the Rule 40(a)(1) proposal. The Committee deleted from the Note to the Rule 40(a)(1) proposal a reference to the proposed amendment to Rule 4(a)(1)(B). Apart from that, the Committee made no changes to the proposed Rule 40(a)(1) amendment as published. The fall 2008 minutes reflect the Committee's discussion of various wording issues:

> The Committee discussed whether to change the proposal's language in response to Chief Judge Easterbrook's comments. Chief Judge Easterbrook states that it is incorrect to use "United States" as an adjective; he would prefer that the Rule use the adjective "federal." It was noted that this is a matter of style, and that adopting Chief Judge Easterbrook's proposed change would render amended Rule 40(a)(1) inconsistent with the language used in restyled Civil Rule 12(a).
>
> The Committee also discussed the Public Citizen Litigation Group's concern that the language in the proposed Rule 4 and Rule 40 amendments could be read to exclude instances when the court of appeals ultimately concludes that the federal officer's or employee's act did not occur "in connection with duties performed on the United States' behalf." Public Citizen argues that the wording should be changed to make clear that the extended time periods' availability turns on the nature of the act as alleged by the plaintiff rather than on the nature of the act as ultimately found by the court. Public Citizen suggests that this could be achieved by changing "an act or omission occurring in connection with" to read "an act or omission alleged to have occurred in connection with." Mr. Letter expressed opposition to Public Citizen's proposed wording change; the time period for rehearing should not turn on the way in which the complaint was framed. The Reporter pointed out that the uncertainty which concerns Public Citizen would presumably be less in connection with Rule 40(a)(1) (compared to the concern over Rule 4(a) and appeal time) because where the question is the time to seek rehearing, there will already be a panel opinion which will indicate the panel's view of the facts. A member noted that Public Citizen's proposed language would diverge from the language used in Civil Rule 12(a).

At the spring 2009 meeting, discussion focused on the implications of the grant of certiorari in *United States ex rel. Eisenstein v. City of New York*, 129 S. Ct. 988 (2009), with respect to the interpretation of Rule 4(a)(1)(B) and 28 U.S.C. § 2107. At the June 2009 Standing Committee meeting, the Standing Committee remanded the Rule 40 proposal to the Appellate Rules Committee

for further consideration in the light of the anticipated decision in *Eisenstein*.

The Committee's fall 2009 discussion is captured in the minutes that are included in the agenda book; thus, I will not summarize that discussion here. But it may be useful to quote the minutes concerning the Committee's discussion of the wording of the Rule 40 proposal:

> Members also discussed the wording of the Rule 40 proposal as approved at the fall 2008 meeting. A participant questioned whether the language "for an act or omission occurring in connection with duties performed on the United States' behalf" captured the sense that the Committee desires. One DOJ attorney had suggested to Mr. Letter that this language might lead to litigation over whether a particular act or omission did or did not qualify; this attorney had queried whether a better formulation might be one that captures cases in which "any party claims that the act or omission occurred in connection with [etc.]." The Reporter noted that the Committee had discussed a somewhat similar question at the fall 2008 meeting.
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> .... After [the fall 2008] discussion was recapitulated, members at the fall 2009 meeting did not express an immediate inclination to alter the proposed language shown in the agenda materials. However, it was noted that if the DOJ wished to propose alternative language it could do so in advance of the spring 2010 meeting.

D. Remaining drafting questions

Assuming that the Committee wishes to propose amending Rules 4 and 40 (in tandem with proposed legislation to amend Section 2107), the language of the Rule 4 and 40 proposals as published in August 2007 provides an obvious starting point. The question is whether any of that language should be altered.[3]

It is worthwhile to consider the question of whose view of the facts should govern the availability of the longer time periods. As Doug Letter's DOJ colleague suggested, the published language might engender litigation over whether an act or omission really occurred in connection with duties performed on the United States' behalf. In this regard, it might be of interest to consider the Court's treatment of a similar question. Addressing an analogous context, where the availability of removal jurisdiction depended on the litigant's ability to come within 28 U.S.C. § 1442(a)(1)'s reference to acts "under color of ... office," the Court has held:

> The federal officer removal statute is not 'narrow' or 'limited.'.... At the very least, it is

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[3] When the Committee voted in fall 2008 to approve the Rule 40 proposal separately from the Rule 4 proposal, the Committee deleted from the Rule 40 Committee Note a reference to the Rule 4 proposal. That deletion, of course, would be unnecessary if the Rule 4 and Rule 40 proposals move forward simultaneously.

> broad enough to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law. One of the primary purposes of the removal statute – as its history clearly demonstrates – was to have such defenses litigated in the federal courts. The position of the court below would have the anomalous result of allowing removal only when the officers had a clearly sustainable defense. The suit would be removed only to be dismissed. Congress certainly meant more than this when it chose the words 'under color of * * * office.' In fact, one of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court. The officer need not win his case before he can have it removed.

Willingham v. Morgan, 395 U.S. 402, 406-07 (1969). I would hope that litigants would be conservative in their estimates of whether a given fact pattern fits the in-connection-with-federal-duties test, and I would also hope that appellate courts would be more liberal in their conclusions on the question.

As suggested during the spring 2008 meeting, it may also be worthwhile to consider the treatment of litigation involving *former* U.S. officers or employees. The published language of the Rule 4 and 40 proposals tracks the language in Civil Rule 12(a)(3),[4] which also does not specifically mention former officers or employees. The 2000 Committee Note to Civil Rule 12 addresses this question: "An action against a former officer or employee of the United States is covered by [Rule 12(a)(3)(B)] in the same way as an action against a present officer or employee. Termination of the relationship between the individual defendant and the United States does not reduce the need for additional time to answer."[5]

I am not aware of problems in the past nine years of practice under the individual-capacity provisions in Civil Rules 4(i) and 12(a).[6] On the other hand, it should be noted that the stakes would

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[4] It also roughly tracks the language in Civil Rule 4(i)(3), concerning service on "a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf (whether or not the officer or employee is also sued in an official capacity)."

[5] Similar language appears in the 2000 Committee Note to Civil Rule 4(i). One magistrate judge, in a report and recommendation that was adopted by the district court, has implied that former employees are not within the scope of Rule 4(i)(3). *See Grant v. Callahan*, 2008 WL 4997597, at *6 (W.D. Okla. 2008) ("The Court lacks sufficient information to determine whether Dr. McNerney was employed at the prison when the suit began. If he was, the Plaintiff would have been obligated to serve the United States as well as Dr. McNerney. See Fed.R.Civ.P. 4(i)(3).").

[6] *See generally* 4B Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1107 (discussing Rule 4(i)). Admittedly, I did find two recent unpublished district court decisions (by the same judge) that relied on pre-2000 caselaw for the proposition that service on a *Bivens* defendant requires only service on the defendant himself or herself and not

be higher for provisions governing appeal time than for provisions governing service or answer deadlines. In the case of service, Rule 4(i)(4) requires the court to "allow a party a reasonable time to cure its failure to ... (B) serve the United States under Rule 4(i)(3), if the party has served the United States officer or employee." In the case of answer deadlines, such deadlines would seem to be claim-processing rules that can in appropriate cases be extended under Civil Rule 6(b). Thus, erroneous guesses as to the scope of the individual-capacity provisions in Civil Rules 4(i) and 12(a) are unlikely to cause a litigant serious damage.[7] By contrast, as the Committee is aware, the appeal deadline – because it is set by statute – would presumably be treated as jurisdictional under *Bowles*. That would mean that a litigant's erroneous reliance on the view that the 60-day appeal period applied would doom the late appeal even if no litigant objected on timeliness grounds and even if the would-be appellant had based its view (that the 60-day appeal provision applied) on a misrepresentation by the court. If the litigant realized its mistake within 30 days after the 30-day appeal time actually ran out, the litigant could seek an extension of time to file the notice of appeal under Appellate Rule 4(a)(5) and 28 U.S.C. § 2107(c); but those extension provisions would not assist litigants who failed to realize their mistake until more than 30 days after the real appeal time ran out.

II. A tentative sketch of possible legislation amending Section 2107

This section presents only a very tentative sketch of possible legislation amending Section 2107. Obviously, the input of various experts on the legislative process will be needed as this project moves forward. But it seems useful to take the opportunity to seek the Committee's views on the potential shape of the legislation. Accordingly, I set forth here, for discussion purposes, both a sketch of a possible amendment to Section 2107 – shown by means of redlining on the current version of Section 2107 – and also a sketch of a proposed bill to implement that amendment. The sketches set out here assume that the Committee decides to adhere to the language of the proposed Rule 4 amendment as shown in the version that was published for comment in summer 2007.

In addition to reviewing the proposed language sketched below for amended Section 2107(b), it would also be useful for Committee members to focus on the question of the effective date of the legislation (and the amendment to Rule 4). If all goes smoothly in the approval and implementation process, such amendments would be coordinated to take effect on December 1, 2011. But there would be one transitional question that I think it might be useful to address: What about appeals in cases where judgment is entered during November 2011? Take a case in which the 30-day appeal period might currently apply, but in which the 60-day appeal period would apply after the adoption

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also service on the United States. *See Parikh v. Township of Edison*, 2009 WL 5206011, at *7 (D.N.J. Dec. 29, 2009); *Laffey v. Plousis*, 2008 WL 305289, *6 n.3 (D.N.J. Feb. 1, 2008), *aff'd on other grounds*, 2010 WL 489473 (3d Cir. Feb. 12, 2010) (unpublished opinion).

[7] In the case of time to answer, the statement in the text assumes that the tardy litigant would be able to show good cause and, if necessary, excusable neglect under Civil Rule 6(b).

of the proposed amendments. If the judgment in such a case is entered on November 1, 2011, the time to appeal (calculated as of November 2011) will run out on December 1, 2011. But on December 1 – when a notice of appeal would still be timely even under the old framework – the new provisions will have taken effect and will appear to provide an appeal time limit of 60 days rather than 30 days. If a litigant in this case looks up the appeal time as of December 1, 2011, the newly-amended text will indicate that the litigant has 60 days to appeal. It may therefore be useful to draft an effective-date provision that provides for transitional situations such as this. An example of such a provision is set forth in Section 3 of the proposed draft bill below.

§ 2107. Time for appeal to court of appeals

(a) Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

(b) In any such action, suit or proceeding ~~in which the United States or an officer or agency thereof is a party~~, the time as to all parties shall be sixty days from such entry if one of the parties is:

(1) the United States;
(2) a United States agency;
(3) a United States officer or employee sued in an official capacity; or
(4) a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf.

(c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause. In addition, if the district court finds--

(1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and

(2) that no party would be prejudiced,

the district court may, upon motion filed within 180 days after entry of the judgment or order or within 14 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

(d) This section shall not apply to bankruptcy matters or other proceedings under Title 11.

* * *

A BILL

To clarify appeal time limits in civil cases to which United States officers or employees are parties.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Appeal Time Clarification Act of 2011.'

SEC. 2. AMENDMENT RELATED TO TITLE 28, UNITED STATES CODE.

Section 2107(b) is amended by striking its current contents and substituting the following: 'In any such action, suit or proceeding, the time as to all parties shall be sixty days from such entry if one of the parties is:

(1) the United States;
(2) a United States agency;
(3) a United States officer or employee sued in an official capacity; or
(4) a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf.'

SEC. 3. EFFECTIVE DATE

The amendment made by this Act shall take effect on December 1, 2011, and shall govern appeals from judgments, orders or decrees entered on or after November 1, 2011.

Encls.

07-CV-004

07-CR-003

07-AP-003

07-BR-015

"Frank H. Easterbrook" <frank.easterbrook@acsalaskа.net>

12/12/2007 02 29 AM

To Rules_Comments@ao uscourts gov

cc

Subject August 2007 Rules Package

I have only a few brief comments on these proposals.

The time-computation rules are nicely done. I recommended changes along these lines during my time on the Standing Committee and am pleased to see that the task is largely complete. These amendments should take effect in 2009, "only" 16 years after a majority of the Standing Committee urged that changes of this kind be accomplished as soon as possible.

The benefits of using real days are so apparent that I am left to scratch my head about the survival (and proposed amendment in this cycle) of Fed. R. App. P. 26(c), which adds 3 days whenever time is calculated from a document's service rather than its filing. Why should this rule persist? Build the time into the deadline for briefs; don't leave it up in the air whether three days should be added to some other period. (For 3 days are *not* added if the document is "delivered" on the service date.)

The rule makes little sense. It was originally designed to accommodate delay in the Postal Service. Today briefs and similar documents regularly are delivered by FedEx or courier; increasingly they are delivered electronically with zero waiting. Yet Rule 26(c), which says that no days are added if a courier plops the document on counsel's desk, provides that 3 days *are* added if the document arrives as an email attachment, or via message from a court's e-filing site That's inconsistent.

My court has concluded that the entire routine is absurd and has overridden Rule 26(c)--not by a local rule, which wouldn't be cricket (see Fed. R. App. P. 47(a)(1)), but by setting a briefing schedule by order in almost every case. Each order gives a date on which the brief must be *filed*

When a deadline applies to filing rather than service, Rule 26(c) drops out of the picture. Although the Seventh Circuit has been doing this for more than 20 years, lawyers regularly are confused by the difference between "filing" dates, to which Rule 26(c) does not apply, and "service" dates, to which it does, so each of these orders includes a warning that the conversion to a filing date means that no time is added on account of service by mail.

That the Seventh Circuit must add this proviso to each order shows the potential for confusion caused by the differing rules for computation of time following filing versus service.

Note, by the way, that the three extra days *also* interferes with the goal of allocating time in 7-day parcels, which then end on weekdays. Adding three days to a 30-day or 45-day period is not likely to increase the chance that the last day will be a weekend, but adding 3 days to a 14-day period (used for some motions) will.

So the Standing Committee should complete the time-computation project by rescinding rather than amending Rule 26(c), with adjustments in other deadlines if appellees and respondents otherwise would have too little time.

One other brief comment, concerning both Fed. R. App. P. 4(a)(1)(B) and Fed. R. App. P. 40(a)(1). The draft amendments to these two rules refer to "the United States; a United States agency; [and] a United States officer". United States is a proper noun; the first usage ("the United States") is therefore correct. Treating a proper noun as an adjective ("a United States agency") is not correct; it is an example of noun plague. We should not have stylistic backsliding so soon after the style project rewrote all of these rules. "Federal agency" is better, using a real adjective as an adjective. If you have some compelling need to use "United States," then say "agency of the United States" (etc.). Sometimes Congress writes this error into a statute ("United States Court of Appeals"), and there is nothing the judiciary can do about the legislature's poor drafting. But the Constitution gets it right ("We the People of the United States"; "the Congress of the United States"; "the judicial Power of the United States"; "the Chief Justice of the United States"), and the federal judiciary should do no less

Frank H. Easterbrook

07-AP-011

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February 12, 2008

Peter G. McCabe
Secretary of the Committee on Rules
of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C 20544

Re: Comments on Proposed Amendments to the Federal Rules of Appellate Procedure

Dear Mr. McCabe.

Enclosed are the comments of Public Citizen Litigation Group on the proposed amendments to the Federal Rules of Appellate Procedure. Thank you for your consideration of these comments

Sincerely,

/s/

Brian Wolfman

Public Citizen Litigation Group's
Comments on Proposed FRAP Amendments

Proposed Rule 12.1 (Indicative Rulings)

• We share the concern expressed in the proposed committee note that, because of the potential loss of appellate jurisdiction over the initial appeal (and, thus, the issues raised in that appeal), a remand terminating all appellate proceedings should occur "only when the appellant has stated clearly its intention to abandon the appeal." As the committee explains, that is a serious concern because if the first appeal is terminated, the appellant might be "limited to appealing [only] the denial of the postjudgment motion." The committee note does not say *how* an appellant should express an intent to abandon an appeal, and, moreover, an advisory committee note is not binding. We believe that this problem should be resolved in the Rule itself, by inserting the following as the penultimate sentence of proposed Rule 12.1(b): "The court of appeals shall not dismiss the appeal unless, in the notice referred to in subdivision (a), the appellant expressly requests that the appeal be dismissed."

• The proposed committee note also states that when a motion is filed in the district court during the pendency of an appeal, litigants should "bear in mind" that a separate notice of appeal may be necessary "to challenge the district court's disposition of the motion." We believe that the committee note should remind litigants that an *amended* notice of appeal may be filed in this circumstance. That is a worthwhile reminder because an amended notice of appeal does not require a new filing fee. *See* FRAP 4(a)(4)(B)(iii).

• We have one stylistic suggestion regarding Rule 12.1(a): Change "because of an appeal that has been docketed" to "because an appeal has been docketed."

Proposed Amendment to Rule 4(a)(4)(B)(ii)

We have no quarrel with the proposed wording change. We question, however, whether this subdivision serves a useful purpose. In 1993, Rule 4 was amended to provide that a notice of appeal filed before disposition of one of the "tolling" post-judgment motions becomes effective upon disposition of the motion. FRAP 4(a)(4)(B)(i). That Rule presumes that appellants intend to pursue their initial appeals after disposition of post-judgment motions. That makes sense because the appellee is not prejudice by that presumption, and, if the appellant does not want to pursue the initial appeal after disposition of a post-trial motion, it can simply abandon that appeal.

But why not go further and provide that the original notice of appeal serves as the appellant's appeal from any order disposing of any post-trial motion? To be sure, that order could not have been referenced in the appellant's original notice of appeal, *see* FRAP 3(c)(1)(B), but that "failure" of notice would not prejudice the appellee. After all, because all interlocutory orders are said to merge into the final judgment, and many appealable orders resolve numerous contested issues, Rule 3(c)(1)(B) – which requires only that the notice of appeal designate "the judgment, order, or part thereof being appealed" – does not actually put the appellee or the court on notice of the issues to be raised on appeal. Rather, the appellee generally is put on notice of the issues on appeal when, shortly after an appeal is filed, the appellant states the issues on a form or in some other filing required by the circuit clerk. *Cf.* FRAP 10(b)(3)(A). In any event, it is difficult to see what benefit flows from requiring the appellant to file another notice of appeal (or an amended notice) or what harm is caused by allowing the original notice of appeal to serve as an appeal from the order disposing of a post-judgment motion. In sum, our

amendment would prevent the inadvertent loss of issues on appeal, without harming appellees or the courts.

Proposed Amendments to Rules 4(a)(1)(B)(iv) and 40(a)(1)(D)

In general, we support this amendment. We have one concern about its wording. Assume that an appeal is taken 31 days after judgment is entered by the district court or a petition for rehearing is filed 15 days after judgment is entered by the court of appeals. Assume further that the case is one in which, to quote the proposed Rules, the plaintiff alleges that the defendant is a "a United States officer or employee" and suit has been brought against that officer or employee in his or her individual capacity based on an "act or omission [allegedly] occurring in connection with duties performed on the United States' behalf." What if the court of appeals holds that the act or omission did *not* occur in connection with duties performed on the United States' behalf? Does that mean the court of appeals did not have jurisdiction over the appeal because it was filed late or that the rehearing petition was untimely? We assume that is not the committee's intent, but the Rule could be read that way. And there could be an adverse consequence of reading it that way. If the court finds that the officer or employee was not acting in connection with his or her official duties, the officer or employee might still be held individually liable on some other basis (such as under state common law), and we would not want a situation in which the court felt it lacked power to act on the ground that the appeal or rehearing petition was filed too late. We believe that any ambiguity can be resolved by replacing "occurring in connection" with "alleged to have occurred in connection."

Brian Wolfman – February 12, 2008

U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

February 14, 2008

07-AP-014

Mr. Peter G. McCabe
Secretary of the Committee on
Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Dear Mr. McCabe:

The United States Department of Justice appreciates this opportunity to comment on proposed amendments to the Federal Rules of Appellate Procedure. As the nation's principal litigator in the federal courts, the Department has a strong and longstanding interest in participating in the rules amendment process, and in sharing with the Committee on Rules of Practice and Procedure its experiences with the rules and describing how its practice could be affected by the proposed amendments.

This letter addresses the Committee's proposed amendments to FRAP 4 and 40, and proposed FRAP 12.1. The Department of Justice is sending a separate letter to the Committee to address the proposed "time computation" amendments.

As explained below, the Department supports the proposed amendments to FRAP 4 and 40 (both of which evolved from proposals by the Department), and, while we support the new proposed FRAP 12.1, we urge an amendment to the draft Committee Note accompanying that rule.

1. The Committee has proposed amendments to FRAP 4(a)(1)(B) and FRAP 40(a)(1) in order to make clear that additional notice-of-appeal and rehearing-petition time limits apply in cases involving "a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf." We support both of these changes.

Currently, FRAP 4(a)(1) provides that in a civil case a notice of appeal generally must be filed with the district court within thirty days after the judgment or order appealed from is entered. See FRAP 4(a)(1)(A). However, "[w]hen the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered." FRAP 4(a)(1)(B). This extended time for filing a notice of appeal in cases in which the United States is a party recognizes the Federal Government's need to review the case, determine whether an appeal is warranted, and secure approval from the Solicitor General.

FRAP 40(a)(1) states that "a petition for panel rehearing may be filed within 14 days after entry of judgment," unless this time is altered by court order or local rule. "But in a civil case, if the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment * * * ." Ibid. The forty-five day period, "analogous to the provision in Rule 4(a) extending the time for filing a notice of appeal in cases involving the United States, recognizes that the Solicitor General needs time to conduct a thorough review of the merits of a case before requesting a rehearing." Rule 40, Advisory Committee Notes, 1994 Amendment.

Although the extended filing times in FRAP 4 and 40 clearly apply to appeals involving a federal officer sued in his official capacity, neither rule explicitly extends these filing times to appeals in which a United States officer or employee is sued in an individual capacity for actions that occur in the performance of his official duties. As a result, the proper deadline by which to file a notice of appeal or petition for rehearing is an issue that frequently arises in Bivens appeals. Clarification of the rules would allow the Government to utilize the extended filing times intended for appeals in which the United States participates. Currently, out of an abundance of caution, the Government's general practice in Bivens appeals is to file notices of appeal within thirty days or seek extensions of the fourteen-day limit for petitions for rehearing, in order to avoid any possibility of litigation over timeliness.

We note that the same rationale for providing an extended deadline in FRAP 4 and 40 to appeals in which "the United States or its officer or agency is a party" supports an extended deadline for appeals in which the United States may participate because of its representation of an officer or employee sued in his individual capacity. See 28 C.F.R. § 50.15(a) (federal officer or employee sued in individual capacity is eligible for representation when his actions "reasonably appear to have been performed within the scope of the employee's employment" and representation is in the interest of the United States). When a United States officer or employee is sued in his individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States, and the Government decides to provide representation to the officer or employee, the Government, as in any other appeal to which it is a party, requires time to conduct a review of the case, determine whether appeal or rehearing is appropriate, and seek approval from the Solicitor General.

Further, such amendments would maintain consistency between the FRAP and the Federal Rules of Civil Procedure, governing district court matters. FRCP 12(a) sets forth the relevant periods in which a defendant must serve an answer to a complaint in district court. FRCP 12(a) provides that the default period is twenty days, but that, when "[t]he United States, an agency of the United States, or an officer or employee of the United States sued in an official capacity" is the defendant, the period is extended to sixty days. Similar to the current versions of FRAP 4 and 40, FRCP 12, prior to an amendment in 2000, provided that "[t]he United States or an officer or agency thereof" was entitled to sixty days to file an answer; the former version of the rule did not specify whether this extended time to file also applied to a case in which the defendant was a United States

officer or employee sued in his individual capacity for acts performed within the scope of his employment. In the 2000, however, FRCP 12(a)(3)(B) was added to remedy this situation.

FRCP 12(a)(3)(B) now provides that the extended sixty-day period applies to a suit against "[a]n officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States." The rationale for adopting this amendment was that in cases involving a United States officer or employee sued in his individual capacity for actions arising out of the performance of his official duties, "[t]ime is needed for the United States to determine whether to provide representation to the defendant officer or employee." FRCP 12, Advisory Committee Notes, 2000 Amendment. Moreover, "[i]f the United States provides representation, the need for an extended answer period is the same as in actions against the United States, a United States agency, or a United States officer sued in an official capacity." Ibid.

Therefore, because the Federal Rules of Civil Procedure have been amended to clarify that an extended filing time for the United States, its agencies, or officers should also apply to district court filings in a case involving a United States officer or employee sued in his individual capacity for actions occurring in the performance of his official duties, the proposed amendments to FRAP 4 and FRAP 40 would be consistent with the rules governing the district courts, and will serve important policy interests.

2. Acting on a suggestion originally made by the Solicitor General, the Committee is proposing a new appellate rule setting out a procedure for "indicative rulings" by the district courts. These are tentative rulings issued by the district courts in response to motions after a trial court has lost jurisdiction because of the filing of a notice of appeal. All of the Circuits have established procedures through case law for dealing with such motions, under which a district court can indicate that it would be inclined to grant, for example, a motion under FRCP 60(b) if it still had jurisdiction. We proposed a new FRAP provision to describe and govern this practice because so many practitioners seemed unaware of it.

The Appellate and Civil rules committees ultimately agreed to recommend new provisions in the FRAP and FRCP concerning indicative rulings. As currently framed, proposed FRAP 12.1 is broadly worded, and would appear to cover civil as well as criminal cases. This broad coverage causes concern for the Department, and we therefore urge that the Committee Note for proposed FRAP 12.1 be changed to read as follows, in pertinent part: "Appellate Rule 12.1 is limited to the Civil Rule 62.1 context and to newly discovered evidence motions under Criminal Rule 33(b)(1), as provided in *United States v. Cronic*, 466 U.S. 648, 667 n.42(1984), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. 3582(c)."

We make this proposal after extensive consultations with our criminal law experts within the Justice Department, including in the United States Attorneys' offices throughout the United States. Their broad experience makes clear that the issue of possible indicative rulings legitimately arises

only in the context of FRCrP 33(b)(1) (dealing with motions for a new trial based on newly discovered evidence), FRCrP 35(b) (dealing with motions by the Government for a reduced sentence because of a defendant's substantial assistance), and 18 U.S.C. 3582(c) (dealing with motions for a reduction in sentence from the Director of the Bureau of Prisons or based on a retroactive guidelines amendment); we are not aware of any other types of motions in criminal cases for which an indicative ruling might be appropriate. We are concerned that, without the change to the Committee Note that we are urging, the federal district courts will be swamped with inappropriate motions by prisoners acting pro se who do not understand the limited purposes for which indicative rulings are warranted.

Accordingly, our proposed amendment to the Committee Note would make clear that motions under FRCrP 33(b)(1), FRCrP 35(b), and 18 U.S.C. 3582(c) are covered by the new indicative rulings rule, but that the new rule does not otherwise apply broadly to motions outside the civil context. (Note that there is no reason to include FRCrP 35(a) within the coverage of the new rule because FRAP 4(b)(5) already makes clear that a trial court retains jurisdiction to rule on motions under FRCrP 35(a) (motions to correct clear sentencing errors).) With the change to the Committee Note described above, the Department recommends that FRAP 12.1 be adopted.

Very respectfully,

Paul D. Clement
Solicitor General

TAB 5B

MEMORANDUM

DATE: February 25, 2010

TO: Judge Jeffrey S. Sutton

FROM: Catherine T. Struve, Reporter

RE: Permissive Interlocutory Tax Appeals

At its November 2009 meeting, the Appellate Rules Committee discussed the possibility of proposing amendments to Appellate Rules 13 and 14 to address permissive interlocutory appeals under 26 U.S.C. § 7482(a)(2). Committee members agreed that it would be useful for the Committee to reach out to the tax bar and bench, as a way of obtaining advance comment on the proposals before deciding whether to seek permission to publish them officially for comment. Part I of this memo summarizes the reasons why the Committee is considering the amendments. Part II provides a sketch of the proposed amendments. Part III discusses drafting choices, and Part IV summarizes questions upon which comment would be helpful.

I. Reasons for considering the proposed amendments

In 1980, the Second Circuit held in *Shapiro v. C.I.R.*, 632 F.2d 170 (2d Cir. 1980), that 28 U.S.C. § 1292(b) does not authorize permissive interlocutory appeals from an order of the Tax Court.[1] In 1986, Congress responded to *Shapiro*[2] by enacting 26 U.S.C. § 7482(a)(2), which adopts for interlocutory appeals from the Tax Court a system similar to Section 1292(b)'s system for interlocutory appeals from the district courts.[3] Section 7482(a)(2) provides that "[w]hen any judge of the Tax Court includes in an interlocutory order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of

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[1] The *Shapiro* court explained: "The language of s 1292(b) refers only to orders by a 'district judge' and proceedings in a 'district court,' making no reference to orders of any other court. Moreover, Fed.R.App.P. 5, governing appeals from interlocutory orders under s 1292(b), also refers solely to the 'district court,' and Rule 5 is expressly excluded from application to the Tax Court by Rule 14." *Shapiro*, 632 F.2d at 171.

[2] *See* H. R. Conf. Report No. 99-841, III, 1986 U.S.C.C.A.N. 4075, 4894.

[3] *See generally* Knibb, Fed. Ct. App. Manual § 18:1 (5th ed.).

the litigation," the court of appeals "may, in its discretion, permit an appeal to be taken from such order, if application is made to it within 10 days after the entry of such order." When applying Section 7482(a)(2), the Tax Court has looked to caselaw interpreting Section 1292(b).[4]

The adoption of Section 7482(a)(2) did not lead to any amendments of the Appellate Rules; thus, it is not entirely clear what rules govern an interlocutory appeal by permission under Section 7482(a)(2). As of 2010, though, Tax Court Rule 193(a) states in part: "For appeals from interlocutory orders generally, see rules 5 and 14 of the Federal Rules of Appellate Procedure." This reference is somewhat puzzling, because Rule 14 (with respect to appeals to which it applies) excludes the application of Rule 5.

Tax Court Rule 193 explains how to seek the permission of the Tax Court for a permissive interlocutory appeal under Section 7482(a)(2). As Tax Court Rule 193(a) suggests, Appellate Rule 5 would be the obvious candidate to govern court of appeals procedure in connection with such appeals – but Appellate Rule 14 provides that Appellate Rule 5 does not apply to the review of a Tax Court decision. Thus, the question arises whether it might be useful to remove a source of potential confusion by amending the Appellate Rules to make clear that Appellate Rule 5 applies to interlocutory tax appeals under Section 7482(a)(2).

During its initial discussions of this question, the Committee noted that it would be useful to know whether interlocutory tax appeals occur with regularity or whether (alternatively) interlocutory tax appeals under Section 7482(a)(2) are so rarely seen that it might not be worth fixing this apparent glitch in the Appellate Rules. I informally consulted Judge Mark V. Holmes of the U.S. Tax Court about the treatment of interlocutory appeals by permission under Section 7482(a)(2), and also about Tax Court Rule 193(a)'s puzzling reference to Appellate Rules 5 and 14. Judge Holmes responded:

> [T]he short answer to your questions is that you have spotted a flaw in the FRAP that I do think would be a good thing to repair, but that the universe of cases to which it would apply is tiny. There are a reasonable number of these motions every year, but nearly all are frivolous (mine have included interlocutory appeals seeking jury trials or holding my court unconstitutional). There seem to have been a grand total of 3 that we've certified over the years: Rhone-Poulenc v. Comm'r, 249 F.3d 175 (3d Cir. 2001) (where the Circuit Court disagreed and bumped it back to us); Siben v. Comm'r, 930 F.2d 1034 (2d Cir. 1991) (technical but very important question on the calculation of the statute of limitations in a partnership tax proceeding), and Samuels, Kramer & Co. v. Comm'r, 930 F.2d 975 (2d Cir. 1991) (one of a number of cases challenging our special trial judges under the Appointments Clause of the Constitution -- ultimately leading to the Supreme Court case, Freytag v. Comm'r.)

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[4] *See, e.g., General Signal Corp. & Subsidiaries v. C.I.R.*, 104 T.C. 248, 255 (U.S. Tax Ct. 1995).

I also asked my clerk to look at our Court's archives and talk to some of our institutional memory and she developed two theories for the odd last sentence in our Tax Court Rule 193 that you spotted.

1) The "please notice" theory - In 1986, after Congress authorized us to issue interlocutory orders with the enactment of section 7482(a)(2), we quickly followed up with Rule 193. The minutes of our Rules Committee (none of whose members are both still with us and remember anything about the topic) record a statement from someone that IRC Section 7482(a)(2) would require the amendment of FRAP 5 and 14, but that since amendments to the Federal Rules are not up to the Tax Court, the issue cannot be resolved by us. Perhaps the last sentence of our Rule 193 was an obviously way too subtle signal.

2) The procedural belt and suspenders theory- Rule 14 deals with appellate review of tax court decisions. Not tax court orders. Section 7482(a)(2)(B) states that "for purposes of subsections (b) and (c), an order described in this paragraph shall be treated as a decision of the Tax Court." So maybe we wanted a cross-reference touching both FRAP 14 (decisions) and FRAP 5 (orders). This is just a wild guess, since, as you noticed, both FRAP 14's exclusion of FRAP 5, and FRAP 5 (or FRAP 13(d)(1)'s exclusion of FRAP 5) would need tinkering to fix the problem.

Or maybe we didn't think about it hard enough.

In addition, Douglas Letter consulted the Tax Division of the Department of Justice concerning the possible Title III amendments and related issues. In a March 25, 2009 memorandum, Gilbert Rothenberg – the Chief of the Tax Division's Appellate Section – shared comments and suggestions from Steve Parks, a Tax Division attorney. The memorandum stated in part:

FRAP 14 specifies which rules in FRAP apply to appeals from "decisions" of the Tax Court. Since an interlocutory order under Sec. 7482(b)(2) is not a "decision," FRAP 14 would not directly govern which rules in FRAP apply to the review of such interlocutory orders. Moreover, FRAP 14 specifically *excludes* FRAP 5 – which provides procedural rules governing appeals of interlocutory orders of district courts – from the list of rules that are applicable to appeals from decisions of the Tax Court.... [A]n amendment to FRAP 14 that makes that rule applicable to petitions for permission to appeal under Sec. 7482(a)(2), and that makes FRAP 5 applicable (with appropriate adjustments) to appeals from such interlocutory orders, would eliminate the confusion, or glitch, in FRAP on this issue.

On the question of whether a Rules amendment would be worthwhile, the memo stated:

.... A quick search of Westlaw turned up only four appellate cases since Sec. 7482(a)(2)'s enactment in 1986 in which courts of appeals were presented with requests to appeal under that provision (three of which were granted). It is likely that other such requests are made periodically and disposed of in orders that are not reported on Westlaw. Nevertheless, it seems clear that the provision is not frequently used. On the other hand, if Sec. 7482(a)(2) was thought by Congress to be useful enough to warrant enactment, it would be appropriate for court rules to accommodate its use. It might also be noted that cases in which Sec. 7482(a)(2)'s procedures are properly employed may be quite important. For example, the Second Circuit in *Samuels, Kramer & Co. v. Commissioner*, 930 F.2d 975 ([2d Cir.] 1991), granted permission to appeal under Sec. 7482(a)(2) on the issue of the Tax Court's authority under the Appointments Clause of the Constitution to appoint special trial judges – an issue that (in a later case) reached the Supreme Court.

After further consideration, the Appellate Rules Committee decided to consider possible Appellate Rules amendments to address the question of interlocutory appeals under Section 7482(a)(2). The Committee discussed possible wording for such amendments at its November 2009 meeting. The proposals shown in Part II, below, reflect the Committee's November 2009 discussion.

II. Proposed amendments

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

Rule 13. ~~Review of a Decision of the Tax Court~~ Appeal as of Right

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

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

the Tax Court's decision is entered.

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

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

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

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

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

(2) If an appeal as of right from ~~a~~ the Tax Court ~~decision~~ is taken to more

than one court of appeals, the original record must be sent to the court named in the first notice of appeal filed. In an appeal to any other court of appeals, the appellant must apply to that other court to make provision for the record.

(e) Applicability of Other Rules.

All provisions of these rules, except Rules 4-9, 15-20, and 22-23, apply to appeals as of right from the Tax Court. [References in these rules to the district court and district clerk are to be read as referring to the Tax Court and its clerk.]

Committee Note

Rules 13 and 14 are amended to address the treatment of permissive interlocutory appeals from the Tax Court under 26 U.S.C. § 7482(a)(2). Rules 13 and 14 do not currently address such appeals; instead, those Rules address only appeals as of right from the Tax Court. The amendments consolidate provisions relating to appeals as of right in a revised Rule 13, and place new provisions relating to permissive interlocutory appeals in a revised Rule 14. The caption of Title III is amended to reflect the broadened application of this Title.

Rule 14. ~~Applicability of Other Rules to the Review of a Tax Court Decision~~ Appeal by Permission

~~All provisions of these rules, except Rules 4-9, 15-20, and 22-23, apply to the review of a Tax Court decision.~~

All provisions of these rules, except Rules 3- 4, 5(d)(1)(B), 6-9, 13, 15-20, and 22-23, apply to appeals by permission from the Tax Court. Such appeals are governed by Rule 5, except for 5(d)(1)(B). References in [Rules 5, 10, 11, and 12(c)] [these rules] to the district court and district clerk are to be read as referring to the Tax Court and its clerk.

Committee Note

The existing text of Rule 14, which addresses the applicability of various Appellate Rules to appeals as of right from the Tax Court, is relocated to a new subdivision (e) of Rule 13. The new text of Rule 14 addresses the applicability of the Appellate Rules to permissive interlocutory appeals from the Tax Court under 26 U.S.C. § 7482(a)(2). Rule 14, as amended, provides that such appeals are governed by Rule 5. Rule 5(d)(1)(B), however, does not apply to such appeals because it references Rule 7 cost bonds and Rule 7 does not apply to appeals from the Tax Court. In general, the Appellate Rules apply to permissive interlocutory appeals from the Tax Court, except that Rules 3-4, 5(d)(1)(B), 6-9, 13, 15-20, and 22-23 do not apply.

III. Drafting choices

The proposed draft amendments shown in Part I track closely the approach already taken in Rules 13 and 14. Thus, proposed new Rule 14's list of inapplicable FRAP provisions is very similar to the list in existing Rule 14 (which would become new Rule 13(e)). The two lists of exclusions differ only in obvious ways: proposed Rule 14 excludes Rules 3 and 4 because those Rules deal specifically with appeals as of right, and proposed Rule 14 does not exclude Rule 5 (other than Rule 5(d)(1)(B)). I should note that the list of inapplicable provisions in current Rule 14 has never been substantively amended. Whether the inclusions and exclusions specified in current Rule 14 are as appropriate now as they were when first adopted in 1968 is a question upon which it would be useful to obtain comment.

In the example, I excluded Rule 5(d)(1)(B) from applying to permissive appeals from Tax Court orders because I suspect that specific tax provisions address the question of bonds in connection with appeals from the Tax Court.[5] This is another matter upon which comment would be useful.

Current Rule 13(d)(1) specifies particular Rules in which references to the district court and the district clerk are to be read to refer to the Tax Court and its clerk. That language is bracketed in the draft set forth in Part II because it seems useful to consider a possible alternative to the current approach.[6] There are other Appellate Rules (not specified in current Rule 13(d)(1)) that also use the term "district court" or "district clerk." A possible alternative would be to provide a global definition instead of specifying only certain rules in which the terms

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[5] 26 U.S.C. § 7485(a) requires the provision of a bond before the review of a Tax Court *decision* can stay assessment or collection. 26 U.S.C. § 7482(c)(3) authorizes the court of appeals to require additional "undertakings ... as a condition of or in connection with the review" of a Tax Court decision, and Section 7482(a)(2)(B) includes permissive appeals from Tax Court orders within the scope of Section 7482(c). For a discussion of various sorts of bonds in tax appeals, see 14 Mertens Law of Fed. Income Tax'n § 51:21.

[6] That possible alternative is shown in bracketed language in proposed Rule 13(e) and in the second set of brackets in proposed Rule 14.

"district court" and "district clerk" refer to the Tax Court and its clerk. An example of this alternative approach can be found in Rule 6(b)(1)(C), which refers simply to "any applicable rule": "when the appeal is from a bankruptcy appellate panel, the term 'district court,' as used in any applicable rule, means 'appellate panel.'"

Here is a chart showing Appellate Rules that refer to "district court" or "district clerk." The endnotes discuss issues specific to particular rules.

	Provision specified in Rules 13(d)(1) and/or the first bracketed alternative in proposed Rule 14 (as applicable) as a rule in which references to district court and clerk mean Tax Court and clerk	***Provision not specified*** as a rule in which references to district court and clerk mean Tax Court and clerk
Provision applies to ***appeal as of right*** and – under proposed new Rule 14 – would apply to ***permissive appeals***	10(a), 10(b)(1)(A)(iii), 10(b)(3)(C), 10(c), 10(d), 10(e)(1), 10(e)(2), 11(b)(1), 11(b)(2), 11(c), 11(e), 11(f), 11(g),[1] 12(c)	1(a)(2), 26(a)(6),[2] 28(a)(4)(A), 30(a)(2), 30(e),[3] 37,[4] 39(d)(3) & 39(e),[5] 42(a), 43(a)(3),[6] 46(a)(1)[7]
Provision applies to ***appeal as of right*** but would not apply to permissive appeals	3(a)(1), 3(a)(3),[8] 3(b)(1), 3(d), 3(e), 12(a)	
Provision does not apply to appeal as of right but would apply to ***permissive appeals***	5(a)(1), 5(a)(3), 5(b)(1)(E)(ii), 5(d)(1)(A), 5(d)(3)	
Provision does not apply to appeal as of right and would not apply to permissive appeals		4, 6-9, 22, 24(a)[9]

IV. Conclusion

As the Committee concluded during its fall meeting, it will be useful to obtain comment on a number of issues:

- Would it be worthwhile to amend Title III of the Appellate Rules to take account of permissive interlocutory appeals under 26 U.S.C. § 7482(a)(2)?

- If so, is the proposed approach sketched in Part II of this memo a good one?

- Do the exclusions set forth in proposed Rules 13(e) and 14 appropriately delineate which Appellate Rules should apply to appeals from the Tax Court?

- Would it be useful to provide a global definition (as shown in proposed Rule 13(e) and the second bracketed alternative in proposed Rule 14) providing that references to the district court and district clerk denote the Tax Court and its clerk?

Endnotes:

Endnote 1. Rule 11(g) states: "If, before the record is forwarded, a party makes any of the following motions in the court of appeals: • for dismissal; • for release; • for a stay pending appeal; • for additional security on the bond on appeal or on a supersedeas bond; or • for any other intermediate order— the district clerk must send the court of appeals any parts of the record designated by any party." A motion for release will not, of course, be made during an appeal from the Tax Court; but other intermediate orders might be sought during such an appeal.

Endnote 2. Rule 26(a)(6) states: "'Legal holiday' means: (A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; (B) any day declared a holiday by the President or Congress; and (C) for periods that are measured after an event, any other day declared a holiday by the state where either of the following is located: the district court that rendered the challenged judgment or order, or the circuit clerk's principal office."

Proposed Rule 1(b) is currently on track to take effect December 1, 2010 if the Supreme Court approves it and Congress takes no contrary action. Proposed Rule 1(b) will define "state" for purposes of the Appellate Rules to include the District of Columbia and any U.S. commonwealth or territory. Thus, one can think of the District of Columbia as "the state in which is located" the Tax Court.

Endnote 3. Rule 30(e) provides: "If a transcript of a proceeding before an administrative agency, board, commission, or officer was used in a district-court action and has been designated for inclusion in the appendix, the transcript must be placed in the appendix as an exhibit."

Technically, this provision applies to appeals as of right from the Tax Court and – under the proposed new Rule 14 – would apply to permissive interlocutory appeals from the Tax Court. It is unclear how often a transcript of an administrative proceeding would be used in a Tax Court proceeding. Rule 30(e) is not specified in either current Rule 13(d)(1) or the proposed amendments Rules 13 and 14 as a rule in which references to the district court mean the Tax Court. That seems unproblematic given the uncertainty as to how often Rule 30(e) would be relevant to appeals from the Tax Court.

Endnote 4. Rule 37 provides: "(a) When the Court Affirms. Unless the law provides otherwise, if a money judgment in a civil case is affirmed, whatever interest is allowed by law is payable from the date when the district court's judgment was entered. (b) When the Court Reverses. If the court modifies or reverses a judgment with a direction that a money judgment be entered in the district court, the mandate must contain instructions about the allowance of interest."

These provisions apply to appeals as of right from the Tax Court and – under the proposed new Rule 14 – would apply to permissive interlocutory appeals from the Tax Court. They are not, however, specified in either current Rule 13(d)(1) or the proposed Rules 13 and 14 as provisions in which references to the district court mean the Tax Court.

At first glance, it may seem odd to include Rule 37 among the rules that are potentially applicable to permissive interlocutory appeals from the Tax Court under proposed Rule 14: an *interlocutory* appeal would seem unlikely to concern a money judgment. However, most circuits that have addressed the question require a Civil Rule 54(b) determination from the Tax Court before they will review the Tax Court's disposition of fewer than all claims in a petition. In such a situation, I suppose it might be possible to see someone seek a permissive appeal under Section 7482(a)(2) to obtain immediate review of a disposition of fewer than all claims in a petition, under circumstances where the disposition in question looks like a money judgment. So perhaps there may be some instances in which Rule 37 might be relevant to permissive interlocutory appeals from the Tax Court.

Rule 37(a), by its own terms, governs interest in the event of an affirmance "[u]nless the law provides otherwise." I have not researched the question of interest on Tax Court judgments, but it seems that Rule 37(a) is drafted so as to avoid any conflict with the applicable tax law provisions: If a tax-law provision governs the treatment of interest in the event a Tax Court judgment is affirmed, Rule 37(a) is written so as not to conflict with that provision.

Rule 37(b) does not pose an obvious conflict with tax law either. Again, I have not researched the question of tax-law provisions that may govern interest when a Tax Court judgment is modified or reversed. But if such provisions exist, Rule 37(b) does not conflict with them; it merely directs the court of appeals to include in the mandate instructions about the allowance of interest.

Endnote 5. Rule 39(d)(3) states: "The clerk must prepare and certify an itemized statement of costs for insertion in the mandate, but issuance of the mandate must not be delayed for taxing costs. If the mandate issues before costs are finally determined, the district clerk must—upon the circuit clerk's request—add the statement of costs, or any amendment of it, to the mandate."

Rule 39(e) states: "The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule: (1) the preparation and transmission of the record; (2) the reporter's transcript, if needed to determine the appeal; (3) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; and (4) the fee for filing the notice of appeal."

These provisions apply to appeals as of right from the Tax Court and – under the proposed new Rule 14 – would apply to permissive interlocutory appeals from the Tax Court. They are not, however, specified in either current Rule 13(d)(1) or proposed Rules 13 and 14 as provisions in which references to the district court and district clerk mean the Tax Court and its clerk.

Rule 39(b) provides: "Costs for or against the United States, its agency, or officer will be assessed under Rule 39(a) only if authorized by law." In the context of tax disputes, a relevant statute is 26 U.S.C. § 7430, which provides (subject to certain limits) that "[i]n any administrative or court proceeding which is brought by or against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty under this title, the prevailing party may be awarded a judgment or a settlement for– (1) reasonable administrative costs incurred in connection with such administrative proceeding within the Internal Revenue Service, and (2) reasonable litigation costs incurred in connection with such court proceeding." See also Tax Court Rules 230-233.

Endnote 6. Rule 43(a)(3) states: "If a party against whom an appeal may be taken dies after entry of a judgment or order in the district court, but before a notice of appeal is filed, an appellant may proceed as if the death had not occurred. After the notice of appeal is filed, substitution must be in accordance with Rule 43(a)(1)."

This provision applies to appeals as of right from the Tax Court and – under the proposed new Rule 14 – would apply to permissive interlocutory appeals from the Tax Court. It is not, however, specified in either current Rule 13(d)(1) or proposed Rules 13 and 14 as a rule in which references to the district court mean the Tax Court.

More generally, it is worth noting that Rule 43(c)(2), concerning automatic substitution of public officers, is slightly in tension (as to its specifics) with 26 U.S.C. § 7484. Rule 43(c)(2) provides: "When a public officer who is a party to an appeal or other proceeding in an official capacity dies, resigns, or otherwise ceases to hold office, the action does not abate. The public officer's successor is automatically substituted as a party. Proceedings following the substitution are to be in the name of the substituted party, but any misnomer that does not affect the

substantial rights of the parties may be disregarded. An order of substitution may be entered at any time, but failure to enter an order does not affect the substitution." Section 7484 provides: "When the incumbent of the office of Secretary changes, no substitution of the name of his successor shall be required in proceedings pending before any appellate court reviewing the action of the Tax Court." (Though the term "Secretary" might be taken to refer only to the Treasury Secretary himself or herself, it appears to have a broader meaning. 26 U.S.C. § 7701(a)(11)(B) provides: "When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof ... [t]he term 'Secretary' means the Secretary of the Treasury or his delegate." And Section 7701(a)(12)(A)(I) provides that the term "or his delegate," "when used with reference to the Secretary of the Treasury, means any officer, employee, or agency of the Treasury Department duly authorized by the Secretary of the Treasury directly, or indirectly by one or more redelegations of authority, to perform the function mentioned or described in the context." This includes the Commissioner of Internal Revenue.)

The bottom line of both provisions is the same: a transition from one Commissioner to the next does not affect any pending appeals. But the technical mechanism differs: Rule 43(c)(2) provides for automatic substitution of the new Commissioner, whereas Section 7484 simply provides that no substitution is needed.

Endnote 7. Rule 46(a)(1) provides: "An attorney is eligible for admission to the bar of a court of appeals if that attorney is of good moral and professional character and is admitted to practice before the Supreme Court of the United States, the highest court of a state, another United States court of appeals, or a United States district court (including the district courts for Guam, the Northern Mariana Islands, and the Virgin Islands)."

Rule 46 applies to appeals as of right from the Tax Court and – under the proposed new Rule 14 – would apply to permissive interlocutory appeals from the Tax Court. It is not, however, specified in either current Rule 13(d)(1) or proposed Rules 13 and 14 as a rule in which references to the district court mean the Tax Court. It is not clear that it makes any difference whether "district court" in Rule 46(a)(1) is read to encompass the Tax Court. Under the Tax Court's present rules, the eligibility requirements for an attorney to be admitted to practice before the Tax Court seem similar to those for admission to the bar of a court of appeals under Rule 46(a)(1). *See* Tax Court Rule 200.

Endnote 8. Rule 3(a)(3) provides: "An appeal from a judgment by a magistrate judge in a civil case is taken in the same way as an appeal from any other district court judgment."

Technically, this provision applies to appeals as of right from the Tax Court; under proposed Rule 14, it would not apply to permissive interlocutory appeals from the Tax Court. Rule 3 is specified in Rule 13(d)(1) as a rule in which references to the district court and district clerk mean the Tax Court and its clerk.

Rule 3(a)(3) would at first glance seem to have no application to appeals from the Tax Court. The Tax Court does not employ magistrate judges as that term is used in 28 U.S.C. §§

631-39. The Tax Court does employ "special trial judges" who can decide certain types of tax matters and who can make recommended findings of fact and conclusions of law on other matters, *see* 26 U.S.C. § 7443A; Tax Court Rule 183. *See generally* Christopher M. Pietruszkiewicz, *Conflating Standards of Review in the Tax Court: A Lesson in Ambiguity*, 44 Hous. L. Rev. 1337 (2008) (discussing role of special trial judges in Tax Court proceedings); Leandra Lederman, *Tax Appeal: A Proposal to Make The United States Tax Court More Judicial*, 85 Wash. U. L. Rev. 1195, 1201 (2008) (describing the Tax Court's special trial judges as "judicial officers who are somewhat analogous to magistrate judges"). One of the typical tasks of special trial judges appears to be the determination of small tax cases (involving amounts of $50,000 or less); when such matters are tried under streamlined procedures to a special trial judge, the question of appellate procedure would not arise because no appeal is available. *See* 26 U.S.C. § 7463(b). However, it appears that there are some types of decisions by special trial judges that could be appealed to the court of appeals. *See* 26 U.S.C. §§ 7443A(b) & (c). *See generally* Kathleen Pakenham, *You Better Shop Around: The Status and Authority of Specialty Trial Judges in Federal Tax Cases*, 103 Tax Notes 1527 (2004) (discussing a previous version of Section 7443A).

Though I have not attempted to explore all the duties of special trial judges, it seems likely that special trial judges – though analogous in some ways to magistrate judges – would not necessarily be deemed so similar in their roles as to fit within the term "magistrate judge" for purposes of Rule 3(a)(3). Assuming that to be the case, Rule 3(a)(3) would have no application to appeals from the Tax Court.

Endnote 9. Despite the fact that it is not excluded from application to Tax Court appeals by Rule 14 (or by proposed Rules 13 and 14), Rule 24(a) does not appear to be intended to apply by its own terms to appeals from the Tax Court. Rather, Rule 24(b) provides that "When an appeal or review of a proceeding before an administrative agency, board, commission, or officer (including for the purpose of this rule the United States Tax Court) proceeds directly in a court of appeals, a party may file in the court of appeals a motion for leave to proceed on appeal in forma pauperis with an affidavit prescribed by Rule 24(a)(1)." Because Rule 24(a) does not appear to apply to appeals from the Tax Court, its references to the district court and district clerk need not encompass references to the Tax Court and its clerk.

MEMORANDUM

DATE: March 13, 2010

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Tax Court decisions

Summary:

As discussed in a separate memo in these agenda materials, the Appellate Rules Committee is considering the possibility of proposing amendments to Appellate Rules 13 and 14 to address permissive interlocutory appeals under 26 U.S.C. § 7482(a)(2). At the November 2009 meeting, a member asked why Title III of the Appellate Rules refers to review of "decisions" rather than "judgments." This memo summarizes the results of my research on this question. The reasons for using the term "decision" are not entirely certain. The term appears in relevant statutes dating back to 1924 and may have originated in a view of the Tax Court's predecessor as an administrative board. Whatever the reasons for the initial choice of the term, its appropriateness was assumed by the drafters of the original Appellate Rules and its use accords with contemporary statutes and Tax Court rules. I therefore recommend the continued use of the term "decision" to refer to Tax Court dispositions that are appealable as of right. Further details in support of this recommendation are provided below.

Discussion:

It seems possible that the use of the term "decision" rather than "judgment" to describe Tax Court dispositions might have something to do with the status of the Tax Court's original predecessor as an administrative board.[1] As one commentator explained,

> The court was originally established in 1924 as the Board of Tax Appeals, "an independent agency in the executive branch of the Government." In 1942, the name of the Board was changed to the Tax Court of the United States, but despite its new title the court's status as an agency of the executive branch was not disturbed. Finally, in 1969, the court was established as a legislative court under article I of the Constitution and its name was changed to the United States Tax

[1] I am indebted to my research assistant Melinda Harris for suggesting this line of inquiry to me.

Court.[2]

One might thus trace the origin of the distinction all the way back to the Revenue Act of 1924, which created the Board of Tax Appeals. When the Supreme Court held in *Old Colony Trust Co. v. Commissioner* that petitions in a Circuit Court of Appeals for review of Board of Tax Appeals dispositions came within the ambit of Article III judicial business, it explained its holding in terms that might be read to imply a distinction between the *judgments* of an Article III court and the *decisions* of the Board of Tax Appeals:

> The Circuit Court of Appeals is a constitutional court under the definition of such courts as given in the Bakelite Case, [Ex parte Bakelite Corporation, 279 U.S. 438 (1929)], and a case or controversy may come before it, provided it involves neither advisory nor executive action by it.
>
> In the case we have here, there are adverse parties. The United States or its authorized official asserts its right to the ... payment by a taxpayer of a tax due from him to the government, and the taxpayer is resisting that payment or is seeking to recover what he has already paid as taxes when by law they were not properly due. That makes a case or controversy, and the proper disposition of it is the exercise of judicial power. The courts are either the Circuit Court of Appeals or the District of Columbia Court of Appeals. The subject-matter of the controversy is the amount of the tax claimed to be due or refundable and its validity, and the judgment to be rendered is a judicial judgment.
>
> The Board of Tax Appeals is not a court. It is an executive or administrative board, upon the decision of which the parties are given an opportunity to base a petition for review to the courts after the administrative inquiry of the Board has been had and decided.

Old Colony Trust Co. v. Commissioner, 279 U.S. 716, 724-25 (1929).[3] The limits on the powers

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[2] Harold Dubroff, The United States Tax Court: An Historical Analysis, 41 Albany L. Rev. 1, 1 (1977) (footnotes omitted) (quoting Revenue Act of 1924, § 900(k), 43 Stat. 253, 338).

[3] Harold Dubroff notes that during that same Term the Supreme Court held in Ex parte *Bakelite Corporation*, 279 U.S. 438 (1929), that the Court of Customs Appeals was a "legislative ... court" created under Article I, *see id.* at 458-59 & n.22, and he suggests that

> [w]ere the *Bakelite* decision available in 1924 and 1926 when major legislation with respect to the Board [of Tax Appeals] was considered, Congress might well have chosen to adopt the article I approach. However, in the absence of that decision and with the uncertainty of the boundaries of the legislative court doctrine, denominating and creating the Board as a "court" may have been viewed

of the Board of Tax Appeals might naturally have led to the distinction between Board "decisions" and court "judgments." Board decisions, for one thing, were not self-enforcing; rather, suit had to be brought on the Board decision in a court of competent jurisdiction.[4]

In any event, whether or not the use of the term "decision" stemmed from the Board of Tax Appeals' original nature as an administrative board, Congress used the term "decision" in

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> as tantamount to providing article III status. This, of course, would have been incompatible with the refusal of Congress to provide life tenure to Board members.

Dubroff, supra note 2, at 9-10. The Court's discussion in *Old Colony Trust* suggests that it did not view the Board of Tax Appeals as such a legislative court.

[4] As the Supreme Court explained when discussing the Board's finding of certain overpayments:

> The Board has not ordered a refund. It could not rightly do so, for its jurisdiction is limited to the determination of the amount of deficiency or overpayment, Revenue Act of 1928, ss 272, 322(d), ... upon the petition of the taxpayer to review a deficiency assessment by the Commissioner. The Board is without authority to order a refund or a credit, although its decision is res adjudicata as to the questions involved in the computation and assessment of taxes for which a deficiency is claimed.... When the determination of overpayment by the Board becomes final, the statute provides that such amounts shall be refunded or credited, ... and upon the Commissioner's failure to comply with the statute, a plenary suit will lie in the District Court or the Court of Claims, for the recovery of any refund to which he is entitled.

U.S. ex rel. Girard Trust Co. v. Helvering, 301 U.S. 540, 542 (1937).

relevant legislation in 1924,[5] 1926,[6] 1942,[7] and 1969,[8] and the current statutory framework continues to use the term "decision." See 26 U.S.C. §§ 7459, 7481-7483. Likewise, The Tax Court's current rules continue to use the term "decision" when referring to Tax Court dispositions that are appealable as of right. See Tax Court Rule 190.

Rules 13 and 14 have referred to Tax Court "decisions" rather than Tax Court "judgments" ever since those Rules took effect in 1968 as part of the original Appellate Rules.[9] The original Committee Note to Rule 13 suggests that the term "decision" may have been drawn from the then-applicable version of 26 U.S.C. § 7483.[10] The Committee Note explained that the new Rule 13 substituted a notice-of-appeal mechanism for Section 7483's petition-for-review

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[5] See Revenue Act of 1924, § 900(g), 43 Stat. 253, 337 (referring to "any suit or proceeding by a taxpayer to recover any amounts paid in pursuance of a decision of the Board").

[6] See Revenue Act of 1926, § 1001(a), 44 Stat. 109 (providing for petitions for judicial review of "[t]he decision of the Board").

[7] The Revenue Act of 1942 changed the title of the Board of Tax Appeals to "The Tax Court of the United States," but also provided that the newly-renamed Tax Court would have the same "jurisdiction, powers and duties" as the Board had previously had. Revenue Act of 1942, § 504, 56 Stat. 798, 957. The statutory language, as amended by the 1942 act, continued to refer to "decision[s]." See id. §§ 510(h) & (j), 56 Stat. 969-70.

[8] The Tax Reform Act of 1969 recharacterized the Tax Court as an "article I" court and re-named it the "United States Tax Court." Tax Reform Act of 1969, Pub. L. No. 91-172, § 951, 83 Stat. 487, 730. By the time of this legislation, the newly-adopted Appellate Rules contemplated that one seeking review of a Tax Court decision would file a notice of appeal rather than a petition for review. The 1969 act revised the statutory framework so that it became consistent with the Appellate Rules' terminology; the revised language continued to refer to Tax Court "decisions." See Tax Reform Act of 1969, § 959, 83 Stat. 734 (revising 26 U.S.C. § 7483 to refer to notices of appeal rather than petitions for review, and referring to "a decision of the Tax Court").

[9] A quick search of the US-RULESCOMM database on Westlaw provides no indication that the distinction between "judgments" and "decisions" was explored during the restyling of the Appellate Rules in the late 1990s.

[10] As noted above, although Section 7483 was amended in 1969 to conform it to the notice-of-appeal mechanism provided in Appellate Rule 13, those amendments did not alter the statute's use of the term "decision." Section 7483 currently provides: "Review of a decision of the Tax Court shall be obtained by filing a notice of appeal with the clerk of the Tax Court within 90 days after the decision of the Tax Court is entered. If a timely notice of appeal is filed by one party, any other party may take an appeal by filing a notice of appeal within 120 days after the decision of the Tax Court is entered."

mechanism: "26 U.S.C. § 7483 ... provides that review of a Tax Court decision may be obtained by filing a petition for review. [Rule 13(a)] provides for review by the filing of the simple and familiar notice of appeal used to obtain review of district court judgments." The original Committee Note to Rule 14 similarly refers to Tax Court "decisions" and district court "judgments": "The proposed rule continues to present the uniform practice of the circuits of regulating review of decisions of the Tax Court by the general rules applicable to appeals from judgments of the district courts."

During the deliberations that led to the adoption of original Appellate Rules 13 and 14, the participants appear to have taken it as a given that the tax-appeal provisions should refer to Tax Court "decisions."[11] Discussions over the course of several years used the term "decision" without mentioning any reasons for distinguishing Tax Court "decisions" from district court "judgments."[12] It seems likely that members preferred, when possible, to use language that squared with that in relevant statutes.[13]

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[11] So, for example, at the May 1963 Appellate Rules Committee meeting the discussion suggests that participants were designedly using the term "decision" for Tax Court appeals. During a discussion of a proposed Rule that appears to have been a predecessor version of what became Appellate Rule 3, "Judge Opper moved that the first sentence of Rule 5(b) be amended so as to read in part '... shall designate the judgment, order, decision or part thereof appealed from; ...'. This change would enable a sentence to be dropped from the proposed Tax Court rule. The Committee voted in favor of this motion." Minutes at 2; see also id. at 32.

Later that year, the Committee changed course and decided not to include a reference to tax court "decisions" in what would become Appellate Rule 3. The minutes of the August 1963 meeting of the Appellate Rules Committee state: "Professor Ward recommended that the word 'decision' in 3(b) be deleted. It was included to apply to Tax Court cases, but he felt that it would cause confusion in practice, since appeals are only taken from judgments and orders. On motion of Judge Barnes, the word was omitted from 3(b). Judge Jameson noted that 'decision' is used in Rule 4(c), and the Reporter was directed to substitute 'judgment' in that rule in the absence of any statutory requirement to the contrary." Minutes at page 2.

[12] See, e.g., Minutes of July 1960 Appellate Rules Committee meeting at 3-5 (noting discussion of an initial draft of the tax-appeal provisions); Minutes of November 1961 Appellate Rules Committee meeting at 1.

[13] Page 30 of the May 20, 1963 minutes indicates that the Committee members were attempting to be faithful to the relevant statutory language governing review of tax court decisions – which is why they were referring to petitions for review in the form of notices of appeal. By the end of the meeting, however, they had decided "that review of Tax Court decisions be termed 'appeals' in Rules 19 and 19x." Minutes at 32. As discussed in footnotes 8 and 10, Congress amended the statutory framework in 1969 so that it tracked the Appellate Rules' reference to seeking review of Tax Court decisions by means of notices of appeal rather than petitions for review.

That preference seems like a useful one to follow at the present time as well. Though this memo has not fully explained the reasons for the use of the term "decision," it has documented the fact that this usage is a long-standing one. It seems to me that any revisions to Title III should continue to use the term "decision" when referring to Tax Court dispositions that are appealable as of right.

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

March 1, 2010

The Honorable John O. Colvin
Chief Judge
United States Tax Court
400 Second Street, NW
Washington, DC 20217

Dear Judge Colvin:

In my capacity as the Chair of the Federal Appellate Rules Committee, I seek your input on an amendment proposal. As the attached memorandum indicates, the Committee is considering amending Appellate Rules 13 and 14 to account for the option of filing a permissive interlocutory appeal from an order of the Tax Court under 26 U.S.C. 7482(a)(2). As part of our deliberations, we agreed that it would be useful to obtain input from the tax bench and bar on at least two points: (1) the wisdom of amending the two provisions; and (2) the drafting proposals currently on the table.

Over the next week or so, I will follow up this letter with a phone call to discuss the proposals. Thank you for your consideration.

Sincerely,

Jeffrey S. Sutton

JSS:jmf

cc: The Honorable Mark V. Holmes
Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
John K. Rabiej, Chief
Rules Committee Support Office
James N. Ishida, Attorney-Advisor
Rules Committee Support Office
Catherine T. Struve, Reporter
Committee on Rules of Practice and Procedure

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

March 1, 2010

Gilbert S. Rothenberg
Chief, Appellate Section, Tax Division
U.S. Department of Justice
Tax Division
Appellate Section
P.O. Box 502
Washington, DC 20044

Dear Mr. Rothenberg:

In my capacity as the Chair of the Federal Appellate Rules Committee, I seek your input on an amendment proposal. As the attached memorandum indicates, the Committee is considering amending Appellate Rules 13 and 14 to account for the option of filing a permissive interlocutory appeal from an order of the Tax Court under 26 U.S.C. 7482(a)(2). As part of our deliberations, we agreed that it would be useful to obtain input from the tax bench and bar on at least two points: (1) the wisdom of amending the two provisions; and (2) the drafting proposals currently on the table.

Over the next week or so, I will follow up this letter with a phone call to discuss the proposals. Thank you for your consideration.

Sincerely,

Jeffrey S. Sutton

JSS:jmf

cc: Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
John K. Rabiej, Chief
Rules Committee Support Office
James N. Ishida, Attorney-Advisor
Rules Committee Support Office
Douglas Letter, Appellate Litigation Counsel
Civil Division, U.S. Department of Justice
Catherine T. Struve, Reporter
Committee on Rules of Practice and Procedure

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

March 1, 2010

Stuart M. Lewis
Buchanan Ingersoll & Rooney
1700 K Street, N.W.
Suite 300
Washington, DC 20006-3807

Dear Mr. Lewis:

In my capacity as the Chair of the Federal Appellate Rules Committee, I seek your input on an amendment proposal. As the attached memorandum indicates, the Committee is considering amending Appellate Rules 13 and 14 to account for the option of filing a permissive interlocutory appeal from an order of the Tax Court under 26 U.S.C. 7482(a)(2). As part of our deliberations, we agreed that it would be useful to obtain input from the tax bench and bar on at least two points: (1) the wisdom of amending the two provisions; and (2) the drafting proposals currently on the table.

As I understand it, you head the Tax Section of the American Bar Association. Would it be possible to share the proposals with some of your colleagues and share any feedback with us?

Over the next week or so, I will follow up this letter with a phone call to discuss the proposals. Thank you for your consideration.

Sincerely,

Jeffrey S. Sutton

JSS:jmf

cc: Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
John K. Rabiej, Chief
Rules Committee Support Office
James N. Ishida, Attorney-Advisor
Rules Committee Support Office
Catherine T. Struve, Reporter
Committee on Rules of Practice and Procedure

UNITED STATES TAX COURT

WASHINGTON, DC 20217

March 12, 2010

Memorandum to: Judge Jeffrey S. Sutton, Chair of the Federal Appellate Rules Committee

From: Chief Judge John O. Colvin, United States Tax Court John O. Colvin

Judge Michael B. Thornton, Chair of the Rules Committee Michael B Thornton

Re: Permissive Interlocutory Appeals and Proposed Amendments to F. R. App. P. 13, 14, and 24

Thank you for providing the Tax Court an opportunity to consider and comment on the proposed amendments to rules 13 and 14 of the Federal Rules of Appellate Procedure addressing permissive interlocutory appeals. The Tax Court generally agrees with the proposals outlined in your March 1, 2010, letter, and the memorandum attached thereto. While the Court agrees that section 7482(a)(2) of the Internal Revenue Code legitimately applies to only a small number of cases, it finds convincing the comment shared in Gilbert Rothenburg's March 25, 2009, memorandum that an amendment to the Federal Rules of Appellate Procedure seems appropriate given the fact that Congress thought section 7482(a)(2) useful enough to warrant enactment. With respect to the drafting approach proposed by the Federal Appellate Rules Committee, the Court agrees with the drafting proposals but also requests that the Committee consider an alternative draft proposed by the Court, a copy of which is attached.

The drafting proposals would adopt the terms used in rules 4 and 5 regarding appeals "as of right" and appeals "by permission", consolidate provisions relating to appeals as of right in a revised rule 13, and place new provisions relating to permissive interlocutory appeals in a revised rule 14. Revised rule 13 would add a new subdivision (e), setting forth the other rules of appellate procedure that are applicable to appeals as of right from the Tax Court, and possibly including a definition of district court and district clerk as meaning the Tax Court and its clerk. Revised rule 14 would also set forth the other applicable rules and include a definition of district court and district clerk.

The Court suggests that revised rule 13 contain the procedures for both types of appeals and that revised rule 14 continue to set forth the other rules applicable to appeals from the Tax Court. Structuring Title III so as to list only once the provisions applicable to the Tax Court would streamline the rules, eliminate redundancy, and provide more easily comprehensible information for pro se taxpayers.

In reviewing the Federal Appellate Rules Committee's drafting proposals and preparing the alternative draft, the Court considered the questions raised with respect to the inapplicable provisions in current rule 14 and to the location of the definition of district court and district clerk. After reviewing the excepted rules listed in the drafting proposal for revised rules 13 and 14, the Court is satisfied that it agrees those exclusions appropriately delineate which appellate rules should apply to appeals from the Tax Court. However, the Court suggests that the exclusion of rule 5(d)(1)(B) be eliminated, as that subdivision refers to bonds under rule 7, the application of which has already been excluded, and subdivisions in other rules that are clearly inapplicable have not been similarly carved out (e.g., rule 3(a)(1), referring to excluded rule 4). The Court agrees that it would be useful to provide a global definition instead of specifying only certain rules in which the terms district court and district clerk are to be read as the Tax Court and its clerk, and believes that the alternative approach found in rule 6(b)(1)(C), referring to "any applicable rule", is preferable.

The Court also notes it is grouped with administrative agencies, boards, commissions, and officers for purposes of leave to proceed in forma pauperis under rule 24(b). When rule 24 was adopted in 1967, the Tax Court was an independent agency in the Executive Branch of the Government, and, as the Committee note to subdivision (a) states, "[a]uthority to allow prosecution of an appeal in forma pauperis is vested in '[a]ny court of the United States' by 28 U.S.C. sec. 1915(a)." The Tax Court began in 1924 as the Board of Tax Appeals, and its Board members were appointed by the President, subject to Senate confirmation. Revenue Act of 1924, ch. 234, sec. 900(k), 43 Stat. 253, 338. In 1942, the name of the Board was changed to the Tax Court of the United States and its members became Judges, but the Court remained an independent agency in the Executive Branch. Revenue Act of 1942, ch. 619, sec. 504(a), 56 Stat. 798, 957.

In 1969, the Court was established as an Article I court and its name was changed to the United States Tax Court with the express purpose of removing the Court from the Executive Branch.

Tax Reform Act of 1969, Pub. L. 91-172, sec. 951, 83 Stat. 730, codified as 26 U.S.C. sec. 7441; see S. Rept. 91-552, at 303, 1969-3 C.B. 614, 615.

In 1991, the Supreme Court confirmed that the Tax Court is a court of law closely resembling the Federal District Courts, that the Tax Court exercises solely judicial powers, and that it remains independent of both the Executive and the Legislative Branches. Freytag v. Commissioner, 501 U.S. 868 (1991).

The Committee note to the 1979 amendment to rule 24(b) indicates that the amendment reflected the change in the title of the Tax Court to the "United States Tax Court", and the establishment of the Court under Article I of the Constitution, citing section 7441 of the Internal Revenue Code. However, continued inclusion of the Court in rule 24(b) may not accurately reflect the intent of the 1979 amendment to recognize the Court as independent of the Executive Branch, and causes confusion for both Courts of Appeals and appellants; e.g., appellate courts have returned Tax Court records to the Internal Revenue Service, believing the Court to be part of that agency.

The Court therefore proposes that the parenthetical "(including for the purpose of this rule the United States Tax Court)" be deleted from rule 24(b). Consistent with the proposed global definition of district court and district clerk as referring to the Tax Court and its clerk, motions for leave to proceed in forma pauperis in an appeal from the Tax Court would then be considered by the Tax Court under rule 24(a). In the alternative, the Court proposes that the title and the text of rule 24(b) be amended to distinguish appropriately its proceedings from administrative and agency proceedings. A copy of the proposed alternative amendments to rule 24(b) is attached.

Either of the suggested amendments to rule 24 would eliminate the inconsistency between the rule as promulgated in 1967 and the 1969 statutory change referred to above. The first of the two alternatives would result in the Tax Court's authorizing in forma pauperis appeals to the Courts of Appeals. The Court has experience with AO Form 240, the substance of which the Court uses in determining the financial need of taxpayers in connection with their requests for the Court to: (1) Waive the payment of filing fees, and (2) pay the costs of interpreters and posttrial transcripts. In the latter situation, the Court's guidelines require it to determine whether a case presents a substantial question and is not frivolous. Pursuant to 28 U.S.C. section 1915(a)(3) and rule 24(a), the trial court must certify in writing if an appeal is not taken in good faith. See Coppedge

v. United States, 369 U.S. 438, 444 n. 8 (1962) (quoting Senator Bacon of the Senate Judiciary Committee discussing the predecessor of section 1915, "[w]hen a judge has heard a case and it is about to be carried to an appellate court, he * * * is in a position to judge whether * * * the litigant is proceeding in good faith.") The Court would endorse a judgment by the Committee to follow that approach and assign the certification duty to our Court. The second of the two alternatives would leave that certification process at the Courts of Appeals.

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

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

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

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

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

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

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

~~(c)~~ (3) **Contents of the Notice of Appeal; Service; Effect of Filing and Service.** Rule 3 prescribes the contents of a notice of appeal, the manner of service, and the effect of its filing

and service. Form 2 in the Appendix of Forms is a suggested form of a notice of appeal.

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

~~(1)~~ (A) An appeal as of right from the Tax Court is governed by the applicable parts of Rules 10, 11, and 12 regarding the record on appeal from a district court, the time and manner of forwarding and filing, and the docketing in the court of appeals. ~~References in those rules and in Rule 3 to the district court and district clerk are to be read as referring to the Tax Court and its clerk.~~

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

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

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

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

Rule 24. Proceeding in Forma Pauperis

* * * * * * *

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

- Or, in the alternative -

Rule 24. Proceeding in Forma Pauperis

* * * * * * *

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

TAB 6A

MEMORANDUM

DATE: March 13, 2010

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 07-AP-E

The Committee's discussions at its past four meetings have left few areas unexplored concerning the implications of *Bowles v. Russell*, 551 U.S. 205 (2007), for appeal-related deadlines. But lest members feel that the agenda materials are incomplete without an update on these questions, I summarize here the Supreme Court's late-2009 decision in *Union Pacific R. Co. v. Brotherhood of Locomotive Engineers and Trainmen General Committee of Adjustment*, 130 S. Ct. 584 (2009), and its decision earlier this month in *Reed Elsevier, Inc. v. Muchnick*, 2010 WL 693679 (March 2, 2010).[1] Both decisions concerned requirements unrelated to appeal deadlines, and both held that the requirement in question was non-jurisdictional. One can thus place both of these decisions within the line of cases, typified by *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006), that have held various statutory requirements not to be jurisdictional. In this sense, both decisions highlight the questions discussed by the Committee at the fall 2009 meeting concerning possible tensions between *Arbaugh* and *Bowles*.

The Court's two most recent decisions might be read as offering competing visions of the way in which to address the respective applicability of *Arbaugh* and *Bowles* when confronted with the contention that a statutory requirement is jurisdictional. In *Union Pacific*, Justice Ginsburg, writing for a unanimous Court, followed *Arbaugh* and distinguished *Bowles* on the ground that the latter "rel[ied] on a long line of this Court's decisions left undisturbed by Congress." *Union Pacific*, 130 S. Ct. at 597. In *Reed Elsevier*, Justice Thomas, writing for the majority, distinguished *Bowles* on a somewhat different ground – namely, "that context, including this Court's interpretation of similar provisions in many years past, is relevant to whether a statute ranks a requirement as jurisdictional." *Reed Elsevier*, 2010 WL 693679, at *9. Justice Ginsburg, joined by two other Justices, wrote separately in *Reed Elsevier* to contest this mode of reconciling *Bowles* with *Arbaugh*.

Part I of this memo summarizes the decision in *Union Pacific*. Part II discusses the opinions in *Reed Elsevier*. Part III concludes that these decisions will not change the trajectory of the lower-court caselaw concerning statutory appeal deadlines; it seems likely that such deadlines will continue to be viewed as jurisdictional.

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[1] I enclose copies of the decisions.

I. *Union Pacific*

Union Pacific did not concern appellate procedure – indeed, it did not concern court procedure. But it does provide a recent example of a statutory obligation deemed by a unanimous Court to be non-jurisdictional, and thus to fall within the *Arbaugh* line of cases rather than the *Bowles* line of cases.

The *Union Pacific* case concerned the Railway Labor Act's framework for the resolution of certain railroad employee grievances. Under that framework, the parties to such a grievance dispute must first "exhaust the grievance procedures specified in the collective-bargaining agreement" before going to arbitration. *Union Pacific*, 130 S. Ct. at 591. "As a final prearbitration step, the [Railway Labor] Act directs parties to attempt settlement 'in conference' between designated representatives of the carrier and the grievant-employee." Id. The Act's section on "General Duties" of carriers and employees states in part:

> Second. Consideration of disputes by representatives
>
> All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.
>
> ....
>
> Sixth. Conference of representatives; time; place; private agreements
>
> In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*, That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

45 U.S.C. § 152. "If the parties fail to achieve resolution 'in the usual manner up to and including the chief operating officer of the carrier designated to handle [minor] disputes,' either party may refer the matter to the NRAB [National Railroad Adjustment Board]." *Union Pacific*, 130 S. Ct. at 592 (quoting 45 U.S.C. § 153 First (i)).

The disputes at issue in *Union Pacific* progressed through the grievance proceedings.[2] Some or all of those disputes were conferenced.[3] Afterward, the Union sought arbitration of all five disputes in the NRAB, and the Union and the Carrier made their NRAB filings simultaneously. Neither party asserted that conferencing was disputed. Just before the NRAB hearing, a member of the NRAB panel objected to the lack of record evidence that conferencing had occurred. Although the Union argued that the Carrier had waived any such objection, the NRAB panel dismissed the arbitration petitions for lack of jurisdiction. The Union petitioned a federal district court for review of the dismissals, and the district court affirmed the NRAB orders. The Seventh Circuit reversed, finding a due process violation. The Carrier, in its petition for certiorari, questioned whether the Railway Labor Act's provision specifying certain narrow grounds for reversal of NRAB orders permitted reversal on the grounds of a due process violation. The Supreme Court, having granted certiorari, accepted the Union's invitation to affirm on a different ground.

The Court reasoned that neither conferencing nor proof of conferencing is a jurisdictional prerequisite to NRAB arbitration. Therefore, the NRAB panel erred in deciding sua sponte that the lack of evidence of conferencing deprived it of jurisdiction. "By refusing to adjudicate cases on the false premise that it lacked power to hear them, the NRAB panel failed 'to conform, or confine itself,' to the jurisdiction Congress gave it." And that failure – being a statutorily specified ground for reversal of a NRAB order – led the Court to affirm the judgment of the court of appeals. *Union Pacific*, 130 S. Ct. at 597-99.

What may be of interest to the Committee is the Court's explanation of the reasons why the provisions at issue in *Union Pacific* did not set a jurisdictional requirement. Noting that its chosen ground for disposition of the case permitted it to avoid the due-process-related question listed in the certiorari petition, the Court observed that the case did provide a salutary opportunity of a different sort: "We can reduce confusion, clouding court as well as Board decisions, over matters properly typed 'jurisdictional.'"

Citing both *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006), and *Kontrick v. Ryan*, 540 U.S. 443 (2004), the Court noted that it has "cautioned ... against profligate use of" the term "jurisdictional," and the Court distinguished non-forfeitable limits on subject matter jurisdiction from forfeitable claim-processing rules. *Union Pacific*, 130 S. Ct. at 596. The Court contrasted the non-jurisdictional requirements addressed in *Arbaugh*, *Kontrick*, and *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982),[4] with "the time limitation for filing a notice of appeal stated

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[2] For the discussion summarized in this paragraph, see *Union Pacific*, 130 S. Ct. at 593-95.

[3] The Union asserted that all five of the disputes were conferenced, and the Carrier conceded (in the Supreme Court) that at least two of them were conferenced.

[4] In *Zipes*, the Court held "that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of

in 28 U.S.C. § 2107(a)," which the Court, "relying on a long line of this Court's decisions left undisturbed by Congress," had held to be jurisdictional. *Union Pacific*, 130 S. Ct. at 597 (citing *Bowles*).

Parsing the Railway Labor Act, the Court concluded that Section 152's references to conferencing were separate from statutory provisions concerning the powers of the NRAB and did not set a jurisdictional requirement:

> The additional requirement of a conference ... is independent of the [collective-bargaining agreement] process. Rather, the conference requirement is stated in the "[g]eneral duties" section of the RLA, § 152, a section that is not moored to the "[e]stablishment[,] ... powers[,] and duties" of the NRAB set out next in § 153 First. Rooted in § 152 and often informal in practice ... , conferencing is surely no more "jurisdictional" than is the presuit resort to the EEOC held forfeitable in *Zipes*, 455 U.S., at 393 .... And if the requirement to conference is not "jurisdictional," then failure initially to submit proof of conferencing cannot be of that genre.

Union Pacific, 130 S. Ct. at 597. The Court also concluded that Congress had given the NRAB "no authority to adopt rules of jurisdictional dimension. See 45 U.S.C. § 153 First (v) (authorizing the NRAB to 'adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section')." *Union Pacific*, 130 S. Ct. at 597-98. Thus, neither procedures adopted by the NRAB nor decisions by an NRAB panel could set in place a jurisdictional – and therefore nonforfeitable – requirement. *See id.* (However, the Court "recognize[d] the Board's authority to adopt claim-processing rules backed by effective sanctions." *Id.* at 598 n.9.)

II. *Reed Elsevier*

Reed Elsevier concerned the certification of a settlement class composed of the owners of copyrights in freelance works that had been included in electronic databases without the copyright owners' consent. Though the proposed class representatives had registered at least some of their copyrights, the class included members who had not registered their copyrights. *Reed Elsevier*, 2010 WL 693679, at *4. With certain exceptions, 17 U.S.C. § 411(a) provides that "no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title." After the district court certified the class and approved the settlement, objectors

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limitations, is subject to waiver, estoppel, and equitable tolling." *Zipes*, 455 U.S. at 393.

appealed. The court of appeals, sua sponte,[5] raised the registration requirement and concluded that the inclusion of the owners of unregistered copyrights required vacatur. *See In re Literary Works in Electronic Databases Copyright Litigation*, 509 F.3d 116, 118, 120 (2d Cir. 2007), *rev'd sub nom. Reed Elsevier, Inc. v. Muchnick*, 2010 WL 693679 (March 2, 2010).

The Supreme Court reversed, with all eight Justices[6] agreeing that Section 411(a)'s registration requirement is not jurisdictional. Justice Thomas, writing for the Court, explained that the Court's decision in *Arbaugh*

> described the general approach to distinguish[ing] "jurisdictional" conditions from claim-processing requirements or elements of a claim: "If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character."

Reed Elsevier, 2010 WL 693679, at *6 (quoting *Arbaugh*, 546 U.S. at 515-16). Analyzing factors such as Section 411(a)'s text, its placement, and its role within the overall statutory scheme, the Court held that Section 411(a) failed to meet *Arbaugh*'s clear statement requirement. *Reed Elsevier*, 2010 WL 693679, at *7-*8.

In *Reed Elsevier*, the amicus appointed to defend the ruling below had relied on *Bowles* in arguing that Section 411(a)'s registration requirement was jurisdictional. The Court, however, distinguished *Bowles*:

> *Bowles* did not hold that any statutory condition devoid of an express jurisdictional label should be treated as jurisdictional simply because courts have long treated it as such. Nor did it hold that all statutory conditions imposing a time limit should be considered jurisdictional. Rather, *Bowles* stands for the proposition that context, including this Court's interpretation of similar provisions in many years past, is relevant to whether a statute ranks a requirement as jurisdictional.

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[5] During mediation in the district court, the defendants had objected to the lack of registration. But that was before they reached a settlement agreement. On appeal, the defendants supported the settlement and the objectors raised other issues but not the registration requirement. *See In re Literary Works in Electronic Databases Copyright Litigation*, 509 F.3d 116, 120 (2d Cir. 2007), *rev'd sub nom. Reed Elsevier, Inc. v. Muchnick*, 2010 WL 693679 (March 2, 2010).

[6] Justice Sotomayor took no part in the consideration or decision of the case.

> .... After analyzing § 2107's specific language and this Court's historical treatment of the type of limitation § 2107 imposes (i.e., statutory deadlines for filing appeals), we concluded that Congress had ranked the statutory condition as jurisdictional. Our focus in *Bowles* on the historical treatment of statutory conditions for taking an appeal is thus consistent with the *Arbaugh* framework.

Reed Elsevier, 2010 WL 693679, at *9 (footnote omitted).

Justice Ginsburg, joined by Justices Stevens and Breyer, concurred in the judgment and in the portion of the Court's opinion that held Section 411(a)'s registration requirement to be non-jurisdictional. She wrote separately, however, because she evidently was unsatisfied with the Court's mode of distinguishing *Bowles* from *Arbaugh*. Noting "undeniable tension between the two decisions," she wrote to explain her understanding of their relationship. *Reed Elsevier*, 2010 WL 693679, at *11 (Ginsburg, J., joined by Stevens & Breyer, JJ., concurring in part and in the judgment). She noted that the *Bowles* dissenters would have applied *Arbaugh* to hold that Section 2107's appeal deadline was not jurisdictional. Taking *Bowles* as a fait accompli, however, she cited her recent opinion in *Union Pacific* for its mode of fitting *Bowles* with *Arbaugh*: "*Bowles* and *Arbaugh* can be reconciled without distorting either decision ... on the ground that *Bowles* 'rel[ied] on a long line of this Court's decisions left undisturbed by Congress.'" *Reed Elsevier*, 2010 WL 693679, at *12 (quoting *Union Pacific*, 130 S. Ct. at 597). Justice Ginsburg pointed out that though the court-appointed amicus cited many precedents treating Section 411(a)'s registration requirement as jurisdictional, none were from the Supreme Court itself.[7]

III. Implications for appeal-related statutory deadlines

If *Union Pacific* and *Reed Elsevier* can be taken as indicating the current trajectory of the Court's jurisprudence on the nature of statutory requirements, then they seem to indicate that the Court views *Arbaugh*'s clear statement rule as setting the general framework for analysis of statutory requirements. There is a division of views on the Court concerning how to reconcile *Bowles* with *Arbaugh*, but that disagreement is unlikely to produce doctrinal differences in the field of statutory appeal-related requirements. Statutory deadlines for taking an appeal will usually, if not always, fall within the ambit of *Bowles* and be held jurisdictional.

The *Reed Elsevier* majority's approach. Justice Thomas, writing for himself and four other Justices in *Reed Elsevier*, explained that *Bowles* was "consistent with the *Arbaugh* framework" because in determining whether the statute "ranks [the relevant] requirement as

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[7] *See Reed Elsevier*, 2010 WL 693679, at *13 ("Amicus cites well over 200 opinions that characterize § 411(a) as jurisdictional, but not one is from this Court, and most are '"drive-by jurisdictional rulings" that should be accorded "no precedential effect"'" (quoting *Arbaugh*, 546 U.S. at 511)).

jurisdictional," the Court should consider a number of factors, including whether the Supreme Court has historically treated the relevant "type of limitation" as jurisdictional. In *Bowles*, the *Reed Elsevier* majority explained, the relevant type of limitation was "statutory conditions for taking an appeal," and a number of Supreme Court precedents had held such conditions to be jurisdictional.

Under this approach, although the *Arbaugh* framework could be argued to govern the nature of an appeal-related statutory deadline, the factors that courts should consider in determining whether the relevant deadline ranks as jurisdictional include the Court's prior treatment of the "type of limitation" that is at issue. Under *Bowles* as explicated by the *Reed Elsevier* majority, when analyzing the jurisdictional status of any statutory condition for taking an appeal, the fact that such conditions have been ranked as jurisdictional by the Court will be a key factor in determining whether the statutory provision in question ranks the requirement in question as jurisdictional. Though it is possible that the language of a given statutory provision might produce a different result, many statutory appeal deadlines contain wording similar enough to Section 2107 that they would fall within the ambit of *Bowles* and be considered jurisdictional.

Justice Ginsburg's approach. Unlike the *Reed Elsevier* majority, which reasoned that *Arbaugh*'s framework entails a multi-factor balancing test in which the Court's prior treatment of similar requirements is a relevant and sometimes dispositive factor, Justice Ginsburg's *Reed Elsevier* opinion took the view that *Arbaugh*'s clear-statement rule applies *unless* (as in *Bowles*) existing Supreme Court precedent requires otherwise.

Justice Ginsburg's approach is more rule-like, while the *Reed Elsevier* majority's multi-factor balancing test is more like a standard. However, in cases concerning statutory appeal deadlines, the two approaches are likely to yield the same results. In any case involving a statutory appeal deadline, Justice Ginsburg's approach would likely require the conclusion that the appeal deadline is jurisdictional unless something distinctive about the statute's text (or perhaps its context and history) renders the statute distinguishable from Section 2107 and thus weakens the argument for following *Bowles*.

Conclusion. Justice Ginsburg may be correct in suggesting that the *Reed Elsevier* majority's opinion will not put an end to lower-court litigation concerning the nature of statutory requirements. In the particular doctrinal area that concerns this Committee, however – namely, statutory appeal deadlines – it seems likely that courts will continue to hold that most (if not all) such deadlines are jurisdictional under *Bowles*.

* * *

As an additional update on *Bowles*-related developments, Committee members may be interested in a recent case in the Ninth Circuit that illustrates the potentially harsh effects of *Bowles*' teaching that statutory appeal deadlines are jurisdictional and cannot be tempered by the "unique circumstances" doctrine. The case concerns the sequelae of the *Eisenstein* decision

(which the Committee has previously discussed in connection with Item No. 03-09):

> Relying on [*United States ex rel. Haycock v. Hughes Aircraft Co.*, 98 F.3d 1100, 1102 (9th Cir.1996)], Plaintiffs filed their notice of appeal 51 days after the entry of judgment. At that time, we would have deemed their appeal timely. But while this appeal was pending, the Supreme Court held that, for the purposes of the filing deadlines of Rule 4(a), the United States is not a party to a qui tam action under the False Claims Act in which it declines to intervene and plaintiffs in such cases have only 30 days to appeal. *Eisenstein*, 129 S.Ct. at 2236-37. We therefore recognize that *Eisenstein* overruled our holding to the contrary in *Haycock*.
>
> Under *Eisenstein*, Plaintiffs' notice of appeal was untimely when filed. The Supreme Court knew that *Eisenstein* could affect pending appeals. Indeed, Plaintiffs in this case filed an amicus brief with the Supreme Court asking that it prohibit retroactive application of its decision in *Eisenstein*.... Despite acknowledging that its decision would have "harsh consequences" for some plaintiffs and "unfairly punish those who relied on the holdings of courts adopting the 60-day limit in cases in which the United States was not a party," the Court expressly refused to limit its decision to prospective application. *Eisenstein*, 129 S.Ct. at 2236 n. 4. Those harsh consequences are now concretely before us: Plaintiffs' appeal is untimely and must be dismissed.

U.S. ex rel. Haight v. Catholic Healthcare West, 2010 WL 376093, at *2 (9th Cir. 2010).

Encls.

130 S.Ct. 584, 187 L.R.R.M. (BNA) 2673, 78 USLW 4009, 158 Lab.Cas. P 10,130, 09 Cal. Daily Op. Serv. 14,552, 2009 Daily Journal D.A.R. 17,122, 22 Fla. L. Weekly Fed. S 20
(Cite as: 130 S.Ct. 584)

H

Supreme Court of the United States
UNION PACIFIC RAILROAD CO., Petitioner,
v.
BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN GENERAL COMMITTEE OF ADJUSTMENT, CENTRAL REGION.
No. 08-604.

Argued Oct. 7, 2009.
Decided Dec. 8, 2009.

Background: Union brought action under Railway Labor Act (RLA) to vacate set of awards by National Railroad Adjustment Board (NRAB) dismissing, for lack of jurisdiction, each of five grievance claims against railroad contesting employees' discipline and/or discharges. The United States District Court for the Northern District of Illinois, Virginia M. Kendall, J., 432 F.Supp.2d 768, granted railroad's motion to dismiss complaint for failure to state a claim. Union appealed. The Court of Appeals for the Seventh Circuit, Rovner, Circuit Judge, 522 F.3d 746, reversed. Certiorari was granted.

Holdings: The Supreme Court, Justice Ginsburg, held that:
(1) given the statutory ground for relief, the Court of Appeals inappropriately decided the question at issue on constitutional, rather than statutory, grounds, and
(2) procedural rule requiring proof of conferencing prior to arbitration of minor disputes before the NRAB was not "jurisdictional" in nature.

522 F.3d 746, affirmed.

GINSBURG, J., delivered the opinion for a unanimous Court.

J. Scott Ballenger, Washington, DC, for petitioner.

Thomas H. Geoghegan, Chicago, IL, for respondent.

J. Michael Hemmer, Patricia O. Kiscoan, Omaha, NE, Donald J. Munro, Goodwin Procter, Maureen E. Mahoney, Counsel of Record, J. Scott Ballenger, James C. Knapp, Jr., Gabriel K. Bell, Latham & Watkins LLP, Washington, DC, for petitioner.

Thomas H. Geoghegan, Counsel of Record, Jorge Sanchez, Carol Nguyen, Michael P. Persoon, Despres Schwartz & Geoghegan, Ltd., Chicago, IL, for Respondent.

For U.S. Supreme Court Briefs, see:2009 WL 1497551 (Pet.Brief)2009 WL 2473879 (Resp.Brief)2009 WL 2903918 (Reply.Brief)

Justice GINSBURG delivered the opinion of the Court.

[1][2] "It is most true that this Court will not take jurisdiction if it should not," Chief Justice Marshall famously wrote, "but it is equally true, that it must take jurisdiction if it should .... We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 6 Wheat. 264, 404, 5 L.Ed. 257 (1821); see *Marshall v. Marshall*, 547 U.S. 293, 298-299, 126 S.Ct. 1735, 164 L.Ed.2d 480 (2006). While Chief Justice Marshall's statement bears "fine tuning," there is surely a starting presumption that when jurisdiction is conferred, a court may not decline to exercise it. See R. Fallon, J. Manning, D. Meltzer, & D. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 1061-1062 (6th ed. 2009). The general rule applicable to courts also holds for administrative agencies directed by Congress to adjudicate particular controversies.

[3] Congress vested in the National Railroad Adjustment Board (hereinafter NRAB or Board) jurisdiction to adjudicate grievances of railroad employees that remain unsettled after pursuit of internal procedures. 45 U.S.C. § 153 First (h), (i). We consider in this case five nearly identical decisions of a panel of the NRAB dismissing employee claims "for lack of jurisdiction." NRAB First Div. Award No. 26089 etc. (Mar. 15, 2005), App. to Pet. for Cert. 65a-107a, 69a (hereinafter Panel Decision). In each case, the panel declared that a procedural rule raised by a panel member, unprompted by the parties, was "jurisdictional" in character and therefore commanded threshold dismissal.

130 S.Ct. 584, 187 L.R.R.M. (BNA) 2673, 78 USLW 4009, 158 Lab.Cas. P 10,130, 09 Cal. Daily Op. Serv. 14,552, 2009 Daily Journal D.A.R. 17,122, 22 Fla. L. Weekly Fed. S 20
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[4] The panel's characterization, we hold, was misconceived. Congress authorized the Board to prescribe rules for the presentation and processing of claims, § 153 First (v), but Congress alone controls the Board's jurisdiction. By presuming authority to declare procedural rules "jurisdictional," the panel failed "to conform, or confine itself, to matters [Congress placed] within the scope of [NRAB] jurisdiction," § 153 First (q). Because the panel was not "without authority to assume jurisdiction over the [employees'] claim[s]," Panel Decision 72a, its dismissals lacked tenable grounding. We therefore ***591** affirm the judgment of the Seventh Circuit setting aside the panel's orders.

I

A

[5][6][7] Concerned that labor disputes would lead to strikes bringing railroads to a halt, Congress enacted the Railway Labor Act (RLA or Act), 44 Stat. 577, as amended, 45 U.S.C. § 151 *et seq.*, in 1926 to promote peaceful and efficient resolution of those disputes. See *Union Pacific R. Co. v. Price*, 360 U.S. 601, 609, 79 S.Ct. 1351, 3 L.Ed.2d 1460 (1959); § 151a. The Act instructs labor and industry "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier...." § 152 First; see *Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377-378, 89 S.Ct. 1109, 22 L.Ed.2d 344 (1969) (describing obligation to pursue agreement as the "heart of the [RLA]"). As part of its endeavor, Congress provided a framework for the settlement and voluntary arbitration of "minor disputes." See *Price*, 360 U.S., at 609-610, 79 S.Ct. 1351. (In the railroad industry, the term "minor disputes" means, primarily, "grievances arising from the application of collective bargaining agreements to particular situations." *Id.*, at 609, 79 S.Ct. 1351.)[FN1]

> FN1. In contrast to minor disputes, which assume "the existence of a collective agreement," major disputes are those "over the formation of collective agreements or efforts to secure them .... They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past." *Elgin, J. & E.R. Co. v. Burley*, 325 U.S. 711, 723, 65 S.Ct. 1282, 89 L.Ed. 1886 (1945).

[8] Many railroads, however, resisted voluntary arbitration. See *id.*, at 610, 79 S.Ct. 1351. Congress therefore amended the Act in 1934 (1934 Amendment) to mandate arbitration of minor disputes; under the altered scheme, arbitration occurs before panels composed of two representatives of labor and two of industry, with a neutral referee serving as tiebreaker. See *id.*, at 610-613, 79 S.Ct. 1351. To supply the representative arbitrators, Congress established the NRAB, a board of 34 private persons representing labor and industry in equal numbers. § 153 First (a); see *Trainmen v. Chicago R. & I.R. Co.*, 353 U.S. 30, 36-37, 77 S.Ct. 635, 1 L.Ed.2d 622 (1957). [FN2] Neutral referees, the RLA provides, shall be appointed by the representative arbitrators or, failing their agreement, by the National Mediation Board. § 153 First (*l*). The 1934 Amendment authorized the NRAB to adopt, at a one-time session in 1934, "such rules as it deems necessary to control proceedings," § 153 First (v); the product of that rulemaking, codified at 29 CFR pt. 301 (2009), is known as Circular One.

> FN2. The RLA divides the NRAB into four Divisions, each covering specified classes of railroad employees. § 153 First (h).

[9] In keeping with Congress' aim to promote peaceful settlement of minor disputes, the RLA requires employees and carriers, before resorting to arbitration, to exhaust the grievance procedures specified in the collective-bargaining agreement (hereinafter CBA). See 45 U.S.C. § 153 First (i). This stage of the dispute-resolution process is known as "on-property" proceedings. As a final prearbitration step, the Act directs parties to attempt settlement "in conference" between designated representatives of the carrier and the grievant-employee. § 152 Second, ***592** Sixth.[FN3] The RLA contains instructions concerning the place and time of conferences, but specifies that the statute does not "supersede the provisions of any agreement (as to conferences) ... in effect between the parties," § 152 Sixth; it is undisputed that in common practice the conference may be as informal as a telephone conversation.

> FN3. Central to the instant controversy, § 152 Second, Sixth read, in full:

> "Second. Consideration of disputes by representatives.
>
> All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."
>
> "Sixth. Conference of representatives; time; place; private agreements.
>
> In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided,* (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further,* That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties."

If the parties fail to achieve resolution "in the usual manner up to and including the chief operating officer of the carrier designated to handle [minor] disputes," either party may refer the matter to the NRAB. § 153 First (i). Submissions to the Board must include "a full statement of the facts and all supporting data bearing upon the disputes." *Ibid.*; see 29 CFR § 301.5(d), (e) (submissions "must clearly and briefly set forth all relevant, argumentative facts, including all documentary evidence"). Arbitration is launched when the party referring the dispute files a notice of intent with the NRAB; after Board acknowledgment of the notice, the parties have 75 days to file simultaneous submissions. NRAB, Uniform Rules of Procedure (rev. June 23, 2003).

[10][11] In creating the scheme of mandatory arbitration superintended by the NRAB, the 1934 Amendment largely "foreclose[d] litigation" over minor disputes. *Price,* 360 U.S., at 616, 79 S.Ct. 1351; see *Railway Conductors v. Pitney,* 326 U.S. 561, 566, 66 S.Ct. 322, 90 L.Ed. 318 (1946) ("Not only has Congress ... designated an agency peculiarly competent to handle [minor disputes], but ... it also intended to leave a minimum responsibility to the courts."). Congress did provide that an employee who obtained a monetary award against a carrier could sue to enforce it, and the court could either enforce the award or set it aside. *Price,* 360 U.S., at 616, 79 S.Ct. 1351;45 U.S.C. § 153 First (p) (1934 ed.). In addition to that limited role, some Courts of Appeals, we noted in *Price,* reviewed awards "claimed to result from a denial of due process of law." 360 U.S., at 616, 79 S.Ct. 1351 (citing *Ellerd v. Southern Pacific R. Co.,* 241 F.2d 541 (C.A.7 1957); *Barnett v. Pennsylvania-Reading Seashore Lines,* 245 F.2d 579, 582 (C.A.3 1957)).

In 1966, Congress again amended the scheme, this time to state grounds on which both employees and railroads could seek judicial review of NRAB orders. The governing provision, still in force, allows parties aggrieved by an NRAB panel order***593** to petition for court review. 45 U.S.C. § 153 First (q) (2006 ed.). The provision instructs that

> "[o]n such review, the findings and order of the division shall be conclusive on the parties, except that the order ... may be set aside, in whole or in part, or remanded ..., for failure of the division to comply with the requirements of [the RLA], for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order."

Courts of Appeals have divided on whether this provision precludes judicial review of NRAB proceedings for due process violations. Compare, *e.g.,Shafii v. PLC British Airways,* 22 F.3d 59, 64 (C.A.2 1994) (review available), and *Edelman v. Western Airlines,*

Inc., 892 F.2d 839, 847 (C.A.9 1989) (same), with *Kinross v. Utah R. Co.*, 362 F.3d 658, 662 (C.A.10 2004) (review precluded).[FN4]

FN4. The disagreement stems from this Court's *per curiam* opinion in *Union Pacific R. Co. v. Sheehan*, 439 U.S. 89, 99 S.Ct. 399, 58 L.Ed.2d 354 (1978). That case involved an NRAB decision turning on a time limitation contained in the governing CBA. Based on that limitation, the Board dismissed an employee's claim. The Tenth Circuit remanded the case to the NRAB on the ground that the Board had failed to consider the employee's equitable tolling argument and thereby violated due process. We summarily reversed, observing that the Board had in fact considered the plea for equitable tolling and explicitly rejected it. *Id.*, at 92, 99 S.Ct. 399. We added that if the Court of Appeals "intended to reverse the [NRAB's] rejection of [the employee's] equitable tolling argument," then the court had exceeded the bounds § 153 First (q) placed on its review authority. *Id.*, at 93, 99 S.Ct. 399. In determining whether the CBA's time limitation was tolled, we said, the Board "certainly was acting within its jurisdiction and in conformity with ... the Act." *Ibid.*

B

The instant matter arose when petitioner Union Pacific Railroad Co. (hereinafter Carrier) charged five of its employees with disciplinary violations. Their union, the Brotherhood of Locomotive Engineers and Trainmen (hereinafter Union), initiated grievance proceedings pursuant to the CBA. The Union asserts that, following exhaustion of grievance proceedings, the parties conferenced all the disputes; counsel for the Carrier conceded at argument that at least two of the disputes were conferenced, Tr. of Oral Arg. 7. Dissatisfied with the outcome of the on-property proceedings, the Union sought arbitration before the First Division of the NRAB. The Union and the Carrier, from early 2002 through 2003, filed simultaneous submissions in the five cases. In each submission, the Union included the notice of discipline (or discharge), the hearing transcript, and all exhibits and evidence relating to the underlying adverse actions used in the grievance proceeding. Neither party mentioned conferencing as a disputed matter. Yet, in each case, both parties necessarily knew whether the Union and the Carrier had conferred, and the Board's governing rule instructs carriers and employees to "set forth all relevant, argumentative facts," 29 CFR § 301.5(d), (e).

On March 18, 2004, just prior to the hearing on the employees' claims, one of the industry representatives on the arbitration panel raised an objection. Petition to Review and Vacate Awards and Orders of First Div. NRAB in No. 05-civ-2401 (ND Ill.), ¶ 20 (hereinafter Pet. to Review). On his own initiative, unprompted by the Carrier, and in executive session, the industry representative asserted that the on-property record included no proof of conferencing. See *ibid.* The Carrier thereafter embraced the panel member's objection.***594** The neutral referee informed the Union of the issue and adjourned the hearing, allowing the Union "to submit evidence that conferencing had in fact occurred." See *id.*, ¶¶ 21-23. The Union did so, offering phone logs, handwritten notes, and correspondence between the parties as evidence of conferencing in each of the five cases. *E.g.*, Panel Decision 67a-68a. From its first notice of the objection, however, the Union maintained that the proof-of-conferencing issue was untimely raised, indeed forfeited, as the Carrier itself had not objected prior to the date set for argument of the cases. *E.g.*, *id.*, at 67a; Pet. to Review ¶¶ 22, 29, 30, 54.

On March 15, 2005, nearly one year after the question of conferencing first arose, the panel, in five identical decisions, dismissed the petitions for want of "authority to assume jurisdiction over the claim[s]." Panel Decision 72a. Citing Circular One, see *supra*, at 3-4, and "the weight of arbitral precedent," the panel stated that "the evidentiary record" must be deemed "closed once a Notice of Intent has been filed with the NRAB ...." Panel Decision 71a.[FN5] In explaining why the record could not be supplemented to meet the no-proof-of-conferencing objection, the panel emphasized that it was "an appellate tribunal, as opposed to one which is empowered to consider and rule on *de novo* evidence and arguments." *Id.*, at 69a.

FN5. The panel observed, however, that the records and notes offered by the Union, "on their face, may be regarded as supportive of its position that the conference[s] occurred." Panel Decision 69a.

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The two labor representatives dissented. The Carrier's submissions, they reasoned, took no exception based on failure to conference or to prove conferencing; therefore, they concluded, under a "well settled principle governing the Board's deliberations," the Carrier had forfeited the issue. *Id.*, at 105a-106a. The dissenters urged that the Union had furnished evidence showing "the cases had all been conferenced, even though the relevant Collective Bargaining Agreement [did] not require [conferencing]." *Id.*, at 105a. Dismissal of the claims, the dissenters charged, demonstrated "the kind of gamesmanship that breeds contempt for the minor dispute process." *Id.*, at 107a.

The Union filed a petition for review in the United States District Court for the Northern District of Illinois, asking the court to set aside the Board's orders on the ground that the panel had "unlawfully held [it lacked] authority to assume jurisdiction over [the] cases [absent] evidence of a 'conference' between the parties in the ... 'on-property' record." Pet. to Review ¶ 1. Nothing in the Act or the NRAB's procedural rules, the Union maintained, mandated dismissal for failure to allege and prove conferencing in the Union's original submission. *Id.*, ¶¶ 3, 4. By imposing, without warrant, "a technical pleading or evidentiary requirement" and elevating it to jurisdictional status, the Union charged, the panel had "egregiously violate[d] the Act," *id.*, ¶ 3, or "fail[ed] to conform its jurisdiction to that required by ... law," *id.*, ¶ 4. Alternatively, the Union asserted that the panel violated procedural due process by entertaining the Carrier's untimely objection, even though "the Carrier had failed to raise any objection as to lack of conferencing" in its submissions. *Id.*, ¶ 5.

The District Court affirmed the Board's orders. Addressing the Union's argument that the no-proof-of-conferencing issue was untimely raised, the court accepted the panel's description of the issue as "jurisdictional," and noted the familiar proposition that jurisdictional challenges may be ***595** raised at any stage of the proceedings. 432 F.Supp.2d 768, 777, and n. 7 (2006).

On appeal, the Seventh Circuit recognized that the Union had presented its case "through both a statutory and constitutional framework." 522 F.3d 746, 750 (2008). The court observed, however, that "the essence of the conflict boils down to a single question: is written documentation of the conference in the on-property record a necessary prerequisite to arbitration before the NRAB?" *Ibid.* It then determined that there was no such prerequisite: "[N]o statute, regulation, or CBA," the court concluded, "required the evidence [of conferencing] to be presented in the on-property record." *Id.*, at 757-758. But instead of resting its decision on the Union's primary, statute-based argument-that the panel erred in ruling that it lacked jurisdiction over the cases-the Court of Appeals reversed on the ground that the NRAB's proceedings were incompatible with due process. See *id.*, at 750.

II

We granted the Carrier's petition for certiorari, 555 U.S. ----, 129 S.Ct. 1315, 173 L.Ed.2d 583 (2009), which asked us to determine whether a reviewing court may set aside NRAB orders for failure to comply with due process notwithstanding the limited grounds for review specified in § 153 First (q).[FN6] As earlier recounted, Courts of Appeals have divided on this issue. See *supra*, at 593, and n. 4. Appearing as respondent in this Court, however, the Union urged affirmance of the Seventh Circuit's judgment on an alternative ground. Reasserting the lead argument it had advanced in its petition for court review, see *supra*, at 594 - 595, the Union maintained that the Board did not "conform, or confine itself, to matters within the scope of [its] jurisdiction," § 153 First (q). Brief for Respondent 52-53. In response, the Carrier stated that the Union's alternative ground "presents a pure question of law that th[e] Court can and should resolve without need for remand." Reply Brief 24, n. 9. We agree.

> FN6. Quoted *supra*, at 593, those grounds are "failure of the division to comply with [RLA] requirements," "failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction," and "fraud or corruption by a member of the division making the order."

[12] So long as a respondent does not "seek to modify the judgment below," true here, "[i]t is well accepted" that the respondent may, "without filing a cross-appeal or cross-petition, ... rely upon any matter appearing in the record in support of the judgment." *Blum v. Bacon*, 457 U.S. 132, 137, n. 5, 102 S.Ct. 2355, 72 L.Ed.2d 728 (1982). The Seventh Circuit, as just observed, see

130 S.Ct. 584, 187 L.R.R.M. (BNA) 2673, 78 USLW 4009, 158 Lab.Cas. P 10,130, 09 Cal. Daily Op. Serv. 14,552, 2009 Daily Journal D.A.R. 17,122, 22 Fla. L. Weekly Fed. S 20
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supra, at 595, understood that the Union had pressed "statutory and constitutional" arguments, but also comprehended that both arguments homed in on "a single question: is written documentation of the conference in the on-property record a necessary prerequisite to arbitration before the NRAB?" 522 F.3d, at 750. Answering this "single question" in the negative, the Court of Appeals effectively resolved the Union's core complaint. But, for reasons far from apparent, the court declared that "once we answer the key question ..., adjudication of the due process claim is unavoidable." *Ibid.*

[13] The Seventh Circuit, we agree, asked the right question, but inappropriately placed its answer under a constitutional, rather than a statutory, headline. As the Court of Appeals determined, and as we discuss *infra,* at 596 - 599, nothing in the Act elevates to jurisdictional status ***596** the obligation to conference minor disputes or to prove conferencing. That being so, the "unavoidable" conclusion, following from the Seventh Circuit's "answer [to] the key question," 522 F.3d, at 750, is that the panel, in § 153 First (q)'s words, failed "to conform, or confine itself, to matters within the scope of [its] jurisdiction." The Carrier, although it sought a different outcome, was quite right to "urg[e] [the Court of Appeals] to consider the statutory claim before the constitutional one." 522 F.3d, at 750.

In short, a negative answer to the "single question" identified by the Court of Appeals leaves no doubt about the Union's entitlement, in accord with § 153 First (q), to vacation of the Board's orders. Given this statutory ground for relief, there is no due process issue alive in this case, and no warrant to answer a question that may be consequential in another case: Absent grounds specified in § 153 First (q) for vacating a Board order, may a reviewing court set aside an NRAB adjudication for incompatibility with due process? An answer to that question must await a case in which the issue is genuinely in controversy.[FN7] In this case, however, our grant of certiorari enables us to address a matter of some importance: We can reduce confusion, clouding court as well as Board decisions, over matters properly typed "jurisdictional."

> FN7. A case of that order would be uncommon. As the Carrier acknowledges, "many of the cases reviewing ostensibly extra-statutory due process objections could have been accommodated within the statutory framework." Brief for Petitioner 36. See also *id.,* at 37 ("The statutory review provisions are plainly generous enough to permit litigants to raise all of the simple, common, easily adjudicated, and likely to be meritorious claims that sail under the flag of due process of law.....").

III

A

[14][15][16] Recognizing that the word "jurisdiction" has been used by courts, including this Court, to convey "many, too many, meanings," *Steel Co. v. Citizens for Better Environment,* 523 U.S. 83, 90, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (internal quotation marks omitted), we have cautioned, in recent decisions, against profligate use of the term. Not all mandatory "prescriptions, however emphatic, are ... properly typed jurisdictional," we explained in *Arbaugh v. Y & H Corp.,* 546 U.S. 500, 510, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006) (internal quotation marks omitted). Subject-matter jurisdiction properly comprehended, we emphasized, refers to a tribunal's "power to hear a case," a matter that "can never be forfeited or waived." *Id.,* at 514, 126 S.Ct. 1235 (quoting *United States v. Cotton,* 535 U.S. 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002)). In contrast, a "claim-processing rule, ... even if unalterable on a party's application," does not reduce the adjudicatory domain of a tribunal and is ordinarily "forfeited if the party asserting the rule waits too long to raise the point." *Kontrick v. Ryan,* 540 U.S. 443, 456, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004).

For example, we have held nonjurisdictional and forfeitable the provision in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.,* requiring complainants to file a timely charge of discrimination with the Equal Employment Opportunity Commission (EEOC) before proceeding to court. *Zipes v. Trans World Airlines, Inc.,* 455 U.S. 385, 393, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982). We have also held nonjurisdictional and forfeitable the Title VII provision exempting employers who engage fewer than 15 employees. ***597***Arbaugh,* 546 U.S., at 503, 515-516, 126 S.Ct. 1235. And we have determined that a Chapter 7 trustee's (or creditor's) limited time to object to the debtor's discharge, see Fed. Rule Bkrtcy. Proc.

130 S.Ct. 584, 187 L.R.R.M. (BNA) 2673, 78 USLW 4009, 158 Lab.Cas. P 10,130, 09 Cal. Daily Op. Serv. 14,552, 2009 Daily Journal D.A.R. 17,122, 22 Fla. L. Weekly Fed. S 20
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4004, is a claim-processing, not a jurisdictional, matter. *Kontrick*, 540 U.S., at 446-447, 460, 124 S.Ct. 906. In contrast, relying on a long line of this Court's decisions left undisturbed by Congress, we have reaffirmed the jurisdictional character of the time limitation for filing a notice of appeal stated in 28 U.S.C. § 2107(a). *Bowles v. Russell*, 551 U.S. 205, 209-211, 127 S.Ct. 2360, 168 L.Ed.2d 96 (2007). See also *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 132, 128 S.Ct. 750, 169 L.Ed.2d 591 (2008) (court must consider *sua sponte* timeliness of lawsuit filed against the United States in the Court of Federal Claims).

[17] With these decisions in mind, we turn back to the requirement that parties to minor disputes, as a last chance prearbitration, attempt settlement "in conference," 45 U.S.C. § 152 Second, Sixth. See *supra*, at 591 - 592, and n. 3. This obligation is imposed on carriers and grievants alike but, we hold, its satisfaction does not condition the adjudicatory authority of the Board.

[18] The Board's jurisdiction extends to "all disputes between carriers and their employees 'growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions....' " *Slocum v. Delaware, L. & W.R. Co.*, 339 U.S. 239, 240, 70 S.Ct. 577, 94 L.Ed. 795 (1950) (quoting § 153 First (i)). True, the RLA instructs that, before any reference to arbitration, the dispute "shall be handled in the usual manner up to and including the [designated] chief operating officer." § 153 First (i). And when the CBA's grievance procedure has not been followed, resort to the Board would ordinarily be objectionable as premature.

The additional requirement of a conference, we note, is independent of the CBA process. Rather, the conference requirement is stated in the "[g]eneral duties" section of the RLA, § 152, a section that is not moored to the "[e]stablishment[,] ... powers[,] and duties" of the NRAB set out next in § 153 First. Rooted in § 152 and often informal in practice, see *supra*, at 591 - 592, conferencing is surely no more "jurisdictional" than is the presuit resort to the EEOC held forfeitable in *Zipes*, 455 U.S., at 393, 102 S.Ct. 1127.[FN8] And if the requirement to conference is not "jurisdictional," then failure initially to submit proof of conferencing cannot be of that genre. See Part III-B, *infra*.

FN8. The RLA states, in § 152 First, a general duty "to settle all disputes," and, in § 152 Second, a more specific duty to "conference." These provisions apply to all disputes in the railroad industry, major as well as minor. They also apply to disputes in the airline industry, over which the NRAB has no jurisdiction. § 181. Neither provision "speak[s] in jurisdictional terms or refer[s] in any way to the jurisdiction of the" NRAB. *Zipes*, 455 U.S., at 394, 102 S.Ct. 1127.

In defense of the Board's characterization of conferencing and proof thereof as jurisdictional, the Carrier points to the NRAB's Circular One procedural regulations, see *supra*, at 591, which provide: "No petition shall be considered by any division of the Board unless the subject matter has been handled in accordance with the provisions of the [RLA]." 29 CFR § 301.2(b). But that provision, as other prescriptions in Circular One, is a claims-processing rule. Congress gave the Board no authority to adopt rules of jurisdictional dimension. See 45 U.S.C. § 153 First (v) (authorizing the NRAB to "adopt such rules as it deems necessary to control proceedings***598** before the respective divisions and not in conflict with the provisions of this section"). And when the fact of conferencing is genuinely contested, we see no reason why the panel could not adjourn the proceeding pending cure of any lapse. Circular One does not exclude such a sensible solution.

[19][20] The Carrier cites NRAB decisions that allegedly support characterization of conferencing as jurisdictional. If the NRAB lacks authority to define the jurisdiction of its panels, however, surely the panels themselves lack that authority. Furthermore, NRAB panels have variously addressed the matter. For example, in NRAB Third Div. Award No. 15880 (Oct. 26, 1967), the panel, although characterizing the conferencing requirement as "jurisdictional," said that "[i]f one of the parties refuses or fails to avail itself of a conference where there is an opportunity to do so, it cannot then assert the defense of a lack of jurisdiction." *Id.*, at 2. See also NRAB Fourth Div. Award No. 5074 (June 21, 2001) (same); NRAB Third Div. Award No. 28147 (Oct. 16, 1989) (same). Cf. *Arbaugh*, 546 U.S., at 511, 126 S.Ct. 1235 ("unrefined" uses of the word "jurisdiction" are entitled to "no precedential effect" (internal quotation marks omitted)). And in NRAB First Div. Award No. 23867, p. 5

130 S.Ct. 584, 187 L.R.R.M. (BNA) 2673, 78 USLW 4009, 158 Lab.Cas. P 10,130, 09 Cal. Daily Op. Serv. 14,552, 2009 Daily Journal D.A.R. 17,122, 22 Fla. L. Weekly Fed. S 20
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(Apr. 7, 1988), the panel observed that the ordinary remedy for lack of conferencing is to "dismiss th[e] claim without prejudice to allow Claimant to cure the jurisdictional defect." That panel reached the merits nevertheless. *Ibid.* Cf. *Steel Co.*, 523 U.S., at 94, 118 S.Ct. 1003 ("Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the [tribunal] is that of announcing the fact and dismissing the cause" (quoting *Ex parte McCardle*, 7 Wall. 506, 514, 19 L.Ed. 264 (1869)).). We note, in addition, the acknowledgment of the Carrier's counsel that, if conferencing has not occurred, NRAB panels have stayed arbitration to allow the parties to confer. Tr. of Oral Arg. 10, 22.[FN9]

> FN9. While holding that the panel did not lack jurisdiction over the employees' claims, we recognize the Board's authority to adopt claim-processing rules backed by effective sanctions. See *supra,* at 591; cf. Fed. Rule Civ. Proc. 37(b)(2) (specifying sanctions, including dismissal, for failure to comply with discovery orders); Rule 41(b) (authorizing involuntary dismissal for failure to prosecute or to comply with rules of procedure or court orders). We also recognize that NRAB panels, in managing individual arbitrations, may prescribe and enforce reasonable procedural requirements.

B

The RLA provides that, when on-property proceedings do not yield settlement, both parties or either party may refer the case to the Board "with a full statement of the facts and all supporting data bearing upon the disputes." § 153 First (i). Circular One correspondingly instructs employees seeking Board adjudication "[to] set forth all relevant, argumentative facts" and "affirmatively show the same to have been presented to the carrier and made a part of the particular question in dispute." 29 CFR § 301.5(d); see § 301.5(e) (similar instruction addressed to carriers). Conferencing, the Carrier urged, is a "relevant, argumentative fac[t]," so proof thereof must accompany party submissions.

As earlier explained, see *supra,* at 597, instructions on party submissions-essentially pleading instructions-are claim-processing, not jurisdictional, rules. Moreover, the Board itself has recognized that conferencing may not be a "question in dispute." It has counseled parties submitting joint exhibits "to omit documents that are unimportant and/or irrelevant to the disposition of the [case]; for example ... letters requesting a conference (assuming that is *not* an issue in the dispute)." ***599** NRAB Instructions Sheet, Joint Exh. Program, p. 5 (July 1, 2003), online at http://www. nmb. gov/ arbitration/ nrab- instruc. pdf (as visited Dec. 3, 2009, and available in Clerk of Court's case file). It bears repetition here that neither the Union nor the Carrier, in its submissions to the Board, identified conferencing as a "question in dispute." See *supra,* at 593.

It makes sense to exclude at the arbitration stage newly presented "data ... in support of [the] employee['s] [grievance]," 29 CFR § 301.5(d)-evidence the carrier had no opportunity to consider prearbitration. A contrary rule would sandbag the carrier. But conferencing is not a fact bearing on the merits of a grievance. Indeed, there may be no disagreement at all about the occurrence of conferencing, as the Union believed to be the case here. Moreover, the RLA respects the right of the parties to order for themselves the conference procedures they will follow. See 45 U.S.C. § 152 Sixth ("[N]othing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) ... in effect between the parties."). In sum, neither the RLA nor Circular One could plausibly be read to require, as a prerequisite to the NRAB's exercise of jurisdiction, submission of proof of conferencing.

* * *

By refusing to adjudicate cases on the false premise that it lacked power to hear them, the NRAB panel failed "to conform, or confine itself," to the jurisdiction Congress gave it. We therefore affirm the judgment of the Court of Appeals for the Seventh Circuit.

It is so ordered.

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--- S.Ct. ----, 2010 WL 693679 (U.S.), 93 U.S.P.Q.2d 1719, 10 Cal. Daily Op. Serv. 2542
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HOnly the Westlaw citation is currently available.

Supreme Court of the United States
REED ELSEVIER, INC., et al., Petitioners,
v.
Irvin MUCHNICK et al.
No. 08-103.

Argued Oct. 7, 2009.
Decided March 2, 2010.

Background: Freelance authors who contracted with publishers to author works for publication in print media, and who retained the copyrights in those works, and trade groups representing such authors brought class action against the publishers alleging electronic reproduction of the works by the publishers infringed their copyrights. The United States District Court for the Southern District of New York, George B. Daniels, J., certified class and approved settlement, and plaintiffs who objected to settlement appealed. The United States Court of Appeals for the Second Circuit, Straub, Circuit Judge, 509 F.3d 116, vacated and remanded. Certiorari was granted.

Holdings: The Supreme Court, Justice Thomas, held that:
(1) Copyright Act's registration requirement is a precondition to filing a copyright infringement claim that does not restrict a federal court's subject-matter jurisdiction with respect to infringement suits involving unregistered works, abrogating *Well-Made Toy Mfg. Corp. v. Goffa Int'l Corp.*, 354 F.3d 112,*Morris v. Business Concepts, Inc.*, 259 F.3d 65,*La Resolana Architects, PA v. Clay Realtors Angel Fire*, 416 F.3d 1195,*Positive Black Talk Inc. v. Cash Money Records Inc.*, 394 F.3d 357,*Yoom, Inc. v. Imageline, Inc.*, 323 F.3d 279,*Murray Hill Publications, Inc. v. ABC Communications, Inc.*, 264 F.3d 622,*Brewer-Giorgio v. Producers Video, Inc.*, 216 F.3d 1281, and *Data Gen. Corp. v. Grumman Systems Support Corp.*, 36 F.3d 1147, and
(2) print publishers and owners of online databases were not judicially estopped from asserting that Copyright Act's registration requirement was not jurisdictional.

509 F.3d 116, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C.J., and SCALIA, KENNEDY, and ALITO, JJ., joined. GINSBURG, J., filed an opinion concurring in part and concurring in the judgment, in which STEVENS and BREYER, JJ., joined. SOTOMAYOR, J., took no part in the consideration or decision of the case.

Charles S. Sims, New York, NY, for petitioners.

Ginger Anders for the United States as amicus curiae, by special leave of the Court, supporting the petitioners.

Deborah Jones Merritt, appointed by this Court, as amicus curiae, supporting the judgment below. Justice Sotomayor recused.

Michael J. Boni, Counsel of Record, Joanne Zack, Joshua D. Snyder, Boni & Zack LLC, Bala Cynwyd, PA, for respondents Letty Cottin Pogrebin.

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For U.S. Supreme Court briefs, see:2009 WL 1419099 (Pet.Brief)2009 WL 1556545 (Resp.Brief)2009 WL 3022904 (Resp.Brief)2009 WL 1387834 (Resp.Brief)2009 WL 3154999 (Reply.Brief)2009 WL 2954160 (Resp.Supp.Brief)

Justice THOMAS, delivered the opinion of the Court.

*3 Subject to certain exceptions, the Copyright Act (Act) requires copyright holders to register their works before suing for copyright infringement. 17 U.S.C.A. § 411(a) (Supp.2009). In this case, the Court of Appeals for the Second Circuit held that a copyright holder's failure to comply with § 411(a)'s registration requirement deprives a federal court of jurisdiction to adjudicate his copyright infringement claim. We disagree. Section 411(a)'s registration requirement is a precondition to filing a claim that does not restrict a federal court's subject-matter jurisdiction.

I

A

The Constitution grants Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors ... the exclusive Right to ... their ... Writings." Art. I, § 8, cl. 8. Exercising this power, Congress has crafted a comprehensive statutory scheme governing the existence and scope of "[c]opyright protection" for "original works of authorship fixed in any tangible medium of expression." 17 U.S.C. § 102(a). This scheme gives copyright owners "the exclusive rights" (with specified statutory exceptions) to distribute, reproduce, or publicly perform their works. § 106. "Anyone who violates any of the exclusive rights of the copyright owner as provided" in the Act "is an infringer of the copyright." § 501(a). When such infringement occurs, a copyright owner "is entitled, *subject to the requirements of section 411,* to institute an action" for copyright infringement. § 501(b) (emphasis added).

This case concerns "the requirements of section 411" to which § 501(b) refers. Section 411(a) provides, *inter alia* and with certain exceptions, that "no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title." [FN1] This provision is part of the Act's remedial scheme. It establishes a condition-copyright registration-that plaintiffs ordinarily must satisfy before filing an infringement claim and invoking the Act's remedial provisions. We address whether § 411(a) also deprives federal courts of subject-matter jurisdiction to adjudicate infringement claims involving unregistered works.

FN1. Other sections of the Act-principally §§ 408-410-detail the registration process, and establish remedial incentives to encourage copyright holders to register their works, see, *e.g.,* § 410(c); 17 U.S.C.A. § 412 (2005 ed. and Supp. 2009).

B

*4 The relevant proceedings in this case began after we issued our opinion in *New York Times Co. v. Tasini,* 533 U.S. 483, 121 S.Ct. 2381, 150 L.Ed.2d 500 (2001). In *Tasini,* we agreed with the Court of Appeals for the Second Circuit that several owners of online databases and print publishers had infringed the copyrights of six freelance authors by reproducing the authors' works electronically without first securing their permission. See *id.,* at 493, 121 S.Ct. 2381. In so holding, we affirmed the principal theory of liability underlying copyright infringement suits that other freelance authors had filed after the Court of Appeals had issued its opinion in *Tasini.* These other suits, which were stayed pending our decision in *Tasini,* resumed after we issued our opinion and were consolidated in the United States District Court for the Southern District of New York by the Judicial Panel on Multidistrict Litigation.

The consolidated complaint alleged that the named plaintiffs each own at least one copyright, typically in a freelance article written for a newspaper or a magazine, that they had registered in accordance with § 411(a). The class, however, included both authors who had registered their copyrighted works and authors who had not. See App. 94.

Because of the growing size and complexity of the lawsuit, the District Court referred the parties to mediation. For more than three years, the freelance authors, the publishers (and their insurers), and the electronic databases (and their insurers) negotiated. Finally, in March 2005, they reached a settlement agreement that the parties intended "to achieve a global peace in the publishing industry." *In re Literary Works in Electronic Databases Copyright Litigation*, 509 F.3d 116, 119 (C.A.2 2007).

The parties moved the District Court to certify a class for settlement and to approve the settlement agreement. Ten freelance authors, including Irvin Muchnick (hereinafter Muchnick respondents), objected. The District Court overruled the objections; certified a settlement class of freelance authors under Federal Rules of Civil Procedure 23(a) and (b)(3); approved the settlement as fair, reasonable, and adequate under Rule 23(e); and entered final judgment. At no time did the Muchnick respondents or any other party urge the District Court to dismiss the case, or to refuse to certify the class or approve the settlement, for lack of subject-matter jurisdiction.

The Muchnick respondents appealed, renewing their objections to the settlement on procedural and substantive grounds. Shortly before oral argument, the Court of Appeals *sua sponte* ordered briefing on the question whether § 411(a) deprives federal courts of subject-matter jurisdiction over infringement claims involving unregistered copyrights. All parties filed briefs asserting that the District Court had subject-matter jurisdiction to approve the settlement agreement even though it included unregistered works.

Relying on two Circuit precedents holding that § 411(a)'s registration requirement was jurisdictional, see 509 F.3d, at 121 (citing *Well-Made Toy Mfg. Corp. v. Goffa Int'l Corp.*, 354 F.3d 112, 114-115 (C.A.2 2003); *Morris v. Business Concepts, Inc.*, 259 F.3d 65, 72-73 (C.A.2 2001)), the Court of Appeals concluded that the District Court lacked jurisdiction to certify a class of claims arising from the infringement of unregistered works, and also lacked jurisdiction to approve a settlement with respect to those claims, 509 F.3d, at 121 (citing "widespread agreement among the circuits that section 411(a) is jurisdictional").[FN2]

> FN2. See *La Resolana Architects, PA v. Clay Realtors Angel Fire*, 416 F.3d 1195, 1200-1201 (C.A.10 2005); *Positive Black Talk Inc. v. Cash Money Records Inc.*, 394 F.3d 357, 365 (C.A.5 2004); *Xoom, Inc. v. Imageline, Inc.*, 323 F.3d 279, 283 (C.A.4 2003); *Murray Hill Publications, Inc. v. ABC Communications, Inc.*, 264 F.3d 622, 630, and n. 1 (C.A.6 2001); *Brewer-Giorgio v. Producers Video, Inc.*, 216 F.3d 1281, 1285 (C.A.11 2000); *Data Gen. Corp. v. Grumman Systems Support Corp.*, 36 F.3d 1147, 1163 (C.A.1 1994).

*5 Judge Walker dissented. He concluded "that § 411(a) is more like the [nonjurisdictional] employee-numerosity requirement in *Arbaugh* [*v. Y & H Corp.*, 546 U.S. 500, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006)]" than the jurisdictional statutory time limit in *Bowles v. Russell*, 551 U.S. 205, 127 S.Ct. 2360, 168 L.Ed.2d 96 (2007). 509 F.3d, at 129. Accordingly, he reasoned that § 411(a)'s registration requirement does not limit federal subject-matter jurisdiction over infringement suits involving unregistered works. *Ibid.*

We granted the owners' and publishers' petition for a writ of certiorari, and formulated the question presented to ask whether § 411(a) restricts the subject-matter jurisdiction of the federal courts over copyright infringement actions. 555 U.S. ----, 129 S.Ct. 1523, 173 L.Ed.2d 655 (2009). Because no party supports the Court of Appeals' jurisdictional holding, we appointed an *amicus curiae* to defend the Court of Appeals' judgment.[FN3] 556 U.S. ----, 129 S.Ct. 1693, 173 L.Ed.2d 1053 (2009). We now reverse.

> FN3. We appointed Deborah Jones Merritt to brief and argue the case, as *amicus curiae*, in support of the Court of Appeals' judgment. Ms. Merritt has ably discharged her assigned responsibilities.

--- S.Ct. ----, 2010 WL 693679 (U.S.), 93 U.S.P.Q.2d 1719, 10 Cal. Daily Op. Serv. 2542
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II

A

[1] "Jurisdiction" refers to "a court's adjudicatory authority." *Kontrick v. Ryan*, 540 U.S. 443, 455, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004). Accordingly, the term "jurisdictional" properly applies only to "prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction)" implicating that authority. *Ibid.*; see also *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 89, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) ("subject-matter jurisdiction" refers to "the courts' statutory or constitutional *power* to adjudicate the case" (emphasis in original)); *Landgraf v. USI Film Products*, 511 U.S. 244, 274, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) ("[J]urisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties' " (quoting *Republic Nat. Bank of Miami v. United States*, 506 U.S. 80, 100, 113 S.Ct. 554, 121 L.Ed.2d 474 (1992) (THOMAS, J., concurring))).

While perhaps clear in theory, the distinction between jurisdictional conditions and claim-processing rules can be confusing in practice. Courts-including this Court-have sometimes mischaracterized claim-processing rules or elements of a cause of action as jurisdictional limitations, particularly when that characterization was not central to the case, and thus did not require close analysis. See *Arbaugh*, http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=2008499362*supra*, at 511-512, 126 S.Ct. 1235 (citing examples); *Steel Co.*, 523 U.S., at 91, 118 S.Ct. 1003 (same). Our recent cases evince a marked desire to curtail such "drive-by jurisdictional rulings," *ibid.*, which too easily can miss the "critical difference[s]" between true jurisdictional conditions and nonjurisdictional limitations on causes of action, *Kontrick*, http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=2004063920*supra*, at 456, 124 S.Ct. 906; see also *Arbaugh*, 546 U.S., at 511, 126 S.Ct. 1235.

*6[2][3] In light of the important distinctions between jurisdictional prescriptions and claim-processing rules, see, *e.g.*, *id.*, at 514, 126 S.Ct. 1235, we have encouraged federal courts and litigants to "facilitat[e]" clarity by using the term "jurisdictional" only when it is apposite, *Kontrick*, http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=2004063920*supra*, at 455, 124 S.Ct. 906. In *Arbaugh*, we described the general approach to distinguish "jurisdictional" conditions from claim-processing requirements or elements of a claim:

> "If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." 546 U.S., at 515-516, 126 S.Ct. 1235 (citation and footnote omitted).

The plaintiff in *Arbaugh* brought a claim under Title VII of the Civil Rights Act of 1964, which makes it unlawful "for an employer ... to discriminate," *inter alia*, on the basis of sex. 42 U.S.C. § 2000e-2(a)(1). But employees can bring Title VII claims only against employers that have "fifteen or more employees." § 2000e(b). *Arbaugh* addressed whether that employee numerosity requirement "affects federal-court subject-matter jurisdiction or, instead, delineates a substantive ingredient of a Title VII claim for relief." 546 U.S., at 503, 126 S.Ct. 1235. We held that it does the latter.

Our holding turned principally on our examination of the text of § 2000e(b), the section in which Title VII's numerosity requirement appears. Section 2000e(b) does not "clearly stat[e]" that the employee numerosity threshold on Title VII's scope "count[s] as jurisdictional." *Id.*, at 515-516, and n. 11, 126 S.Ct. 1235. And nothing in our prior Title VII cases compelled the conclusion that even though the numerosity requirement lacks a clear jurisdictional label, it nonetheless imposed a jurisdictional limit. See *id.*, at 511-513, 126 S.Ct. 1235. Similarly, § 2000e(b)'s text and structure did not demonstrate that Congress "rank[ed]" that requirement as jurisdictional. See *id.*, at 513-516, 126 S.Ct. 1235. As we observed, the employee numerosity requirement is located in a provision "separate" from § 2000e-5(f)(3), Title VII's jurisdiction-granting section, distinguishing it from the "amount-in-controversy threshold ingredient of sub-

ject-matter jurisdiction ... in diversity-of-jurisdiction under 28 U.S.C. § 1332." *Arbaugh*, 546 U.S., at 514-515, 126 S.Ct. 1235. Accordingly, the numerosity requirement could not fairly be read to " 'speak in jurisdictional terms or in any way refer to the jurisdiction of the district courts.' " *Id.*, at 515, 126 S.Ct. 1235 (quoting *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982)). We thus "refrain[ed] from" construing the numerosity requirement to "constric[t] § 1331 or Title VII's jurisdictional provision." *Arbaugh*, *supra*, at 515, 126 S.Ct. 1235 (internal quotation marks omitted).

We now apply this same approach to § 411(a).

B

*7Section 411(a) provides:

"Except for an action brought for a violation of the rights of the author under section 106A(a), and subject to the provisions of subsection (b), no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute a civil action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights. The Register may, at his or her option, become a party to the action with respect to the issue of registrability of the copyright claim by entering an appearance within sixty days after such service, but the Register's failure to become a party shall not deprive the court of jurisdiction to determine that issue."

We must consider whether § 411(a) "clearly states" that its registration requirement is "jurisdictional." *Arbaugh*,http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=2008499362*supra*, at 515, 126 S.Ct. 1235. It does not. *Amicus* disagrees, pointing to the presence of the word "jurisdiction" in the last sentence of § 411(a) and contending that the use of the term there indicates the jurisdictional cast of § 411(a)'s first sentence as well. Brief for Court-Appointed *Amicus Curiae* in support of Judgment Below 18 (hereinafter *Amicus* Brief). But this reference to "jurisdiction" cannot bear the weight that *amicus* places upon it. The sentence upon which *amicus* relies states:

"The Register [of Copyrights] may, at his or her option, become a party to the [copyright infringement] action with respect to *the issue of registrability of the copyright claim* by entering an appearance within sixty days after such service, but the Register's failure to become a party shall not deprive the court of jurisdiction to determine *that issue*." § 411(a) (emphasis added).

Congress added this sentence to the Act in 1976, 90 Stat. 2583, to clarify that a federal court can determine "the issue of registrability of the copyright claim" even if the Register does not appear in the infringement suit. That clarification was necessary because courts had interpreted § 411(a)'s precursor provision,[FN4] which imposed a similar registration requirement, as prohibiting copyright owners who had been *refused* registration by the Register of Copyrights from suing for infringement until the owners *first* sought mandamus against the Register. See *Vacheron & Constantin-Le Coultre Watches, Inc. v. Benrus Watch Co.*, 260 F.2d 637, 640-641 (C.A.2 1958) (construing § 411(a)'s precursor). The 1976 amendment made it clear that a federal court plainly has adjudicatory authority to determine "*that* issue," § 411(a) (emphasis added)-*i.e.*, the issue of *registrability*-regardless of whether the Register is a party to the *infringement* suit. The word "jurisdiction," as used here, thus says nothing about whether a federal court has subject-matter jurisdiction to adjudicate claims for infringement of unregistered works.

FN4. See Act of Mar. 4, 1909, § 12, 35 Stat. 1078.

Moreover, § 411(a)'s registration requirement, like Title VII's numerosity requirement, is located in a provision "separate" from those granting federal courts subject-matter jurisdiction over those respective claims. See *Arbaugh*,http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=2008499362*supra*, at 514-515, 126 S.Ct.

1235. Federal district courts have subject-matter jurisdiction over copyright infringement actions based on 28 U.S.C. §§ 1331 and 1338. But neither § 1331, which confers subject-matter jurisdiction over questions of federal law, nor § 1338(a), which is specific to copyright claims, conditions its jurisdictional grant on whether copyright holders have registered their works before suing for infringement. Cf. *Arbaugh*, http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=2008499362*supra*, at 515, 126 S.Ct. 1235 ("Title VII's jurisdictional provision" does not "specif[y] any threshold ingredient akin to 28 U.S.C. § 1332's monetary floor").

***8** Nor does any other factor suggest that 17 U.S.C.A. § 411(a)'s registration requirement can be read to " 'speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.' " *Arbaugh*, 546 U.S., at 515, 126 S.Ct. 1235 (quoting *Zipes*, 455 U.S., at 394, 102 S.Ct. 1127). First, and most significantly, § 411(a) expressly *allows* courts to adjudicate infringement claims involving unregistered works in three circumstances: where the work is not a U.S. work, where the infringement claim concerns rights of attribution and integrity under § 106A, or where the holder attempted to register the work and registration was refused. Separately, § 411(c) permits courts to adjudicate infringement actions over certain kinds of unregistered works where the author "declare[s] an intention to secure copyright in the work" and "makes registration for the work, if required by subsection (a), within three months after [the work's] first transmission." 17 U.S.C. §§ 411(c)(1)-(2). It would be at least unusual to ascribe jurisdictional significance to a condition subject to these sorts of exceptions.[FN5]

> FN5. Cf. *Zipes*, 455 U.S., at 393-394, 397, 102 S.Ct. 1127 (relying on the fact that Congress had "approved" at least some cases awarding Title VII relief to claimants who had not complied with the statute's Equal Employment Opportunity Commission (EEOC) filing requirement in holding that the filing requirement was not a jurisdictional prerequisite to suit); *United States v. Cotton*, 535 U.S. 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002) ("[J]urisdiction" properly refers to a court's power to hear a case, a matter that "can never be forfeited or waived").

[4] That the numerosity requirement in *Arbaugh* could be considered an element of a Title VII claim, rather than a prerequisite to initiating a lawsuit, does not change this conclusion, as our decision in *Zipes* demonstrates. *Zipes* (upon which *Arbaugh* relied) held that Title VII's requirement that sex-discrimination claimants timely file a discrimination charge with the EEOC before filing a civil action in federal court was nonjurisdictional. See 455 U.S., at 393, 102 S.Ct. 1127;42 U.S.C. § 2000e-5(f)(1) (establishing specific time periods within which a discrimination claimant must file a lawsuit after filing a charge with the EEOC). A statutory condition that requires a party to take some action before filing a lawsuit is not automatically "a *jurisdictional* prerequisite to suit." *Zipes*, 455 U.S., at 393, 102 S.Ct. 1127 (emphasis added). Rather, the jurisdictional analysis must focus on the "legal character" of the requirement, *id.*, at 395, 102 S.Ct. 1127, which we discerned by looking to the condition's text, context, and relevant historical treatment, *id.*, at 393-395, 102 S.Ct. 1127; see also *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101, 119-121, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002). We similarly have treated as nonjurisdictional other types of threshold requirements that claimants must complete, or exhaust, before filing a lawsuit.[FN6]

> FN6. See *Jones v. Bock*, 549 U.S. 199, 211, 127 S.Ct. 910, 166 L.Ed.2d 798 (2007) (treating the administrative exhaustion requirement of the Prison Litigation Reform Act of 1995 (PLRA)-which states that "no action shall be brought with respect to prison conditions under § 1983 of this title, or any other Federal law, by a prisoner ... until such administrative remedies as are available are exhausted," 42 U.S.C. § 1997e(a)-as an affirmative defense even though "[t]here is no question that exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought in court"); *Woodford v. Ngo*, 548 U.S. 81, 93, 126 S.Ct. 2378, 165 L.Ed.2d 368 (2006) (same).

[5][6] The registration requirement in 17 U.S.C.A. § 411(a) fits in this mold. Section 411(a) imposes a precondition to filing a claim that is not clearly labeled jurisdictional, is not located in a jurisdiction-granting provision, and admits of congressionally authorized

exceptions. See §§ 411(a)-(c). Section 411(a) thus imposes a type of precondition to suit that supports nonjurisdictional treatment under our precedents.

C

*9*Amicus* insists that our decision in *Bowles*, 551 U.S. 205, 127 S.Ct. 2360, 168 L.Ed.2d 96, compels a conclusion contrary to the one we reach today. *Amicus* cites *Bowles* for the proposition that where Congress did not explicitly label a statutory condition as jurisdictional, a court nevertheless should treat it as such if that is how the condition consistently has been interpreted and if Congress has not disturbed that interpretation. *Amicus* Brief 26. Specifically, *amicus* relies on a footnote in *Bowles* to argue that here, as in *Bowles*, it would be improper to characterize the statutory condition as nonjurisdictional because doing so would override " 'a century's worth of precedent' " treating § 411(a)'s registration requirement as jurisdictional. *Amicus* Brief 26 (quoting *Bowles*, http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=2012476305 *supra*, at 209, n. 2, 127 S.Ct. 2360). This argument focuses on the result in *Bowles*, rather than on the analysis we employed.

Bowles did not hold that any statutory condition devoid of an express jurisdictional label should be treated as jurisdictional simply because courts have long treated it as such. Nor did it hold that all statutory conditions imposing a time limit should be considered jurisdictional.[FN7] Rather, *Bowles* stands for the proposition that context, including this Court's interpretation of similar provisions in many years past, is relevant to whether a statute ranks a requirement as jurisdictional.

> FN7. *Bowles*, for example, distinguished *Scarborough v. Principi*, 541 U.S. 401, 124 S.Ct. 1856, 158 L.Ed.2d 674 (2004), which characterized as nonjurisdictional an express statutory time limit for initiating postjudgment proceedings for attorney's fees under the Equal Access to Justice Act. See 551 U.S., at 211, 127 S.Ct. 2360. As we explained, the time limit in *Scarborough* "concerned 'a *mode of relief* ... ancillary to the judgment of a court' that already had plenary jurisdiction." 551 U.S., at 211, 127 S.Ct. 2360 (quoting *Scarborough*, *supra*, at 413, 124 S.Ct. 1856; (emphasis added)). *Bowles* also distinguished *Kontrick v. Ryan*, 540 U.S. 443, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004), and *Eberhart v. United States*, 546 U.S. 12, 126 S.Ct. 403, 163 L.Ed.2d 14 (2005)(*per curiam*), as cases in which the Court properly held that certain time limits were nonjurisdictional because they were imposed by rules that did not purport to have any jurisdictional significance. See 551 U.S., at 210-211, 127 S.Ct. 2360. *Kontrick* involved "time constraints applicable to objections to discharge" in bankruptcy proceedings. 540 U.S., at 453, 124 S.Ct. 906. In that case, we first examined 28 U.S.C. § 157(b)(2)(J), the statute "conferring jurisdiction over objections to discharge," and observed that it did not contain a timeliness requirement. *Kontrick*, 540 U.S., at 453, 124 S.Ct. 906. Rather, the "time constraints applicable to objections to discharge" were contained in the Bankruptcy Rules, which expressly state that they " 'shall not be construed to extend or limit the jurisdiction of the courts.' " See *ibid.* (quoting Fed. Rule Bkrtcy. Proc. 9030). *Eberhart*, in turn, treated as nonjurisdictional certain rules that the Court held "closely parallel[ed]" those in *Kontrick*. 546 U.S., at 15, 126 S.Ct. 403.

In *Bowles*, we considered 28 U.S.C. § 2107, which requires parties in a civil action to file a notice of appeal within 30 days of the judgment being appealed, and Rule 4 of the Federal Rules of Appellate Procedure, which "carries § 2107 into practice." 551 U.S., at 208, 127 S.Ct. 2360. After analyzing § 2107's specific language and this Court's historical treatment of the type of limitation § 2107 imposes (*i.e.*, statutory deadlines for filing appeals), we concluded that Congress had ranked the statutory condition as jurisdictional. Our focus in *Bowles* on the historical treatment of statutory conditions for taking an appeal is thus consistent with the *Arbaugh* framework. Indeed, *Bowles* emphasized that this Court had long treated such conditions as jurisdictional, including in statutes *other* than § 2107, and specifically in statutes that predated the creation of the courts of appeals. See 551 U.S., at 209-210, and n. 2, 127 S.Ct. 2360.

Bowles therefore demonstrates that the relevant ques-

tion here is not (as *amicus* puts it) whether § 411(a) itself has long been labeled jurisdictional, but whether the type of limitation that § 411(a) imposes is one that is properly ranked as jurisdictional absent an express designation. The statutory limitation in *Bowles* was of a type that we had long held *did* "speak in jurisdictional terms" even absent a "jurisdictional" label, and nothing about § 2107's text or context, or the historical treatment of that type of limitation, justified a departure from this view. That was not the case, however, for the types of conditions in *Zipes* and *Arbaugh*.

*10[7] Here, that same analysis leads us to conclude that § 411(a) does not implicate the subject-matter jurisdiction of federal courts. Although § 411(a)'s historical treatment as "jurisdictional" is a factor in the analysis, it is not dispositive. The other factors discussed above demonstrate that § 411(a)'s registration requirement is more analogous to the nonjurisdictional conditions we considered in *Zipes* and *Arbaugh* than to the statutory time limit at issue in *Bowles*.[FN8] We thus conclude that § 411(a)'s registration requirement is nonjurisdictional, notwithstanding its prior jurisdictional treatment.[FN9]

FN8. This conclusion mirrors our holding in *Zipes* that Title VII's EEOC filing requirement was nonjurisdictional, even though some of our own decisions had characterized it as jurisdictional. See 455 U.S., at 393, 102 S.Ct. 1127 (noting that "the legal character of the requirement was not at issue in those" earlier cases); see also *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101, 109, 121, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002) (relying on the analysis in *Zipes*).

FN9. *Amicus'* remaining jurisdictional argument-that the policy goals underlying copyright registration support construing § 411(a)'s registration provisions as jurisdictional, see *Amicus* Brief 45-is similarly unavailing. We do not agree that a condition should be ranked as jurisdictional merely because it promotes important congressional objectives. See *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 504, 515-516, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006) (holding that Title VII's numerosity requirement is nonjurisdictional even though it serves the important policy goal of "spar[ing] very small businesses from Title VII liability").

III

[8] *Amicus* argues that even if § 411(a) is nonjurisdictional, we should nonetheless affirm on estoppel grounds the Court of Appeals' judgment vacating the District Court's order approving the settlement and dismissing the case. According to *amicus*, petitioners asserted previously in these proceedings that copyright registration was jurisdictional, and this assertion should estop them from now asserting a right to waive objections to the authors' failure to register. *Amicus* urges us to prevent the parties "from 'playing fast and loose with the courts' by 'deliberately changing positions according to the exigencies of the moment.' " *Amicus* Brief 58 (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001)).

[9] We agree that some statements in the parties' submissions to the District Court and the Court of Appeals are in tension with their arguments here. But we decline to apply judicial estoppel. As we explained in *New Hampshire*, that doctrine typically applies when, among other things, a "party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled." *Id.*, at 750, 121 S.Ct. 1808 (internal quotation marks omitted).

Such circumstances do not exist here for two reasons. First, the parties made their prior statements when negotiating or defending the settlement agreement. We do not fault the parties' lawyers for invoking in the negotiations binding Circuit precedent that supported their clients' positions. Perhaps more importantly, in approving the settlement, the District Court did not adopt petitioners' interpretation of § 411(a) as jurisdictional. Second, when the Court of Appeals asked petitioners to brief whether § 411(a) restricted the District Court's subject-matter jurisdiction, they argued that it did not, and the Court of Appeals rejected their arguments. See App. to Reply Brief for Petitioners 3a-5a, and n. 2. Accepting petitioners' arguments here thus cannot create "inconsistent court determinations" in their favor. *New Hampshire*,http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&Seria

INum=2001440935*supra*, at 751, 121 S.Ct. 1808 (internal quotation marks omitted). We therefore hold that the District Court had authority to adjudicate the parties' request to approve their settlement.

IV

***11** Our holding that § 411(a) does not restrict a federal court's subject-matter jurisdiction precludes the need for us to address the parties' alternative arguments as to whether the District Court had authority to approve the settlement even under the Court of Appeals' erroneous reading of § 411. In concluding that the District Court had jurisdiction to approve the settlement, we express no opinion on the settlement's merits.

We also decline to address whether § 411(a)'s registration requirement is a mandatory precondition to suit that-like the threshold conditions in *Arizona v. California*, 530 U.S. 392, 412-413, 120 S.Ct. 2304, 147 L.Ed.2d 374 (2000) (res judicata defense); *Day v. McDonough*, 547 U.S. 198, 205-206, 126 S.Ct. 1675, 164 L.Ed.2d 376 (2006) (habeas statute of limitations); and *Hallstrom v. Tillamook County*, 493 U.S. 20, 26, 31, 110 S.Ct. 304, 107 L.Ed.2d 237 (1989) (Resource Conservation and Recovery Act of 1976 notice provision)-district courts may or should enforce *sua sponte* by dismissing copyright infringement claims involving unregistered works.

* * *

We reverse the judgment of the Court of Appeals for the Second Circuit and remand this case for proceedings consistent with this opinion.

It is so ordered.

Justice SOTOMAYOR took no part in the consideration or decision of this case.Justice GINSBURG, with whom Justice STEVENS and Justice BREYER join, concurring in part and concurring in the judgment.

I agree with the Court's characterization of 17 U.S.C.A. § 411(a) (Supp.2009). That provision, which instructs authors to register their copyrights before commencing suit for infringement, "is a precondition to filing a claim that does not restrict a federal court's subject-matter jurisdiction." *Ante*, at ----. I further agree that *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006), is the controlling precedent, see *ante*, at ----, and that *Bowles v. Russell*, 551 U.S. 205, 127 S.Ct. 2360, 168 L.Ed.2d 96 (2007), does not counsel otherwise. There is, however, undeniable tension between the two decisions. Aiming to stave off continuing controversy over what qualifies as "jurisdictional," and what does not, I set out my understanding of the Court's opinions in *Arbaugh* and *Bowles*, and the ground on which I would reconcile those rulings.

In *Arbaugh*, we held nonjurisdictional a prescription confining Title VII's coverage to employers with 15 or more employees, 42 U.S.C. § 2000e-2(a)(1). After observing that "the 15-employee threshold ... 'd[id] not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts,' " 546 U.S., at 515, 126 S.Ct. 1235 (quoting *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982)), the *Arbaugh* opinion announced and applied a "readily administrable bright line":

> "If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character. Applying that readily administrable bright line to this case, we hold that the threshold number of employees for application of Title VII is an element of a plaintiff's claim for relief, not a jurisdictional issue." 546 U.S., at 515-516, 126 S.Ct. 1235 (citation and footnote omitted).

***12** As the above-quoted passage indicates, the unanimous *Arbaugh* Court anticipated that all federal courts would thereafter adhere to the "bright line" held dispositive that day.

Bowles moved in a different direction. A sharply divided Court there held "mandatory and jurisdictional" the time limits for filing a notice of appeal stated in 28 U.S.C. § 2107(a), (c). 551 U.S., at 209, 127 S.Ct. 2360 (internal quotation marks omitted). *Bowles* mentioned *Arbaugh* only to distinguish it as involving a statute setting "an employee-numerosity requirement, not a time limit." 551 U.S., at 211, 127 S.Ct. 2360.Section 2107's time limits were "jurisdictional," *Bowles* ex-

plained, because they were contained in a statute, not merely a rule, *id.*, at 210-213, 127 S.Ct. 2360, and because "[t]his Court ha[d] long held that the taking of an appeal within the prescribed time is 'mandatory and jurisdictional,' " *id.*, at 209, 127 S.Ct. 2360. Fidelity to *Arbaugh* and similarly reasoned decisions, [FN*] the dissent in *Bowles* observed, would have yielded the conclusion that statutory time limits "are only jurisdictional if Congress says so." 551 U.S., at 217, 127 S.Ct. 2360 (opinion of Souter, J.).

> FN* *E.g.*, *Eberhart v. United States*, 546 U.S. 12, 126 S.Ct. 403, 163 L.Ed.2d 14 (2005) (*per curiam*); *Scarborough v. Principi*, 541 U.S. 401, 124 S.Ct. 1856, 158 L.Ed.2d 674 (2004); *Kontrick v. Ryan*, 540 U.S. 443, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004).

Bowles and *Arbaugh* can be reconciled without distorting either decision, however, on the ground that *Bowles* "rel[ied] on a long line of this Court's decisions left undisturbed by Congress." *Union Pacific R. Co. v. Locomotive Engineers and Trainmen Gen. Comm. of Adjustment, Central Region*, 558 U.S. ----, ----, 130 S.Ct. 584, 597, --- L.Ed.2d ---- (2009) (citing *Bowles*, 551 U.S., at 209-211, 127 S.Ct. 2360). The same is true of our decision, subsequent to *Bowles*, in *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 128 S.Ct. 750, 169 L.Ed.2d 591 (2008). There the Court concluded, largely on *stare decisis* grounds, that the Court of Federal Claims statute of limitations requires *sua sponte* consideration of a lawsuit's timeliness. *Id.*, at 136, 128 S.Ct. 750 ("[P]etitioner can succeed only by convincing us that this Court has overturned, or that it should now overturn, its earlier precedent.").

Plainly read, *Arbaugh* and *Bowles* both point to the conclusion that § 411(a) is nonjurisdictional. Section 411(a) "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Zipes*, 455 U.S., at 394, 102 S.Ct. 1127. *Arbaugh*'s "readily administrable bright line" is therefore controlling. 546 U.S., at 516, 126 S.Ct. 1235.

***13** *Bowles* does not detract from that determination. *Amicus*, reading *Bowles* as I do, urges on its authority that we hold § 411(a) jurisdictional lest we disregard " 'a century's worth of precedent.' " Brief for Court-Appointed *Amicus Curiae* in Support of Judgment Below 26 (quoting *Bowles*, 551 U.S., at 209, n. 2, 127 S.Ct. 2360); see *ante*, at ----. But in *Bowles* and *John R. Sand & Gravel Co.*, as just explained, we relied on longstanding decisions of *this Court* typing the relevant prescriptions "jurisdictional." *Bowles*, 551 U.S., at 209-210, 127 S.Ct. 2360 (citing, *inter alia*, *Scarborough v. Pargoud*, 108 U.S. 567, 2 S.Ct. 877, 27 L.Ed. 824 (1883), and *United States v. Curry*, 6 How. 106, 12 L.Ed. 363 (1848)); *John R. Sand & Gravel Co.*, 552 U.S., at 136, 128 S.Ct. 750. *Amicus* cites well over 200 opinions that characterize § 411(a) as jurisdictional, but not one is from this Court, and most are " 'drive-by jurisdictional rulings' that should be accorded 'no precedential effect,' " *Arbaugh*, 546 U.S., at 511, 126 S.Ct. 1235 (quoting *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 91, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998)); see *Arbaugh*, 546 U.S., at 514-515, 126 S.Ct. 1235; *ante*, at ---- - ----.

* * *

For the reasons stated, I join the Court's judgment and concur in part in the Court's opinion.

U.S.,2010.
Reed Elsevier, Inc. v. Muchnick
--- S.Ct. ----, 2010 WL 693679 (U.S.), 93 U.S.P.Q.2d 1719, 10 Cal. Daily Op. Serv. 2542

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TAB 6B

MEMORANDUM

DATE: March 13, 2010

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 09-AP-B

This item relates to Daniel Rey-Bear's suggestion concerning the treatment of federally recognized Native American tribes in connection with Appellate Rule 29 and some other Appellate Rules. Mr. Rey-Bear's suggestion originated in his comments on the pending amendment to Appellate Rule 1. New Rule 1(b), which is on track to take effect December 1, 2010 (if the Supreme Court approves it and Congress takes no contrary action), will define the term "state," for purposes of the Appellate Rules, to include the District of Columbia and any United States commonwealth or territory. Mr. Rey-Bear, commenting on the proposed Rule 1(b), proposed that federally recognized Indian tribes be included within the Rule's definition of "state." I enclose his March 13, 2009 and October 5, 2009 letters, as well as my October 16, 2009 memo concerning this item.

Mr. Rey-Bear's suggestion has implications for several Appellate Rules – Rules 22, 26, 29, 44, and 46. With respect to Rule 29, Mr. Rey-Bear proposes that tribes should be entitled under Rule 29(a) to file amicus briefs without obtaining party consent or leave of court, and he also argues that tribes should not be subjected to the new authorship and funding disclosure requirement in proposed new Rule 29(c)(5).[1]

At the Committee's fall 2009 meeting, participants decided that it would be useful to focus on Rule 29's amicus-filing provisions rather than on the possibility of globally defining "state" to include Native American tribes. Participants also discussed whether any changes to Rule 29's amicus-filing provisions should include municipal governments as well as tribal governments. The discussion suggested a number of avenues for further inquiry. Doug Letter agreed to continue his efforts to gather information within the Department of Justice. Steve McAllister undertook to research the history of the U.S. Supreme Court's amicus rule, with a view to determining why Native American tribes are not treated the same as states by that rule. Marie Leary agreed to study amicus filings in the courts of appeals (over the past five or ten years) to determine whether and how often Native American tribes are denied leave to file amicus briefs. It was also suggested that it would be useful to research whether amicus-filing provisions exist in the procedural rules applied in some of the largest tribal courts.

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[1] Like proposed Rule 1(b), proposed Rule 29(c)(5) will take effect on December 1, 2010, if the Supreme Court approves it and Congress takes no contrary action.

Steve McAllister's extremely helpful memo concerning the Supreme Court's amicus-filing rules is included among the agenda materials. Marie Leary expects to be in a position to report the results of her research by the time of the Committee meeting. This memo discusses a couple of additional issues suggested by the Committee's discussion at the fall meeting. Part I of this memo reports the results of my research concerning tribal-court amicus-filing provisions, and also briefly discusses (as a point of comparison) state-court amicus-filing provisions. Part II summarizes my research concerning whether tribes are "persons" for purposes of the Due Process Clauses of the Fifth and Fourteenth Amendments. Part III, informed by the insights in Steve's memo, briefly reflects on possible reasons why tribes were omitted from the 1939 Supreme Court rule listing government entities to be accorded special treatment as amici.

I. Tribal and state amicus-filing rules' treatment of governmental amici

During the fall 2009 Committee meeting, it was suggested that it might be useful to investigate whether tribal court systems have rules concerning amicus filings and, if so, how those rules treat amicus filings by government litigants. I undertook to investigate this question, focusing on a sample of the largest tribal court systems.

Because it proved difficult to compile a list of the largest tribal courts by caseload, I selected, as a proxy, Indian reservation and trust land population as reflected in the 2000 Census data.[2] I asked my research assistant to select the 20 largest federally recognized tribes (measuring size by reservation and trust land population according to the census data).[3] This yielded the following list of tribes (from largest population to smallest):[4]

- Navajo Nation
- Osage Nation
- Confederated Tribes and Bands of the Yakama Nation
- Confederated Salish & Kootenai Tribes of the Flathead Reservation

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[2] The relevant Census 2000 data table can be accessed at http://factfinder.census.gov/home/aian/index.html (follow "Census 2000" heading, then follow "Rankings and Comparisons" subheading, then follow "Population, Housing Units, Area, and Density" hyperlink).

[3] It should be noted that the census data provides only a very rough proxy for tribal size. As far as I can tell, the census data that we employed lists the total population (whether tribe members or non-members) on tribal reservation land and on land held by the federal government in trust for a tribe.

[4] This list employs the same nomenclature as the Bureau of Indian Affairs' list. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 70 Fed. Reg. 71194 (Nov. 25, 2005).

- Arapahoe Tribe of the Wind River Reservation
- Rosebud Sioux Tribe of the Rosebud Indian Reservation
- Ute Indian Tribe of the Uintah & Ouray Reservation
- Nez Perce Tribe
- Oglala Sioux Tribe of the Pine Ridge Reservation
- White Mountain Apache Tribe of the Fort Apache Reservation
- Gila River Indian Community of the Gila River Indian Reservation
- Southern Ute Indian Tribe of the Southern Ute Reservation
- Tohono O'odham Nation of Arizona
- Sisseton-Wahpeton Oyate of the Lake Traverse Reservation
- Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation
- The Leech Lake Band of the Minnesota Chippewa Tribe
- Blackfeet Tribe of the Blackfeet Indian Reservation of Montana
- San Carlos Apache Tribe of the San Carlos Reservation
- Colorado River Indian Tribes of the Colorado River Indian Reservation
- The White Earth Band of the Minnesota Chippewa Tribe

Because population is a very rough proxy for court-system size, we then cross-checked this list against the caseload data reported in a 2002 survey by the Bureau of Justice Statistics.[5] The survey report states that 314 of the 341 federally recognized tribes in the lower 48 states participated in the survey. However, the table showing tribes' reported caseload data indicates that not all respondents provided caseload statistics. We looked for tribes that reported *either* at least 3,000 civil cases filed during a particular calendar year *or* at least 3,000 criminal cases filed during a particular calendar year. That search yielded ten tribes, of which all but three were already on our list. The three additional tribes are:

- Zuni Tribe of the Zuni Reservation, New Mexico
- Cheyenne River Sioux Tribe
- Turtle Mountain Band of Chippewa Indians of North Dakota

I asked my research assistant to search the Internet for relevant provisions in the law of those 23 tribes. She found only six relevant tribal-law provisions:[6]

- Amicus filings only with court permission
  - Navajo Nation: *See* Navajo Nation Rule of Civil Appellate Procedure 13.

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[5] *See* U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, Census of Tribal Justice Agencies in Indian Country, 2002 (2005), http://www.ojp.usdoj.gov/bjs/pub/pdf/ctjaic02.pdf.

[6] A spreadsheet setting forth her findings will be available at the meeting; please let me or James Ishida know if you would like to receive a copy of the spreadsheet prior to the meeting.

- Colorado River Indian Tribes of the Colorado River Indian Reservation: The Colorado River Indian Tribes' Local Rule of Appellate Procedure 10(g) appears to indicate that court permission is required.

- Amicus filings only with court permission or party consent

  - Sisseton-Wahpeton Oyate of the Lake Traverse Reservation: The Northern Plains Intertribal Court of Appeals hears appeals in cases originating in this tribe's court system. For the provision requiring court permission or party consent for amicus filings in the NPICA, see NPICA Rule of Appellate Procedure 29.

  - Blackfeet Tribe of the Blackfeet Indian Reservation of Montana: This tribe's rules of appellate procedure require party consent or court permission for amicus filings, except for filings by the General Counsel of the Blackfeet Tribe itself.

- Amici mentioned, but standards for filing not indicated

  - Confederated Salish & Kootenai Tribes of the Flathead Reservation: *See* Rule of Appellate Procedure 16

  - The White Earth Band of the Minnesota Chippewa Tribe

These results are interesting, but it is unclear what conclusions can be drawn from them with respect to the current proposal concerning federal amicus-filing practices. When comparing tribal-court provisions with federal-court provisions, it is worth noting the significant differences in quantity and type of cases that are processed in the two types of court system. Federal courts have jurisdiction to hear a broad range of cases that may affect the interests of Native American tribes, including cases that concern tribal governmental authority. By contrast, the subject matter jurisdiction of tribal courts has been progressively narrowed by a series of U.S. Supreme Court decisions starting in 1978 (subject to some subsequent revision, by Congress, as to tribal criminal jurisdiction). Tribal courts have criminal jurisdiction only with respect to Indian defendants.[7] Tribal courts' civil jurisdiction over cases involving nonmembers tracks the limits

[7] In 1978 the Supreme Court held that "Indian tribes do not have inherent jurisdiction to try and to punish non-Indians." Oliphant v. Suquamish Indian Tribe 435 U.S. 191, 212 (1978). In 1990, the Court extended *Oliphant* to cover not only non-Indians but also nonmember Indians. *See* Duro v. Reina, 495 U.S. 676, 688 (1990). Less than six months after the Duro decision, Congress overrode it by amending the Indian Civil Rights Act. The ICRA now defines a tribe's "powers of self-government" to include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." Pub. L. No. 101-511, Title VIII, § 8077(b), (c), Nov. 5, 1990, 104 Stat. 1892 (codified at 25 U.S.C. § 1301(2)).

of tribal civil legislative jurisdiction over nonmembers.[8] As to nonmembers, tribal adjudicative jurisdiction extends to cases concerning nonmembers' on-reservation activities where the case involves "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.... [or] the conduct of non-Indians ... when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[9] In the light of these limitations, it seems relatively less likely that tribal courts will hear cases that will result in judgments that affect the interests of non-tribal government entities than that federal courts will hear cases that will result in judgments that affect the interests of tribal government entities.

As another point of comparison, it is interesting to consider the treatment of amicus filings in state courts. I asked my research assistant to search for state-court provisions relating to amicus filings.[10] The results of that research disclose that states take a variety of approaches to amicus filings. Roughly half the states have at least one set of court rules that appears to require court permission for amicus filings.[11] A smaller group of states have at least one set of

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[8] *See* Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997) ("As to nonmembers ... a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction.").

[9] Montana v. United States, 450 U.S. 544, 565-66 (1981). Montana itself concerned tribal regulatory jurisdiction, but, as noted in the text and the preceding footnote, the Court has subsequently indicated that the limits on tribal adjudicative authority track those on tribal legislative authority. Though Montana's holding focused on tribal efforts to regulate non-Indian activities on land owned in fee by non-Indians within the reservation, the Court has applied the Montana limits not only to conduct on land owned by non-Indians but also to conduct occurring on tribally-owned land within the reservation – though it has indicated that the Montana limits are especially stringent "when the nonmember's activity occurs on land owned in fee simple by non-Indians." Plains Commerce Bank v. Long Family Land and Cattle Co., 128 S. Ct. 2709, 2719 (2008).

[10] Specifically, she ran the following search in Westlaw's RULES-ALL database: AMICUS AMICI "FRIEND OF THE COURT". She then skimmed down the list of results looking for state-court rules that address the conditions for filing an amicus brief – e.g., with party consent, or by court permission, or because the amicus is a particular entity such as a state government entity.

A spreadsheet setting forth her findings will be available at the meeting; please let me or James Ishida know if you would like to receive a copy of the spreadsheet prior to the meeting.

[11] *See* Ala. R. App. P. 29; R. Ark. Sup. Ct. 4-6(a); Col. App. R. 29; Conn. R. App. P. § 67-7; De. R. Sup. Ct. 28(a); Fla. R. App. P. 9.370(a); Idaho App. R. 8; Ill. Sup. Ct. R. 345(a); Ky. R. Civ. P. 76.12(7); La. R. Sup. Ct. 7(12), La. Uniform R. Ct. App. 2-12.11; Md. R. Ct. App. 8-511(a); Mich. Ct. App. R. (H)(1); Minn. R. Civ. App. P. 129.01; Mont. R. App. P. 12(7); N.D. R. App. P. 29(a); Neb. R. Sup. Ct. § 2-109(a)(4); N.J. R. Ct. 1:13-9; N.M. R. App. P. 12-215; N.C. R. App. P. 28(i); S.C. R. App. P. 213; S.D. R. App. P. § 15-26A-74; Tenn. R. App. Ct.

court rules that require either court permission or party consent.[12] Three states have at least one set of court rules that apparently require neither court permission nor party consent.[13] Sixteen states have at least one set of court rules that makes an exception for amicus filings by some types of government entity. The appendix that follows this memo provides a list of the relevant provisions from those sixteen states, with quotes of the language concerning the types of entities whose filings receive distinctive treatment.[14]

All sixteen of the state provisions listed above provide special treatment for filings by the state in question.[15] Six of the state provisions listed above extend special treatment to filings by municipal entities.[16] Four of the provisions extend special treatment to filings by the federal government.[17] Only two (or perhaps three) of the provisions extend special treatment to filings by *other* states.[18] Two of the provisions extend special treatment to filings by other specified entities.[19]

Though we found only a small number of state provisions that explicitly authorize special treatment for filings by the federal government in state courts, it is possible that such filings are already separately authorized by 28 U.S.C. § 517. That statute provides that "[t]he Solicitor

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31(a); Utah R. App. P. 25; Utah R. App. P. 50(f); Wyo. R. App. P. 7.12(a).

[12] *See* Alaska R. App. P. 212(c)(9); Ariz. R. Crim. P. 31.25(a); Iowa R. App. P. 6.901(1); Me. R. App. P. 9(e)(1); N.Y. R. Ct. § 670.11(a); Ohio R. App. P. 17; Okla. Sup. Ct. R. 1.12. The Washington state appellate courts require a motion but the relevant rules indicate that party consent is a basis for granting the motion. See Wash. R. App. P. 10.1(e), 10.6(a).

[13] *See* Ga. Sup. Ct. R. 23, Ga. App. Ct. R. 26; Ohio R. Prac. Sup. Ct. § 6(A); Ohio R. Prac. Sup. Ct. § 6.6(A); Pa. R. App. P. 531(a).

[14] In the interests of brevity, the rules cited in this appendix are not cited in the preceding footnotes even though – as to entities other than the specified governmental filers – they require court permission (or, in some instances, party consent).

[15] The California and Hawaii provisions appear to extend special treatment only to certain types of filings by the state, not to all filings by the state.

[16] These are the provisions from Arizona, the District of Columbia, Michigan, Nevada, New Hampshire, and West Virginia.

[17] These are the provisions from the District of Columbia, Nevada, Rhode Island, and Virginia.

[18] These are the provisions from the District of Columbia, Nevada, and perhaps Missouri.

[19] These are the provisions from Michigan and Mississippi.

General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." Though this statute has rarely been cited by state courts,[20] it could be argued to authorize amicus filings by the federal government in state court proceedings.

II. Native American tribes, the Due Process Clauses, and other points of comparison among tribal and non-tribal government entities

At the fall 2009 meeting, a participant stated that federal,[21] state[22] and foreign[23] governments are not considered "persons" entitled to invoke protections under the Constitution's Due Process Clauses and inquired whether the same is true of Native American tribes.

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[20] For one such rare example, see Ren-Guey v. Lake Placid 1980 Olympic Games, Inc., 49 N.Y.2d 771, 773, 403 N.E.2d 178, 179, 426 N.Y.S.2d 473, 474 (N.Y. 1980) ("In view of the statement of interest submitted by the Attorney General of the United States on behalf of the Department of State pursuant to section 517 of title 28 of the U.S. Code, we are persuaded that the courts of our State must refrain from the exercise of jurisdiction to resolve a dispute which has at its core the international 'two-Chinas' problem.").

[21] I have not located any cases addressing the federal government's ability to assert rights under the Fourteenth Amendment Due Process Clause; however, I would be surprised if any court has held that the federal government has rights under the Fourteenth Amendment due process clause (other than, perhaps, to assert its citizens' rights in parens patriae). And, obviously, the federal government would not have any rights under the Fifth Amendment's due process clause.

[22] *See* South Carolina v. Katzenbach, 383 U.S. 301, 323-24 (1966) ("The word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge this has never been done by any court.").

[23] The Supreme Court has not settled the question of whether a foreign government is a "person" that can assert due process rights. *See* Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 619 (1992) ("[a]ssuming, without deciding, that a foreign state is a 'person' for purposes of the [Fifth Amendment] Due Process Clause"). However, a number of lower courts have held that foreign states do not qualify as such "persons." *See, e.g.*, Frontera Resources Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic, 582 F.3d 393, 400 (2d Cir. 2009) (discussing *Weltover* and holding that "foreign states are not 'persons' entitled to rights under the Due Process Clause"); *compare* Altmann v. Republic of Austria, 317 F.3d 954, 970 (9th Cir. 2002) (assuming for sake of argument that foreign states are "persons" for due process purposes, and concluding that due process permitted the exercise of territorial jurisdiction over Austria under circumstances of case).

The Supreme Court has not addressed the question of whether tribes have rights under the Due Process Clauses of the Fifth or Fourteenth Amendments. As Steve's memo observes, the Court has held that when a tribe sues to vindicate a sovereign interest, it does not count as a "person" authorized to bring a claim under 42 U.S.C. § 1983. *See* Inyo County v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony, 538 U.S. 701, 704 (2003). The *Inyo County* Court did not directly address whether tribes have rights under the Due Process Clauses, but its explanation of its holding concerning Section 1983 is instructive. The Court observed that "qualification of a sovereign as a 'person' who may maintain a particular claim for relief depends not 'upon a bare analysis of the word "person,"' ... but on the 'legislative environment' in which the word appears." *Inyo County*, 538 U.S. at 711 (quoting Pfizer Inc. v. Government of India, 434 U.S. 308, 317 (1978)). In *Inyo County*, the Bishop Paiute Tribe based its Section 1983 claim on its interest, as a tribal sovereign, in freedom from state-court law enforcement process. The Court, reasoning that "Section 1983 was designed to secure private rights against government encroachment, ... not to advance a sovereign's prerogative to withhold evidence relevant to a criminal investigation," concluded that "the Tribe may not sue under § 1983 to vindicate the sovereign right it here claims." *Id.* at 712.

Assuming that the mode of statutory interpretation employed in *Inyo County* can be generalized to the interpretation of constitutional provisions, analysis of whether Native American tribes are "persons" who can assert rights under the Due Process Clauses would seem, under *Inyo County*, to entail a consideration of the context in which those Clauses were adopted. Due to the apparent paucity of caselaw on this question, I have not attempted to pursue such an analysis, but I would be glad to do so if the Committee feels that it would be useful.

As Steve's memo points out, a comparison of tribal governments with other governments might also take into account other aspects of sovereignty. One might, for example, consider the law of sovereign immunity. Tribes, like states and the federal government, possess sovereign immunity that is protected by federal law. Municipal governments do not. However, tribal sovereign immunity, unlike state sovereign immunity, is not constitutionally protected. Tribal sovereign immunity is subject to abrogation by Congress. State sovereign immunity is only subject to such abrogation in certain narrow circumstances.

As another point of comparison, tribes, like states and the federal government, possess legislative and adjudicative authority. However, according to Supreme Court precedents, tribal government authority is not constitutionally protected. Rather, that authority can be defined by federal common law and re-defined by Congress. By contrast, state government authority possesses constitutional protection.

In the end, such comparisons appear to shed only indirect light on the question at hand. Ample authority can be found for the proposition that in some contexts, tribal governments possess prerogatives similar to those of federal or state government bodies; but counter-examples can also be found. An analysis of broad background principles might also take account of the federal government's trust responsibility to tribal governments.

III. Reflections on the history of the Supreme Court's amicus-filing rule

Steve's memo illuminates the history of the Supreme Court's amicus-filing rule. As he explains, ever since 1939 the relevant rule has always permitted amicus filings (without party consent or court leave) for defined federal, state, or municipal entities.[24] Steve provides a thoughtful explanation of the rule's evolution and of the system that predated the rule's adoption.

Steve's insights led me to reflect on the possible reasons why the Supreme Court's amicus-filing rule, adopted in 1939, might have omitted any mention of amicus filings by tribes. Obviously, these reflections are pure speculation. But it seems possible that one factor contributing to the omission of tribes from the list of governmental amicus filers may have been the relative rarity of tribal litigants prior to and at the time of the adoption of the amicus-filing rule in 1939.

During the early days of the United States, there was a marked tendency to view Native American tribes as entities to be dealt with diplomatically – i.e., by treaty-making – rather than through the litigation process. Treaty-making with the Indian tribes did not end until 1871.[25] Meanwhile, the federal courts had not proven hospitable to tribal claims. Famously, Chief Justice Marshall held in *Cherokee Nation v. Georgia* that the Cherokee Nation – though a "state" – was not a "foreign state" entitled to invoke the party-based jurisdiction of the federal courts.[26] Given the absence of any general grant of federal question jurisdiction prior to 1875,[27] it is thus unsurprising that tribes were not a notable presence in federal litigation during the 19th century. By the turn of the 20th century, tribes' interests were at issue in federal litigation, but the seminal Supreme Court decision of the period – *Lone Wolf v. Hitchcock* – held that tribe members'

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[24] As noted in his memo, the relevant definition has evolved over time, but the basic substance is unchanged. Current Supreme Court Rule 37.4 permits amicus filings (without party consent or court leave) for briefs "presented on behalf of the United States by the Solicitor General; on behalf of any agency of the United States allowed by law to appear before this Court when submitted by the agency's authorized legal representative; on behalf of a State, Commonwealth, Territory, or Possession when submitted by its Attorney General; or on behalf of a city, county, town, or similar entity when submitted by its authorized law officer."

[25] *See* Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71).

[26] *See* Cherokee Nation v. Georgia, 30 U.S. 1, 20 (1831) (concluding that the Cherokee Nation was not a foreign state for purposes of Article III's grant of jurisdiction over controversies "between a State... and foreign States"); *id.* at 16 (characterizing the Cherokee Nation "as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself"). *Compare id.* at 80 (Thompson, J., joined by Story, J., dissenting) (arguing that the Cherokee Nation was a foreign state for jurisdictional purposes).

[27] The short-lived exception to the statement in the text, of course, was the Act of Feb. 13, 1801, which was repealed in 1802.

claims of constitutional and treaty violations in connection with the allotment of tribal lands could not be vindicated in federal court.[28]

Richard Collins and Karla Miller have suggested a number of reasons why suits by tribes – other than Indian claims cases brought under specific statutory grants – were uncommon prior to the 1960s:

> Tribes were poor, and the means to sue have become widely available only in modern times. Tribal leaders were demoralized by 19th century conquests and lacked knowledge of the legal system. Racial hostility near Indian communities led to assumptions that courts would be inhospitable to Native American claims. Indian law was (and is) inordinately complex. Few lawyers understood much about the subject, which was not organized until 1941. Tribal rights depended on treaties with the United States, but Congress withheld Indian treaty claims from the general jurisdiction of the Court of Claims until 1946. When tribes did sue, they had some successes but suffered discouraging failures, notably in Lone Wolf. That decision and others gave federal authorities almost unrestricted power over tribes and their land and endorsed the 80-year federal policy of doing away with tribal governments. In some instances, there were difficulties deciding on the identity of a party plaintiff claiming to be an Indian nation. And, of course, resort to courts was less common in American society generally before the 1960s.

Richard B. Collins & Karla D. Miller, A People Without Law, 5 Indigenous L. J. 83, 85 (2006) (footnotes omitted). Collins and Miller examine another possible contributing factor: the notion "that tribes and Indians were not legal entities or persons able to bring suit." Id. As they note, "[w]hen Felix Cohen and his staff at Interior compiled the [1941] *Handbook of Federal Indian Law*, tribal capacity was prominent enough in the records and literature that the subject commanded a distinct section in their book." Id. Collins and Miller conclude that doubts over tribal capacity to sue were "unsupported by authoritative legal holding" and that "events between

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[28] The *Lone Wolf* Court concluded:

> We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the government exercised its best judgment in the premises. In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress, and not to the courts. The legislation in question was constitutional, and the demurrer to the bill was therefore rightly sustained.

Lone Wolf v. Hitchcock, 187 U.S. 553, 568 (1903).

1946 and 1968 settled the issue conclusively in favour of tribal capacity," but they observe that such doubts nonetheless colored "statements in a few legal opinions and in articles in popular and scholarly journals in the late 19th and early 20th centuries." Id. at 86-87.

Though Collins and Miller focus their analysis on the ability of tribes to litigate as parties, the same dynamics likely affected the participation of tribes as amici during the early 20th century. In the light of this history, one might well conclude that it would have been surprising if an amicus-filing rule adopted in 1939 had listed tribal amici.

IV. Conclusion

This memo has summarized the results of some of the inquiries that we have pursued as a result of the discussion at the November 2009 meeting. Steve McAllister's excellent memo, the inquiries by Doug Letter and the research by Marie Leary will provide a rich set of information in which to ground the Committee's discussion of this item.

Encls.

Appendix
List of state provisions that make an exception for amicus filings by some types of government entity:

- Ariz. R. Civ. App. P. 16(a):
  - Filings by "the State of Arizona or an officer or agency thereof, or by a county, city, or town."
- Cal. R. Ct. 8.200(c), Cal. R. Ct. 8.487(c), Cal. R. Ct. 8.520(f), Cal. R. Ct. 8.882(d)
  - Filings by the Attorney General, "unless the brief is submitted on behalf of another state officer or agency."
- R. D.C. Ct. App. 29(a)
  - Filings by "[t]he United States or the District of Columbia, or an officer or agency thereof, or a State, Territory, Commonwealth or political subdivision thereof."
- Haw. R. App. P. 28(g)
  - "The attorney general may file an amicus curiae brief without order of the court in

all cases where the constitutionality of any statute of the State of Hawai'i is drawn into question, provided that the attorney general shall file the brief within 30 days after the filing of the answering brief, or within 30 days after notice was received pursuant to Rule 44, whichever period last expires."

- Mass. R. App. P. 17; see also R. Dist. Ct. Mass. 17
    - "... consent or leave shall not be required when the brief is presented by the Commonwealth."
- Mich. Sup. Ct. R. 7.306(D)
    - "No motion for leave to file an amicus curiae brief is necessary if the brief is presented on behalf of the people of the state of Michigan or the state of Michigan, or any of its agencies or officials, by the Attorney General; on behalf of any political subdivision of the state when submitted by its authorized legal officer, its authorized agent, or an association representing a political subdivision; or on behalf of the Prosecuting Attorneys Association of Michigan or the Criminal Defense Attorneys of Michigan."
- Miss. R. App. P. 29(a)
    - "... when the brief is presented by the state and sponsored by the Attorney General or by a guardian ad litem who is not otherwise a party to the appeal."
- Mo. Sup. Ct. R. 84.05(f); Mo. Ct. App. W.D. 26; Mo. Ct. App. E.D. 375; Mo. Ct. App. S.D. 15
    - "Leave for the filing of an amicus curiae brief shall not be necessary when the brief is presented by the attorney general or by a state entity authorized by law to appear on its own behalf."
- Nev. R. App. P. 29(a)
    - "The United States, the State of Nevada, an officer or agency of either, a political subdivision thereof, or a state, territory or commonwealth may file an amicus curiae brief without the consent of the parties or leave of court."
- N.H. R. Sup. Ct. 30
    - "Consent to the filing of a brief of an amicus curiae is unnecessary when the brief is presented for the State of New Hampshire by the attorney general (as amicus and not as a party); for any State agency authorized by law to appear on its own behalf by its appropriate legal counsel; or for any political subdivision of the State

by its authorized law officer."

- N.Y. Ct. App. R. § 500.11(j); see also N.Y. R. Ct. § 500.12(e), N.Y. R. Ct. § 500.23
  - "The Attorney General of the State of New York ...."
- Or. R. App. P. 8.15
  - "The State of Oregon may appear as amicus curiae in any case in the Supreme Court and Court of Appeals without permission of the court."
- R.I. Sup. Ct. R. 16(h)
  - "... consent or leave shall not be required when the brief is presented by the United States or an officer or agency thereof, or by the State of Rhode Island or an officer or agency thereof."
- Va. R. Sup. Ct. 5:30(a); see also Va. R. Sup. Ct. 5A:23(a)
  - "A brief amicus curiae may be filed: (1) on behalf of the United States or the Commonwealth of Virginia without the prior consent of this Court or counsel ...."
- Vt. R. App. P. 29
  - " ... consent or leave shall not be required when the brief is presented by the State of Vermont or an officer or agency thereof."
- W. Va. R. App. P. 19
  - " ... consent or leave shall not be required when the brief is presented by the State of West Virginia or an officer or agency thereof, or by a county or municipality."

TO: The Hon. Jeffrey S. Sutton, Chair, Appellate Rules Committee
Professor Catherine Struve, Reporter, Appellate Rules Committee

FROM: Steve McAllister

RE: Proposed Amendment to FRAP Rule 29(a) and Investigation of the Supreme Court's Rule Regarding Amicus Briefs

DATE: January 6, 2010

At our Fall 2009 meeting in Seattle, during discussion of a proposed amendment to FRAP 29(a), I volunteered to explore the Supreme Court's rule on amicus briefs with particular regard to the treatment of Indian Tribes, foreign nations, and cities and counties. This memorandum explains the results of my research.

Current FRAP 29(a) provides as follows regarding amicus briefs:

> **(a) When Permitted.** The United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.

Current Supreme Court Rule 37.4 provides as follows:

> 37.4. No motion for leave to file an *amicus curiae* brief is necessary if the brief is presented on behalf of the United States by the Solicitor General; on behalf of any agency of the United States allowed by law to appear before this Court when submitted by the agency's authorized legal representative; on behalf of a State, Commonwealth, Territory, or Possession when submitted by its Attorney General; or on behalf of a city, county, town, or similar entity when submitted by its authorized law officer.

The "city, county, town or similar entity" language of Rule 37.4 makes it considerably broader than FRAP 29(a). The substance of Rule 37.4 has remained virtually unchanged since the Court first adopted such a rule in 1939 (then part of Rule 27). That said, the Court itself in 1995 changed the language to that above from previous versions, such as the 1990 version, which read as follows:

> 37.4. Consent to the filing of a brief of an *amicus curiae* is not necessary when the brief is presented on behalf of the United States by the Solicitor General; on behalf of any agency of the United States authorized by law to appear on its own behalf when submitted by the agency's authorized legal representative; on behalf of a State, Territory, or Commonwealth when submitted by its Attorney General; or on behalf of a political subdivision of a State, Territory, or Commonwealth when submitted by its authorized law officer.

The 1954 version was quite similar to the 1990 version, providing that:

> 42.4. Consent to the filing of a brief of an *amicus curiae* need not be had when the brief is presented for the United States sponsored by the Solicitor General; for any agency of the United States authorized by law to appear in its own behalf, sponsored by its appropriate legal representative; for a State, Territory, or Commonwealth sponsored by its Attorney General; or for a political subdivision of a State, Territory, or Commonwealth sponsored the authorized law officer thereof.

The 1954 version was in fact the first time the Court promulgated a separate rule specifically to address amicus briefs (Rule 42 – "Briefs Of An Amicus Curiae"). The first Supreme Court rule to address amicus briefs expressly in any way was promulgated in 1939. That rule (a subsection of Rule 27 – titled "Briefs"), states:

> 27.9. A brief of an *amicus curiae* may be filed when accompanied by written consent of all parties to the case, except that consent need not be had when the brief is presented by the United States or an officer or agency thereof and sponsored by the Solicitor General, or by a State or a political subdivision thereof.

Interestingly, the 1954 amicus brief rule language prompted a comment by Justice Black published in the U.S. reports accompanying the promulgation of the new rules. He wrote: "I have never favored the almost insuperable obstacles our rules put in the way of briefs sought to be filed by persons other than the actual litigants. Most of the cases before this Court involve matters that affect far more people than the immediate record parties. I think the public interest and judicial administration would be better served by relaxing rather than tightening the rule against *amicus curiae* briefs." 346 U.S. 946, 947 (1954) (Statement of Black, J.). Presumably he was referring to Rules 42.1, .2, and .3, all of which were not part of the prior version (Rule 27, promulgated in 1939), and all of which emphasized the requirement to have consent of all of the parties or in the alternative requiring a motion for leave to file, the latter which Rule 42.1 expressly noted was "not favored" prior to the Court's consideration of certiorari or a jurisdictional statement.

It appears that no Supreme Court rules prior to 1939 contain a provision addressing amicus briefs. I checked Supreme Court rules back to 1790 and found nothing on amicus curiae or amicus briefs. Thus, the origin of the modern Rule 37.4 appears to be Rule 27.9 as promulgated in 1939. *See* 306 U.S. 707-09 (1939).

The Court appears to promulgate rules and amendments on an ad hoc basis, with no regular schedule or pattern appearing from its past practices. Thus, the Court has re-promulgated its rules in their entirety on numerous occasions, going back as follows: 2007, 2005, 2003, 1999, 1997, 1995, 1990, 1980, 1970, 1967, 1954, 1939, 1932, 1928, 1925, 1911, 1907, 1884, 1858, 1843, 1828, 1816. The Court's first rules date to 1790 and appear to have been created ad hoc as issues arose, for example, appointing the first clerk of the court, *see* 5 U.S. (1 Cranch) xvi (1803) (order, dated Feb. 3, 1790, appointed John Tucker, Esq. of Boston as clerk and directed that "the clerk of this court do reside and keep his office at the seat of the national government, and that he do not practice, either

as an attorney or a counselor, in this court, while he shall continue to be clerk of the same"), or in original jurisdiction cases, which were some of the earliest on the Court's docket.[1] The Court also has occasionally promulgated an amendment to only a single rule or a handful of rules. *See, e.g.*, 373 U.S. 955 (1963) (inserting the following sentence after Rule 61: "The term 'state court' when used in these rules includes the Supreme Court of the Commonwealth of Puerto Rico, and references in these rules to the law and statutes of a state law include the law and statutes of the Commonwealth of Puerto Rico.").

A search for accounts of the history of amicus briefs in the Supreme Court produced a very illuminating article[2] that indicates amicus participation in the Supreme Court did not make its appearance until after 1820. Indeed, the first formal amicus curiae may have been Henry Clay who appeared under instructions from the State of Kentucky in the case of *Green v. Biddle*, 21 U.S. (8 Wheat.) 1 (1823). Even then, Clay's appearance was the exception, not counting the United States which with some regularity during the 19th century was permitted to intervene or otherwise participate in a variety of cases. *See, e.g., Florida v. Georgia*, 58 U.S. (17 How.) 478 (1854) (permitting U.S. to appear as an "amicus curiae" in an original jurisdiction case involving a boundary dispute between the two States). States apparently began receiving amicus curiae status during and following the Civil War. *See, e.g., Steamship Co. v. Jolliffe*, 69 U.S. (2 Wall.) 450, 454 (1864) (California permitted to file brief); *Mining Co. v. Consolidated Mining Co.*, 102 U.S. (12 Otto) 167, 168 (1880) (California and the U.S. allowed "to take part in the argument.")

Two other points the article suggests—one confirming my research and the other an interesting sidenote. First, the article declares that the Court did not formally adopt any amicus rules until the 20th century. Instead, the Court relied on its discretion to address amicus situations, as well the expertise of the Supreme Court bar to know when and how to make amicus requests to the Court. Second, as the article puts it (and the Henry Clay example illustrates), the "organizations were not regarded as the amicus but rather the lawyer himself."[3]

In any event, all of my research suggests that the first SCOTUS rule addressing amicus briefs appeared in 1939 and since then the three categories of amici that do not need consent in order to file such briefs (and now also are not required to disclose support or authorship under Sup. Ct. R. 37.6) are (1) the U.S. and its agencies, (2) the States, Commonwealths, and Territories, and (3) cities, counties, towns and similar entities. Thus, cities and counties always have been accommodated under the Supreme Court's rule, while Indian Tribes and foreign nations have never been accommodated.

After completing this research, I spoke with Chris Vasil, Deputy Clerk of the Supreme Court, on January 5, 2010, and he in turn spoke with Maj. Gen. (ret.) William Suter, Clerk of the Court. Neither of them could recall any discussion in the past 20 years about the question whether Indian Tribes or foreign nations might be given the

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[1] See Stephen R. McAllister, *Can Congress Create Procedures For The Supreme Court's Original Jurisdiction Cases?*, 12 The Green Bag 2D 281 (May 2009).
[2] Samuel Krislov, *The Amicus Curiae Brief: From Friendship To Advocacy*, 72 Yale L.J. 694 (1963).
[3] *Id.* at 703.

same status as the U.S., the States, and cities and counties in Rule 37.4 (and as a result, in Rule 37.6). Neither recalled any requests by tribes or foreign nations for inclusion in the Supreme Court rule, nor did they recall any argument about or even discussion of the topic inside the Clerk's Office or the Court.

The Deputy Clerk indicated that, of course, both Indian Tribes and foreign nations have filed amicus briefs in the Court, typically on the merits after cert. has been granted. He did not recall any instances of such amici being denied permission to file a brief so long as their request was timely made, and he indicated that in many instances the parties all consent to such filings, making it unnecessary for such amici to file a motion for leave to file with the Court.

The Deputy Clerk informed me that the 1995 change in Rule 37.4's language to refer to "a city, county, town, or similar entity" instead of the prior language ("a political subdivision of a State, Territory, or Commonwealth") was the result of cases in which disputes arose about whether particular local government entities were in fact "political subdivisions" of their states. He gave the example of a local school board, which strictly speaking is not a city, county or town, but might be considered in a sense a political subdivision. That said, the Deputy Clerk did not recall any discussion of tribes or foreign nations at the time the rules were amended in this regard in 1995.

Lastly, the Deputy Clerk indicated that the Supreme Court Clerk's office pays attention to changes in the FRAP and that the Court has in the past followed changes in the FRAP in considering and making changes to the Supreme Court's rules. Thus, he indicated that if the Appellate Rules Committee were to propose a change to FRAP 29 to account for Indian Tribes and/or foreign nations, the Clerk's Office at the Supreme Court likely would look carefully at any such changes.

Finally, I offer what little I know about the legal status of Indian Tribes vis-à-vis the States and local governments such as cities and counties. Legally, the status of Indian Tribes is like that of the States for some purposes, as Mr. Rey-Bear's letter of March 13, 2009, argues, but unlike the States for others. For example, the Supreme Court has held that neither States nor Indian Tribes are "persons" in litigation under 42 U.S.C. § 1983. *See Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989) (States are not "persons" who can be sued under § 1983); *Inyo County v. Paiute-Shoshone Indians of the Bishop Community*, 538 U.S. 701 (2003) (Tribes are not "persons" who can sue or be sued under § 1983). Municipal entities such as cities and counties, however, are "persons" under § 1983. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978). Part of the reasoning in these cases has been that the word "person" usually is not used to refer to "sovereigns" such as the States and Tribes, while municipal entities are viewed as more corporate and less sovereign in nature.

That said, the issue of statutory "person" status is complicated, with the Supreme Court holding in other contexts that both States and foreign nations are persons. *See, e.g., Georgia v. Evans*, 316 U.S. 159 (1942) (State is a "person" for purposes of suing under federal antitrust statutes); *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978) (foreign government is a "person for purposes of suing under federal antitrust statutes).

Given these holdings, presumably Tribes could sue under the federal antitrust statutes as "persons," though they clearly cannot sue or be sued as "persons" under § 1983.

The Supreme Court also has distinguished between the United States and States on the one hand, and Tribes on the other hand, for constitutional (Eleventh Amendment) immunity purposes, holding that both the United States and States may sue a State without running afoul of the immunity, *United States v. Mississippi*, 380 U.S. 128 (1965); *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657 (1838), while holding that the immunity prevents Tribes and foreign nations from suing States. *Blatchford v. Native Village*, 501 U.S. 775 (1991); *Monaco v. Mississippi*, 292 U.S. 313 (1934). And, as under § 1983, municipal entities are treated as lesser entities than States for constitutional immunity purposes, and thus can be sued because they do not partake of the immunity. *Lincoln County v. Luning*, 133 U.S. 529 (1890).

Speaking now personally, my strong impression is that the real issue here is "dignity". It may be that the Indian Tribes' requests to file amicus briefs are never denied in the Circuits, or that tribes only infrequently make such requests so that the situation only rarely arises. Nonetheless, Supreme Court Rule 37.4 may reflect a policy judgment (although it may actually be more a result of historical practice than deliberate policy choices) that (1) the United States, (2) the States, and (3) cities, counties and towns should not have to obtain consent of the parties or file a motion with the Court when they wish to participate in cases as an amicus, presumably because of these entities' stature and importance.

A strong argument can be made that the Indian Tribes and foreign nations are potential amici that in many cases may be at least as important and helpful to the courts as cities, counties, towns or other local government entities. FRAP 29(a) of course only includes the (1) United States (and its offers or agencies) and (2) States, Territories, Commonwealths, and the District of Columbia in the categories of those entities that do not need consent of the parties or leave of court to file an amicus brief. FRAP 29(a) does not include cities, counties, or towns. This difference between FRAP 29(a) and Supreme Court Rule 37.4 may be justifiable, but FRAP 29(a) certainly departs from the longstanding practice in the Supreme Court, which has included local government in its amicus rules for over 70 years, ever since the Court first promulgated a rule addressing amicus briefs in 1939.

There are strong arguments that the United States plays a unique role in the federal courts and federal litigation, and there are good arguments that the States are more substantial players in most instances than many if not all of the Indian Tribes. But if a decision were made to include cities, counties and towns in FRAP 29(a), then it is hard to see how also including even several hundred federally-recognized Indian Tribes in the rule would impose any greater burden on the courts, or impose any greater risks of collusion or behind-the-scenes maneuvering by litigants than would be present when thousands of cities, counties and towns were included.

MEMORANDUM

DATE: October 16, 2009

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 09-AP-B

This item arises from a comment submitted by Daniel Rey-Bear concerning the pending amendment to Appellate Rule 1. New Rule 1(b), which is on track to take effect December 1, 2010 (if the Supreme Court approves it and Congress takes no contrary action), will define the term "state," for purposes of the Appellate Rules, to include the District of Columbia and any United States commonwealth or territory. Mr. Rey-Bear, commenting on the proposed Rule 1(b), has proposed that federally recognized Indian tribes be included within the Rule's definition of "state." I enclose his March 13, 2009 and October 5, 2009 letters.

As the Committee noted at its spring 2009 meeting, Mr. Rey-Bear's suggestion is thoughtful and important and deserves careful study. Though the suggestion has implications for several Rules – Rules 22, 26, 29, 44, and 46 – it seems likely that the most significant rule in that group is Rule 29: Mr. Rey-Bear's comments indicate that the main impetus for his proposal is his view that Native American nations should be treated the same as states for purposes of amicus filings. He proposes that tribes should be entitled under Rule 29(a) to file amicus briefs without obtaining party consent or leave of court, and he also argues that tribes should not be subjected to the new authorship and funding disclosure requirement in proposed new Rule 29(c)(5).[1]

At the Committee's spring 2009 meeting, Doug Letter undertook to make initial inquiries among relevant federal government entities concerning the treatment of tribal litigants for the purposes of both Rule 29(a)'s provision for filing without party consent or court leave and proposed Rule 29(c)(5)'s provision concerning disclosure of amicus-brief authorship and funding. Pending the results of those inquiries, this memo briefly recapitulates my previous discussion of some of the issues raised by Mr. Rey-Bear's suggestion, and sketches some possible avenues for future empirical investigation.

I. An overview of issues raised by Mr. Rey-Bear's suggestion

Mr. Rey-Bear points out that Native American tribes, like states, are sovereign

[1] Like proposed Rule 1(b), proposed Rule 29(c)(5) will take effect on December 1, 2010, if the Supreme Court approves it and Congress takes no contrary action.

governments. That all three branches of the federal government recognize this fact, he suggests, "support[s] classification of federally recognized Indian tribes as 'states' along with the District of Columbia, federal territories, commonwealths, and possessions." He notes the interpretive canon that provides that statutes should be liberally construed in favor of Native American tribes, and he cites court decisions that "have found tribes to qualify as 'territories' under various statutes." He notes that tribes "have greater status than territories."

Mr. Rey-Bear also focuses his arguments on the proposed definition's effect on the operation of Rules 22, 26, 29, 44 and 46. He asserts that it would be appropriate for Rule 22 to apply to habeas proceedings under the Indian Civil Rights Act by petitioners seeking to challenge their detention by an Indian tribe. He argues that including Indian tribes within Rule 1(b)'s definition of "state" would not affect the determination of legal holidays under Rule 26(a) "because there is no known federally established Indian reservation where a circuit court's principal office or a federal district court is located." He argues that Native American tribes should be treated like states for purposes of Rule 29's amicus-filing provisions, and notes that this concern "is the main reason" for his submission of the comment. He points out that "[l]ike states, Indian tribes often find the need to submit amicus briefs in important cases affecting their sovereign interests," and he argues that tribes should not be required to seek party consent or court permission for such filings. Noting the proposed amendment to Rule 29(c), Mr. Rey-Bear argues that treating tribes like states "is especially warranted given the further disclosure requirements that the proposed revision to Rule 29 will impose on nongovernmental amicus briefs." Turning to Rule 44, Mr. Rey-Bear argues that "[i]t would be very appropriate and valuable for Indian tribes to be included in the notice and certification provided for in this Rule." Finally, Mr. Rey-Bear asserts that the inclusion of Indian tribes within Rule 1(b)'s definition would also function appropriately in connection with Rule 46's attorney-admission provision; "tribally licensed attorneys should be entitled to the same eligibility as attorneys who are admitted to practice solely in a territory."

A. Rule 22(b)

In prior memos, I have suggested that including territories and the District of Columbia within the definition of "state" would not alter the operation of Rule 22(b)'s certificate-of-appealability provision. Cases already exist that treat the District of Columbia, Guam, Puerto Rico and the Virgin Islands as states for purposes of the statutory provisions concerning federal habeas corpus for state prisoners; thus, encompassing these entities within "state" for purposes of Rule 22(b) would accord with current practice. Though the status of American Samoa and the Northern Mariana Islands is less clear, I reasoned that defining "state," for FRAP purposes, to include all these entities should not cause a problem in the application of Appellate Rule 22(b): If, for example, American Samoa is not subject to the federal habeas framework, the question of Rule 22(b)'s applicability to American Samoa will simply never arise.

The analysis differs with respect to Native American tribes. Federal law does authorize habeas petitions by tribal prisoners, but the statutory framework is distinct from that which applies to state prisoners. The statute in question is 25 U.S.C. § 1303, which provides that "[t]he

privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." Section 1303 does not in terms require a petitioner whose claim has been dismissed by the district court to obtain a certificate of appealability in order to appeal. Though I have not yet had an opportunity to research the question, it is not self-evident that a certificate of appealability is required for appeals by petitioners seeking to challenge detention by a tribe. I did find one case which mentioned that the petitioner had obtained a certificate of probable cause (the pre-AEDPA equivalent of a certificate of appealability). *See Wetsit v. Stafne*, 44 F.3d 823, 825 (9th Cir. 1995). But on a quick search I have not found any cases requiring a certificate of appealability. Moreover, it is difficult to see how the COA requirement in 28 U.S.C. § 2253(c) could coherently apply to petitions by prisoners held by tribes. Section 2253(c) permits the grant of a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." As Mr. Rey-Bear points out, the provisions in the Bill of Rights do not constrain Native American tribes, and therefore a claim by one held by a tribe would typically assert, not a constitutional violation, but rather a statutory violation. Admittedly, the statutory violation in question would ordinarily be one that is grounded in a provision of the Indian Civil Rights Act, and the ICRA guarantees by statute a number of rights similar to those guaranteed (as against state and federal government actors) by the Constitution's Bill of Rights. Nonetheless, it is far from clear that the COA requirement set by Section 2253(c) and reflected in Rule 22 applies to petitions by those held by Native American tribes. It would seem advisable to determine – in coordination with the Criminal Rules Committee – whether petitioners seeking to challenge detention by a tribe currently must obtain a certificate of appealability in order to appeal a district court judgment dismissing the petition. If they do not, then the inclusion of tribes within the definition of "state" for purposes of Rule 22 would alter current practice.

B. Rule 26(a)

For forward-counted periods, Rule 26(a)(6)(C)[2] includes within the definition of "legal holiday" a "day declared a holiday by the state where either of the following is located: the district court that rendered the challenged judgment or order, or the circuit clerk's principal office." Mr. Rey-Bear's October 2009 letter states that including tribes within the definition of "state" will not affect the determination of legal holidays under Rule 26(a) because no district courts and no principal circuit court offices are located on federally established Indian reservations. Assuming that Mr. Rey-Bear is correct on this point, that would remove one question about the proposed inclusion of Native American tribes within the definition of "state"; on that view, the analysis of Rule 26(a) weighs neither in favor of the proposed inclusion nor against it.

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[2] My discussion in the text focuses on Rule 26 as it will read effective December 1, 2009, absent contrary action by Congress. Current Rule 26(a) includes a substantially similar provision incorporating state holidays, *except* that the current provision applies to both forward-counted and backward-counted periods.

C. Rule 29

Mr. Rey-Bear's central concern relates to Rule 29, and it seems very worthwhile to consider the change that he proposes – namely, an amendment that would add federally recognized Indian tribes to the list of entities that need not seek party consent or court permission in order to file an amicus brief. It should be noted that, in this regard, the amendments as published will simply maintain current law. That is to say, under current law, Rule 29(a) lists the entities that may file amicus briefs without court permission or party consent: "The United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia." Under the proposed amendments, the list will be the same: Rule 29(a) will list – as the entities that may file amicus briefs without court permission or party consent – "[t]he United States or its officer or agency, or a state," and Rule 1(b) will define "state" to "include[] the District of Columbia and any United States commonwealth or territory." Therefore, the question whether to add Native American tribes to the list of exempt filers might be seen as a step beyond the scope of the published amendments. On the other hand, as Mr. Rey-Bear points out, the pending amendment to Rule 29(c), by imposing a disclosure requirement and applying that requirement to entities not exempted under Rule 29(a), does alter the obligations of non-exempt amici, including federally recognized tribes.

This aspect of Mr. Rey-Bear's proposal is discussed further in Part II below.

D. Rule 44

Mr. Rey-Bear's suggestion concerning Rule 44 also merits serious consideration. His core concern – that tribes ought to receive the same notification as the state and federal governments do when the validity of a statute is at issue – is a reasonable one. At least two questions seem to warrant further consideration. One concerns the advisability of coordination, on this question, with the Civil Rules Committee.[3] Another concerns the applicability of Rule 44's current language in the context of tribal legislation. Though I cannot presume to speak for Indian tribes, I would think that they might find such a notification provision important whenever the *validity* of a tribal law is challenged in litigation, whether or not the challenge is a *constitutional* one. Indeed, one might also question whether all Indian tribes would consider it wise to support the adoption of a notification requirement that is premised (as currently drafted) on the notion that the challenge is *constitutional* in nature. Indian tribes may in at least some instances consider it important to emphasize that a particular limitation on tribal authority is not constitutional but rather is set by federal common law and thus can be altered by Congress. *See generally United States v. Lara*, 541 U.S. 193, 196 (2004) (holding that "Congress has the constitutional power to relax restrictions that the political branches have, over time, placed on the exercise of a tribe's inherent legal authority").

E. Rule 46

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[3] Civil Rule 5.1 contains provisions similar to those in Appellate Rule 44.

Mr. Rey-Bear's suggestion concerning Rule 46 is likewise worth considering, but that consideration might benefit from additional research. As Mr. Rey-Bear notes, a large number of tribes currently have tribal courts. According to the federal government, at least 175 of the federally recognized Indian tribes in the lower 48 states have "a formal tribal court."[4] Mr. Rey-Bear states that tribal courts "typically provide for admission to practice by attorneys based in large part on documented prior admission and good standing before the highest court or bar of a state or the District of Columbia." If that is the case with respect to all tribes, then it would seem that including tribes within the definition of "state" for purposes of Rule 46 would not have any practical effect. Although Mr. Rey-Bear also argues that Indian tribes should be treated with respect equivalent to that accorded states and territories, that principle – with which I agree – does not necessarily establish that admission to practice before a tribe's highest court should qualify an attorney for admission to practice before a federal court of appeals. After all, foreign nations are treated the same as Indian tribes for purposes of current Rule 46, and the fact that admission to practice in a foreign nation does not qualify an attorney for admission to practice in a federal court of appeals should not be taken as a sign of disrespect to the nation in question.

II. Some possible ways to study Mr. Rey-Bear's proposal concerning Rule 29

The discussion at the Committee's spring 2009 meeting suggested that members might find it helpful to obtain data concerning the frequency with which Native American tribes file amicus briefs by consent of the parties, file amicus briefs with court permission, or are denied leave to file amicus briefs.

I used some Westlaw searches to obtain an approximate sense of possible answers to the first two questions. As a very rough (and under-inclusive) method of searching for amicus filings by Native American nations, I ran the following search in Westlaw's CTA-BRIEFS database: pr,ti((amicus) /s (tribe nation indian "native american")).[5] That search retrieved 120 documents (not all of which were relevant). To get a sense of how many of the search results were relevant, I skimmed the first 30 results. Those 30 results included 20 amicus briefs filed by Indian tribes (either alone or together with other amici). Of those 20 amicus briefs, six stated

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[4] Steven W. Perry, Census of Tribal Justice Agencies in Indian Country, 2002, at iii (December 2005), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/ctjaic02.pdf. I say "at least" because the survey report states that 314 of the 341 federally recognized tribes in the lower 48 states participated in the survey, and thus the numbers in the report may be slightly lower than the actual numbers for all 341 tribes.

[5] The search is under-inclusive because Westlaw's CTA-BRIEFS database contains "*selected* briefs filed with the U.S. Court of Appeals" (emphasis added). Moreover, though the database includes filings in some circuits as far back as the 1970s, its coverage of other circuits commences much more recently (for the Tenth Circuit, as recently as 2000).

that the parties had consented to the brief's filing; eight appeared to be filed by permission;[6] and for the remaining six, the basis for filing was not discernable from the brief. The briefs I skimmed indicate that Native American tribes file amicus briefs in cases involving a wide range of issues. Consent to these amicus filings is often given,[7] but perhaps more often the amicus finds it necessary to seek leave of court.[8]

Because the Westlaw database evidently includes only briefs that were filed, searches in that database will not shed light on one of the more salient questions – namely, how often Native American tribes fail to obtain party consent and also are denied leave to file an amicus brief. I wonder whether it might be possible to search the CM/ECF replication databases for relevant docket entries in the courts of appeals – perhaps using something like the terms "motion /s (tribe indian) /s (amicus amici brief) /s denied." I have not yet consulted Marie Leary about the feasibility of such a study, because before asking the Federal Judicial Center to invest time in such research it seemed advisable to await both the results of Doug Letter's inquiries and the Committee's further consideration of how it would prefer to proceed.

Encls.

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[6] I am assuming that the briefs in Westlaw's database were actually filed – i.e., that if permission was sought, it was granted.

[7] As another very rough measure of the proportion of briefs that were filed by consent, I ran the following "locate" command within the search results: (brief 29(a)) /s consent!. This located 41 of the 120 documents – suggesting that a significant proportion, but not a majority, of the tribal amicus briefs in the database were filed with party consent.

[8] For an example of a case in which the United States refused to consent to the filing of an amicus brief by a tribe, see Motion of Amici Curiae Oglala Sioux Tribe, Hemp Industries Association, and Vote Hemp for Leave to File Accompanying Amici Brief, *United States v. White Plume*, Nos. 05-1654 & 05-1656 (8th Cir.), 2005 WL 5628783.

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October 5, 2009

VIA EMAIL AND FIRST-CLASS MAIL

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Rules_Comments@ao.uscourts.gov
Washington, D.C. 20544

Re: Proposed Amendment to Appellate Rule 1 Regarding Indian Tribes (Docket No. 08–AP-007)

Dear Mr. McCabe:

This letter follows up on my letter of March 13, 2009 (enclosed here), which proposed that new Federal Rule of Appellate Procedure 1(b), which will define the term "state" for purposes of the Appellate Rules, be revised to include federally recognized Indian tribes.

Per a telephone discussion on May 29, 2009 with Professor Catherine Struve, the Reporter for the Advisory Committee on Appellate Rules, I understand that my proposal may be put on the discussion agenda for the Committee's fall meeting. And from the Judiciary's Federal Rulemaking website and the Rules Committee Support Office, I understand that the Committee's next meeting is scheduled for November 5-6, 2009. Given that, I write this letter to reaffirm my proposal and to request that it be considered at the Committee's upcoming meeting. This letter also addresses three points regarding my proposal noted in Professor Struve's memo of March 27, 2009 to the Committee, which addressed comments on the proposed Rule 1(b) in advance of the Committee's April 2009 meeting. The first two of these matters were discussed with Professor Struve on May 29, 2009.

First, Professor Struve's memo on page 4 states the following:

> Mr. Rey-Bear's opening comments point out that Native American tribes are sovereign governments and that they should be treated with the dignity accorded to other sovereigns. This point is correct, but it does not in itself establish that Indian tribes should be included in the definition of "state" for purposes of the Appellate Rules. Foreign nations are also sovereigns, and they are not included within the definition of "state." Thus, it seems to me, excluding tribes from the definition of "state" carries no necessary implication of disrespect to tribes as sovereigns.

Unlike foreign sovereigns, which by definition are foreign to the federal system of government in the United States, Indian tribes are "domestic dependant nations," *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831), which are "physically within the territory of the United States and subject to ultimate federal control," *United States v. Wheeler*, 435 U.S. 313, 322 (1978). Indian tribes therefore constitute one of the distinct classes of governments that comprise the United States, along with the fifty states, the District of Columbia, and the various United States commonwealths and territories. Given this, there is a substantial reason for distinguishing Indian tribes from foreign nations, and including the former but not the latter with the definition of "state" in proposed Rule 1(b). Otherwise, Indian tribes will remain the only domestic sovereign in the United States not accorded equal status under the Rules, and Indian tribes will not even be accorded the same status as Guam, American Samoa, the U.S. Virgin Islands, Puerto Rico, and the Northern Mariana Islands, which are not even independent sovereigns with inherent powers like Indian tribes and states, *see Wheeler*, 435 U.S. at 321-23. Excluding Indian tribes from Rule 1(b) unduly disrespects their domestic sovereign status.

Second, Professor Struve's memo on page 5 notes that my prior letter did not address application of Rule 1(b) to Rule 26(a), regarding time computation, which is scheduled to be amended effective December 1, 2009. The amended version of Rule 26 that has been forwarded to Congress and will become effective later this year provides generally that in any time period calculation "if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday." Rule 26(a)(1)(C); Rule 26(a)(2)(C). Rule 26 then defines "legal holiday" to include federal holidays and "any other day declared a holiday by the state where either of the following is located: the district court that rendered the challenged judgment or order, or the circuit clerk's principal office." Rule 26(a)(6)(C).

Revision of Rule 1(b) to include federally recognized Indian tribes would not have any affect on this application of Rule 26 because there is no known federally established Indian reservation where a circuit court's principal office or a federal district court is located. For reference, compare the listings of locations of circuit clerks' principal offices and federal district courts, organized by circuit, available at http://www.uscourts.gov/courtlinks/, with maps of all federally recognized Indian reservations in the United States, organized by state, available at http://www.nationalatlas.gov/printable/fedlands.html#list.

Finally, as noted on page 3 of my prior letter and on page 3 of Professor Struve's memo, the main reason for my proposing inclusion of Indian tribes in the definition of "state" in Rule 1 is the additional burdens otherwise placed on Indian tribes regarding amicus curiae filings, especially under the revised version of Rule 29. Just since the submission of my comments, my firm has filed another appellate amicus brief that reiterates my concern on this

point. *See* Navajo Nation's and Pueblo of Laguna's *Amicus Curiae* Brief Supporting the Jicarilla Apache Nation and Opposing Mandamus Petition, *In re United States of America*, No. 2009-M908 (Fed. Cir. Aug. 13, 2009). I accordingly hope that the Committee with consider this comment and revise Rule 1 so that Indian tribes will be treated like all other sovereign and territorial governments in the United States and not be subject to additional disclosure and filing requirements under revised Rule 29.

Thank for your you attention to this matter.

Very truly yours,

NORDHAUS LAW FIRM, LLP

Daniel I.S.J. Rey-Bear
Board Certified Specialist
Federal Indian Law

Enclosure: Letter from Daniel I.S.J. Rey-Bear, Nordhaus Law Firm LLP, to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure (March 13, 2009).

cc (w/encl.): Prof. Catherine Struve, Reporter, Advisory Committee on Appellate Rules

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March 13, 2009

VIA EMAIL AND FIRST-CLASS MAIL

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Rules_Comments@ao.uscourts.gov
Washington, D.C. 20544

Re: Proposed Federal Rule of Appellate Procedure 1(b)

Dear Mr. McCabe:

This letter provides a comment on the proposed revision of the Federal Rules of Appellate Procedure, as stated in the July 29, 2008 revised Report of the Advisory Committee on Appellate Rules. While I recognize that the comment period for this rulemaking ended on February 17, 2009, I only learned of this proposed amendment since then, and so submit my comments now. I hope that the Committee will consider this comment. In particular, I am submitting this comment to propose that new Rule 1(b), which will define the term "state" for purposes of the Appellate Rules, be revised to include federally recognized Indian tribes. As explained below, federal law broadly and consistently recognizes that Indian tribes are sovereigns like states, Indian tribes should be treated at least the same as territories, which are already included in the proposed Rule, and Indian tribes should be expressly included in the definition of "state" under the Appellate Rules.

Federal Law Recognizes that Indian Tribes are Sovereigns like States.

The commerce clause of the Unites States Constitution recognizes Indian tribes as sovereign entities alongside the states. U.S. Const. art. I, § 8, cl. 3. And each branch of the federal government likewise recognizes that Indian tribes are sovereign governments. For example, the U.S. Supreme Court has consistently recognized that Indian tribes are "domestic dependent nations," *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831), with "retained sovereignty," *United States v. Wheeler*, 435 U.S. 313, 328 (1978), and the "capacity of a separate sovereign." *United States v. Lara*, 541 U.S. 193, 210 (2004). Moreover, Indian tribal sovereignty is inherent and pre-constitutional, it inheres in Indian tribes themselves, and it does not flow from the United States Constitution or from any delegation of federal authority. *Wheeler*, 435 U.S. at 322-23; *Talton v. Mayes*, 163 U.S. 376, 380-84 (1896); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 581 (1832).

Congress also recognizes tribes as sovereign governments. Numerous examples abound in Title 25 of the United States Code, which wholly concerns Indians, including the recognition of tribal powers of self-government in the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303. Congress also has recognized the status of tribal governments more generally, such as the requirement that "[e]ach agency . . . develop an effective process to permit elected officers of State, local, and *tribal governments* . . . to provide meaningful and timely input in the development of regulatory proposals containing significant Federal intergovernmental mandates." 2 U.S.C. § 1534(a) (emphasis added).

The executive branch also recognizes that Indian tribes constitute sovereign governments. For example, Executive Order 13175 entirely mandates "Consultation and Coordination with Indian Tribal *Governments*." 65 Fed. Reg. 67,249 (Nov. 6, 2000) (emphasis added). And Executive Order 13,336 specifically reaffirmed "the unique political and legal relationship of the Federal Government with tribal governments" and that '[t]his Administration is committed to continuing to work with these Federally recognized tribal governments on a government-to-government basis . . . ." 69 Fed. Reg. 25,295 (May 5, 2004). Altogether, these judicial decisions, congressional enactments, and executive policy pronouncements support classification of federally recognized Indian tribes as "states" along with the District of Columbia, federal territories, commonwealths, and possessions.

Indian Tribes Should be Treated at Least the Same as Territories.

The current proposed revision to Appellate Rule 1(b) defines "state" to include "the District of Columbia and any United States commonwealth or territory." Whether a given political entity "comes within a given congressional act applicable in terms to a 'territory' depends upon the character and aim of the act." *People of Puerto Rico v. Shell Co. (Puerto Rico), Ltd.*, 302 U.S. 253, 258 (1937). Thus, for a congressional enactment, it is not enough that Congress did not consider the situation at issue; rather, courts must determine whether Congress would have varied the statutory language if Congress had foreseen it. *Id.* at 257. Courts addressing this issue accordingly must go beyond the statutory words themselves and consider "the context, the purposes of the law, and the circumstances under which the words were employed." *Id.* at 258. Moreover, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985).

Under this analysis, both federal and state courts have found tribes to qualify as "territories" under various statutes. *See, e.g., United States ex rel. Mackey v. Coxe*, 59 U.S. 100, 103-04 (1855) (finding Cherokee Nation to be a territory under federal statute governing recognition of estate administrators); *National Labor Relations Board v. Pueblo of San Juan*,

276 F.3d 1186, 1198 (10th Cir. 2002) (en banc) (treating Indian tribes as states and territories under the National Labor Relations Act); *Tracy v. Superior Court of Maricopa County*, 810 P.2d 1030, 1035-46 (Ariz. 1991) (holding that tribes qualify as territories under the Uniform Act to Secure the Attendance of Witnesses); *Jim v. CIT Financial Services Corp.*, 533 P.2d 751, 752 (N.M. 1975) (holding that tribes constitute territories under the federal full faith and credit statute). Indian tribes therefore should be accorded the same status under proposed Appellate Rule 1(b).

Indeed, the Supreme Court has expressly recognized that Indian tribes have a greater status than territories. *Wheeler*, 435 U.S. at 321-23. Specifically, while Indian tribes retain "'inherent powers of a limited sovereign which has never been extinguished[,]" territorial governments are "'entirely the creation of Congress'" and not "an independent political community like a State, but . . . 'an agency of the federal government.'" *Id.* at 321, 322. This distinction readily supports inclusion of Indian tribes within the definition of "state" alongside "territories" under the Appellate Rules.

Indian Tribes Should Be Included in the Definition of "State" under the Appellate Rules.

Each of the references to "state" in the Appellate Rules properly should encompass Indian tribes. As noted in the Advisory Committee report, these references include Appellate Rules 22, 29, 44, and 46. First, Rule 22 concerns federal "habeas corpus proceeding[s] in which the detention complained of arises from process issued by a state court[.]" Fed. R. App. P. 22(b)(1). This certainly should encompass Indian tribes, since the Indian Civil Rights Act expressly recognizes that "[t]he privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." 25 U.S.C. § 1303.

Next, Rule 29 provides that "a State, Territory, Commonwealth, or the District of Columbia may file an amicus-curiae brief without the consent of the parties or leave of the court." Fed. R. App. P. 29(a). The failure to expressly include Indian tribes within the scope of this rule is the main reason for my submission of this comment. Like states, Indian tribes often find the need to submit amicus briefs in important cases affecting their sovereign interests. *See, e.g., Amoco Production Co. v. Watson,* 410 F.3d 722 (D.C. Cir. 2005) (Jicarilla Apache Nation and Southern Ute Indian Tribe, amici curiae); *Independent Petroleum Assoc. of America v. Dewitt,* 279 F.3d 1036 (D.C. Cir. 2002) (same); *South Dakota v. United States Dep't of the Interior*, 69 F.3d 878 (8th Cir. 1995), *cert. granted, vacated, & remanded,* 519 U.S. 919 (1996) (Jicarilla Apache Nation, Pueblo of Laguna, and Pueblo of Santa Ana, amici curiae). Unfortunately, because Indian tribes are not expressly included within the terms of Rule 29(a), they must seek consent of parties and obtain leave of the court out of an abundance

of caution, even as they assert that they properly should qualify under the Rule. Imposition of these additional requirements is unwarranted given the sovereign governmental status of Indian tribes. Instead, the classification of Indian tribes along with other governments under the Appellate Rules is especially warranted given the further disclosure requirements that the proposed revision to Rule 29 will impose on nongovernmental amicus briefs.

Next, Rule 44 provides for notice to the court clerk and certification to a state attorney general if a party questions the constitutionality of a state statute in a proceeding in which the state or its agency, officer, or employee is not a party in an official capacity. Fed. R. App. P. 44(b). It would be very appropriate and valuable for Indian tribes to be included in the notice and certification provided for in this Rule since the Supreme Court has recognized that federal constitutional proscriptions do not apply to Indian tribes, *Talton*, 163 U.S. at 384; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 & n.7 (1978), and expressly held that analogous claims against Indian tribes under the Indian Civil Rights Act are barred by their sovereign immunity from suit, except for habeas corpus claims as referenced above, *Martinez*, 436 U.S. at 59. Existing Supreme Court authority and the sovereign governmental status of Indian tribes warrants according them the same level of process in this regard as the proposed rule revision would provide to the District of Columbia and federal territories, commonwealths, and possessions.

Finally, Rule 46 provides as follows:

> An attorney is eligible for admission to the bar of a court of appeals if that attorney is of good moral and professional character and is admitted to practice before the Supreme Court of the United States, the highest court of a state, another United States court of appeals, or a United States district court (including the district courts for Guam, the Northern Mariana Islands, and the Virgin Islands).

Fed. R. App. P. 46(a)(1). Indian tribes should be included within the scope of this Rule because the Supreme Court has recognized that "[t]ribal courts play a vital role in tribal self-government . . . and the Federal Government has consistently encouraged their development." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14-15 (1987); *see also* Indian Tribal Justice Act, 25 U.S.C. §§ 3601-31; Indian Tribal Justice Technical & Legal Assistance Act, 25 U.S.C. §§ 3651-81; Sandra Day O'Connor, *Lessons from the Third Sovereign*, 33 Tulsa L.J. 1 (1997).

In particular, more than 140 Indian tribes currently have tribal courts, which often are structured similar to state courts. Cohen's Handbook of Federal Indian Law (Nell Jessup Newton ed. 2005), § 4.04[3]c][iv], at 265, 270. These tribal courts typically provide for

admission to practice by attorneys based in large part on documented prior admission and good standing before the highest court or the bar of a state or the District of Columbia. *See, e.g.*, Blackfeet Tribal Law & Order Code § 9-10; Cherokee Nation Supreme Court Rule 132; Hopi Indian Tribe Law & Order Code § 1.9.3.2; Jicarilla Apache Nation Code § 2-9-7(A); Nez Perce Tribal Code § 1-1-36(b); Winnebago Tribal Code § 1-402(1). Accordingly, an attorney admitted to practice before the highest court of an Indian tribe is almost necessarily already admitted to practice before the highest court of a state. Therefore, given the status of Indian tribes relevant to territories as discussed above, tribally licensed attorneys should be entitled to the same eligibility as attorneys who are admitted to practice solely in a territory, such as Guam, the Northern Mariana Islands, or the Virgin Islands.

In conclusion, numerous considerations support inclusion of federally recognized Indian tribes within the definition of a "state" in the proposed revision of Appellate Rule 1(b).

Thank for your you attention to this matter.

Very truly yours,

NORDHAUS LAW FIRM, LLP

Daniel I.S.J. Rey-Bear
Board Certified Specialist
Federal Indian Law

cc: John Dossett, National Congress of American Indians
Richard Guest, Native American Rights Fund
Governor John Antonio, Pueblo of Laguna
Governor Bruce Sanchez, Pueblo of Santa Ana
Governor Ruben A. Romero, Pueblo of Taos

TAB 7A

MEMORANDUM

DATE: March 13, 2010

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 09-AP-C

As the Committee discussed at the fall 2009 meeting, the Bankruptcy Rules Committee is reviewing Part VIII of the Bankruptcy Rules – the rules that govern appeals from bankruptcy court to a district court or bankruptcy appellate panel. These rules were originally modeled on the Appellate Rules, but they have not always been updated to reflect changes to the Appellate Rules over time. The current review is designed to consider amendments that clarify the Part VIII rules and make certain other improvements, while also taking account of new developments such as the prevalence of electronic filing.

The project to revise Part VIII of the Bankruptcy Rules is an impressive undertaking. The Appellate Rules Committee should coordinate closely with the Bankruptcy Rules Committee so as to ensure a good fit between the Appellate Rules and the Part VIII Rules on issues relating to direct permissive appeals under Section 158(d)(2) and also on timing issues relating to rehearing motions. In both these connections the Appellate Rules Committee stands to benefit from the expertise and guidance of participants in the Part VIII revision project.

More generally, the Part VIII revision project will provide models for possible future Appellate Rules amendments. A particularly noteworthy aspect of the Part VIII project is its effort to take account of the changes wrought by the shift to electronic filing. The bankruptcy courts are, of course, well ahead of the courts of appeals in implementing this shift. Their experience provides a useful model for possible changes that – in time – may become appropriate for adoption in the Appellate Rules.

The Bankruptcy Rules Committee committed this review, in the first instance, to its Subcommittee on Privacy, Public Access, and Appeals. The Subcommittee held an open meeting in Boston on September 30, 2009, and is continuing its deliberations by conference call this spring. The resulting proposals will be published for comment, at the earliest, in summer 2011. I anticipate that the Committee will be asked to comment on the draft during fall 2010 and/or spring 2011. In the meantime, if members are interested in seeing the current draft of the Part VIII proposals, please let me or James Ishida know.

TAB 7B

MEMORANDUM

DATE: March 13, 2010

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 09-AP-D

John Kester, a member of the Standing Committee, has suggested that the Committee consider the implications of *Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599 (2009).[1] Mr. Kester wrote to Judge Rosenthal:

> Probably you are aware of the Supreme Court's decision ... in Mohawk Industries, Inc. v. Carpenter ... , which dealt with whether certain attorney-client-privilege rulings are appealable under the Cohen doctrine, and in the course of its holding (and even more in the concurring opinion) referred to the authority to deal with such issues through the rulemaking process. One could read it all as an invitation to bring some order to the somewhat ad hoc Cohen jurisprudence through rulemaking.
>
> I have no particular view on whether our body should step into this, or, if it did, what and how extensive the answers should be. It seemed to me that the most one would do at this point, if anything, would be to refer the topic to the Appellate Advisory Committee for them to ponder ....

Part I of this memo summarizes the *Mohawk Industries* decision. Part II considers possible rulemaking responses to the decision. Part III concludes by suggesting that such rulemaking responses should proceed only on the basis of empirical data concerning their likely benefits and costs.

I. The *Mohawk Industries* decision

In *Mohawk Industries*, 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.

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[1] I enclose a copy of the decision.

The collateral order doctrine, instituted by *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47 (1949), treats a non-final order as a final judgment – for purposes of taking an appeal under 28 U.S.C. § 1291 – if the order "[is] conclusive, ... resolve[s] important questions completely separate from the merits, and ... would render such important questions effectively unreviewable on appeal from final judgment in the underlying action." *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994). Justice Sotomayor, writing for the Court in *Mohawk Industries*, stressed the need to cabin the collateral order doctrine because interlocutory appeals can cause inefficiency and can interfere with the district judge's capacity to manage the litigation. *Mohawk Industries*, 130 S. Ct. at 605.

The third of the three *Cohen* elements proved dispositive in *Mohawk Industries*: the Court held that orders requiring disclosure of assertedly attorney-client-privileged information could be adequately reviewed by means other than through the collateral order doctrine. This element, the Court reasoned, focuses on the relevant category of claims and asks "whether delaying review until the entry of final judgment 'would imperil a substantial public interest' or 'some particular value of a high order.'" *Mohawk Industries*, 130 S. Ct. at 605 (quoting *Will v. Hallock*, 546 U.S. 345, 352-53 (2006)). The Court noted the important interests served by the attorney-client privilege, which promotes full communications between lawyer and client, facilitates legal counseling and advocacy, and thereby furthers the interests of the justice system. *See id.* at 606. But the Court concluded that excluding attorney-client privilege disputes from appealability through the collateral order doctrine would not significantly dilute the privilege's useful effects. The Court found it implausible that clients would think far enough ahead to be deterred from frank communications with their lawyers based on potential barriers to appealing a future adverse privilege ruling. Moreover, the Court reasoned that even if a client were to think so far ahead, such a far-sighted client would perceive other possible avenues for obtaining appellate review of such rulings (i.e., appeals by permission under 28 U.S.C. § 1292(b), mandamus petitions, or disobeying the ruling and thus potentially triggering an appealable contempt order). *See id.* at 607-08. In sum, the Court viewed the incremental benefits (to the privilege) of collateral-order review as doubtful, and it feared that including attorney-client privilege disputes within the collateral order doctrine would prove costly – both because those appeals could themselves burden the courts of appeals and because it would be difficult to distinguish attorney-client privilege disputes from "orders implicating many other categories of sensitive information." *Id.* at 609.

In the opinion's concluding section – which was joined by all members of the Court – Justice Sotomayor stressed that any further consideration of the petitioner's arguments for expanded appellate review of attorney-client privilege rulings should take place within the rulemaking process:

> In concluding that sufficiently effective review of adverse attorney-client privilege rulings can be had without resort to the Cohen doctrine, we reiterate that the class of collaterally appealable orders must remain "narrow and selective in its membership." *Will*, 546 U.S., at 350.... This admonition has acquired special force in recent years with the enactment of legislation designating rulemaking,

> "not expansion by court decision," as the preferred means for determining whether and when prejudgment orders should be immediately appealable. *Swint* [*v. Chambers County Comm'n*], 514 U.S. [35,] 48 [(1995)]. Specifically, Congress in 1990 amended the Rules Enabling Act, 28 U.S.C. § 2071 *et seq.*, to authorize this Court to adopt rules "defin[ing] when a ruling of a district court is final for the purposes of appeal under section 1291." § 2072(c). Shortly thereafter, and along similar lines, Congress empowered this Court to "prescribe rules, in accordance with [§ 2072], to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under [§ 1292]." § 1292(e). These provisions, we have recognized, "warran[t] the Judiciary's full respect." *Swint*, 514 U.S., at 48....
>
> Indeed, the rulemaking process has important virtues. It draws on the collective experience of bench and bar, see 28 U.S.C. § 2073, and it facilitates the adoption of measured, practical solutions. We expect that the combination of standard postjudgment appeals, § 1292(b) appeals, mandamus, and contempt appeals will continue to provide adequate protection to litigants ordered to disclose materials purportedly subject to the attorney-client privilege. Any further avenue for immediate appeal of such rulings should be furnished, if at all, through rulemaking, with the opportunity for full airing it provides.

Mohawk Industries, 130 S. Ct. at 609.

Justice Thomas joined in the discussion quoted immediately above and in the judgment, but wrote separately to criticize the rest of the opinion for the Court. He argued that the Court should have eschewed any analysis of whether attorney-client privilege disputes could fit within the collateral order doctrine – in part because, in his view, that analysis might appear to pre-judge issues that could come under consideration in the course of any examination of this area in the rulemaking process. "Accordingly," Justice Thomas concluded, "I would leave the value judgments the Court makes in its opinion to the rulemaking process, and in so doing take this opportunity to limit – effectively, predictably, and in a way we should have done long ago – the doctrine that, with a sweep of the Court's pen, subordinated what the appellate jurisdiction statute says to what the Court thinks is a good idea." *Mohawk Industries*, 130 S. Ct. at 612 (Thomas, J., concurring in part and in the judgment).

II. Possible rulemaking responses to *Mohawk Industries*

The Committee may wish to consider whether any rulemaking response is warranted in the wake of *Mohawk Industries*. Such a response could range from one that focuses on attorney-client privilege rulings to one that attempts a broader rationalization of the areas currently covered (or not covered) by the collateral order doctrine.

As the Court observed in *Mohawk Industries*, the rulemakers have authority to provide

for immediate appeals of various types of orders – either by defining the relevant decision as final, see 28 U.S.C. § 2072(c), or by providing for interlocutory appeals, see 28 U.S.C. § 1292(e).[2]

Any proposal to expand the availability of immediate appellate review for orders rejecting claims of attorney-client privilege would raise two general sets of issues: First, would the benefits of such an expansion outweigh its costs? And second, if such an expansion were to be undertaken, how would one distinguish orders rejecting claims of attorney-client privilege from other types of orders from which litigants might strongly wish to take an immediate appeal?

The first set of issues bristles with empirical questions that have yet to be fully explored.[3] Does the possibility of an erroneous district court rejection of attorney-client privilege decrease the frankness of attorney-client communications?[4] Even if that is not the case, do erroneous

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[2] The issues raised by *Mohawk Industries* are thus distinguishable from those raised by Justice Breyer's concurrence in *Carlsbad Technology, Inc. v. HIF Bio, Inc.*, 129 S. Ct. 1862 (2009). In *Carlsbad*, the Court held that 28 U.S.C. § 1447(d) does not bar appellate review of remand orders when the remand is occasioned by the district court's decision under 28 U.S.C. § 1367(c) not to exercise supplemental jurisdiction over the remanded claims. *See id.* at 1867. Justice Breyer, joined by Justice Souter, concurred but wrote separately to note the odd landscape of appellate review of remand orders. In particular, Justice Breyer noted that the Court had held that Section 1447(d) bars appellate review of a district court order remanding claims that had been removed under the Foreign Sovereign Immunities Act, and he contrasted that holding with *Carlsbad*'s holding: "[W]e have held that § 1447 *permits* review of a district court decision in an instance where that decision is unlikely to be wrong and where a wrong decision is unlikely to work serious harm. And we have held that § 1447 *forbids* review of a district court decision in an instance where that decision may well be wrong and where a wrong decision could work considerable harm." *Id.* at 1869 (Breyer, J., joined by Souter, J., concurring). Justice Breyer concluded by "suggest[ing] that experts in this area of the law reexamine the matter with an eye toward determining whether statutory revision is appropriate." *Id.* at 1869-70. Justice Breyer's invitation for expert review of this area was not directed specifically at the rulemaking committees – which makes sense, given that the obvious mode for addressing the sort of anomaly noted by Justice Breyer would be statutory amendment (of Section 1447(d)) rather than rulemaking.

[3] Despite Justice Thomas's complaint that the majority had prejudged the question, I do not read the Court's opinion in *Mohawk Industries* to preclude rulemakers' consideration of whether to expand immediate appellate review of orders rejecting claims of attorney-client privilege. I read the Court's opinion to indicate that if there is a case to be made for such an expansion, it should be made to the rulemakers rather than to the Court.

[4] The *Mohawk Industries* Court stated that "[m]ost district court rulings on these matters involve the routine application of settled legal principles. They are unlikely to be reversed on appeal, particularly when they rest on factual determinations for which appellate deference is the

district court rejections of attorney-client privilege provide discovering parties with undue settlement leverage?[5] If opportunities for immediate appellate review of such district court orders were expanded, how many such appeals would be taken?[6] Given the potentially large

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norm." *Mohawk Industries*, 130 S. Ct. at 607.

[5] For briefs making this argument, see Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner at 22, *Mohawk Industries*, 130 S. Ct. 559 (No. 08-678), 2009 WL 1263621; Brief of DRI - The Voice of the Defense Bar as Amicus Curiae in Support of Petitioner at 17-18, *Mohawk Industries*, 130 S. Ct. 559 (No. 08-678), 2009 WL 1206221. Justice Breyer's questioning at oral argument attempted to explore related questions:

> JUSTICE BREYER: .... [M]aybe there is some information that you come across with the ABA, for example, that has 300,000 -- maybe 600 -- you know, hundreds of thousands of members. There might be instances in the circuits where appeal was denied, where the lawyers would say, my goodness, appeal was denied, I want to tell you the hardship that that worked.
>
> Has anyone gone around and tried to find if there are such instances, as there must be, how serious it was? How harmful, how often do we have any empirical information on that question?
>
> MR. ALLEN: Your Honor, I do not have any empirical information to answer that question....
>
> JUSTICE BREYER: Is it wrong for me to expect that if this would work, a lot of instances of serious hardship not allowing the appeal, some lawyers in their meetings would be upset and they would raise a few examples? So doesn't the fact that you have been unable to find any tend to count against you?
>
> MR. ALLEN: I don't believe it does, Your Honor, I don't believe that should count against us.

Transcript of Oral Argument at 53-54, *Mohawk Industries*, 130 S. Ct. 559 (No. 08-678), 2009 WL 3169419.

[6] The *Mohawk Industries* briefs debated that question. Compare Brief for Petitioner at 40, *Mohawk Industries*, 130 S. Ct. 559 (No. 08-678), 2009 WL 1155404 ("[A] review of the opinions published in the Federal Reporter and those included in the Federal Appendix from the three circuits that have recognized collateral order jurisdiction in this context (the Third, Ninth, and D.C. Circuits) reveals that since ... 1997, these circuits have exercised collateral order jurisdiction in a total of approximately eleven appeals in which the appellant sought immediate review of an order compelling a party to disclose information protected by the attorney-client

universe of such orders, would the option of immediate appeals provide wealthy defendants with a tool for inflicting expense and delay on their opponents? Would an expanded opportunity for such immediate appeals interfere with the district judge's ability to manage the case?[7] Could such appeals be taken from a district judge's ruling in the middle of a trial? Would such appeals flood the courts of appeals with an undue amount of additional work?

The second set of issues poses challenging boundary questions. If orders rejecting claims of attorney-client privilege warrant an expansion of immediate appellate review, then what about orders rejecting claims of work product protection? Orders rejecting other types of privilege claims (such as marital privilege or doctor-patient privilege)? Other momentous discovery rulings? Indeed, should a reexamination of the boundaries of and exceptions to the final judgment rule focus only on discovery matters, or should it attempt a more general rationalization of the landscape that is currently defined by the collateral-order doctrine?

If the collateral-order doctrine is up for a broader review, then one obvious candidate for examination would be the appealability of orders rejecting claims of qualified immunity. As the Federal Practice and Procedure treatise has summarized existing doctrine:

> Appeals from pretrial orders refusing to terminate proceedings on the basis of a claimed immunity have generated significant complexities and confusions. These complexities and confusions surround a core that remains clear, at least for the time being. Public officials are entitled to appeal denial of motions to dismiss or for summary judgment that rest on an asserted official immunity, at least to the extent that pure questions of law are raised. How far appeal is permitted as the dispute becomes increasingly factual is less clear. The scope of review also is disputed, both as to matters of fact bearing on the immunity defense and as to questions that do not go directly to immunity but are related to it. Several other matters involving the right to appeal are likewise uncertain, various incidents of the right remain unresolved, and trouble has been encountered in

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privilege."), and Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner at 30-32, *Mohawk Industries*, 130 S. Ct. 559 (No. 08-678), 2009 WL 1263621 (arguing that from 1997 to 2009, the Third Circuit has issued 13 times as many written decisions on qualified or absolute immunity immediate appeals than on attorney-client privilege immediate appeals), with Brief for Respondent at 48, *Mohawk Industries*, 130 S. Ct. 559 (No. 08-678), 2009 WL 1965294 ("Over the last dozen years, three circuits - the Third, Ninth, and D.C. - have broken, in varying degrees, from the nonappealability rule. The experience in these circuits does nothing to alleviate the concern that a similar ruling from [the Supreme] Court would unleash a deluge of new interlocutory appeals.").

[7] The district judge's ability to manage the proceedings could be safeguarded by employing a mechanism that required a district-court certification in order for an appeal to occur.

> identifying the nature of other assertions of "immunity" that might be treated in the same way as official immunity. All of these difficulties arise from a conflict between the desire to bolster the benefits of immunity to include protection against the burdens of pretrial proceedings and trial and the desire to meet the ordinary needs of an appeals system built around the final judgment rule.

15A Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice & Procedure § 3914.10.

III. Conclusion

As Mr. Kester suggests, the *Mohawk Industries* Court's reference to the rulemaking process provides a reason for the Committee to consider whether rulemaking activity is warranted to broaden the availability of immediate appeals. But it seems to me that any such activity should proceed, if at all, only if empirical data are gathered that support the need for such broadening and that indicate such broadening's benefits will outweigh its predictable costs. It is not clear that such empirical data exist at this time.

Encl.

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Supreme Court of the United States
MOHAWK INDUSTRIES, INC., Petitioner,
v.
Norman CARPENTER.
No. 08-678.

Argued Oct. 5, 2009.
Decided Dec. 8, 2009.

Background: Employee sued employer, alleging that employee's termination had violated federal statute because it had amounted to conspiracy to deter employee from testifying in separate federal-court action alleging employer's hiring of illegal aliens. The United States District Court for the Northern District of Georgia, No. 07-00049-CV-HLM-4,Harold L. Murphy, J., granted employee's motion to compel disclosure of information related to employee's pre-termination interview with employer's attorney, which employer opposed on grounds of attorney-client privilege. Employer sought interlocutory appeal of order to disclose, and petitioned for writ of mandamus to compel District Court to vacate its order. The United States Court of Appeals for the Eleventh Circuit, 541 F.3d 1048, dismissed the appeal and denied a writ. Certiorari was granted.

Holding: The Supreme Court, Sotomayor, J., held that disclosure orders adverse to the attorney-client privilege do not qualify for immediate appeal under the collateral order doctrine, abrogating *In re Napster, Inc. Copyright Litigation*, 479 F.3d 1078,*United States v. Philip Morris Inc.*, 314 F.3d 612, and *In re Ford Motor Co.*, 110 F.3d 954.

541 F.3d 1048, affirmed.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, SCALIA, KENNEDY, GINSBURG, BREYER, and ALITO, JJ., joined, and in which THOMAS, J., joined, as to Part II-C. THOMAS, J., filed an opinion concurring in part and concurring in the judgment.

Randall L. Allen, for Petitioner.

Judith Resnick, for Respondent.

Edwin S. Kneedler, for United States as amicus curiae, by special leave of the Court, supporting the Respondent.

*603Randall L. Allen, Daniel F. Diffley, James C. Grant, William M. D'Antignac, Jr., Samuel R. Rutherford, Alston & Bird LLP, Atlanta, Georgia, for Petitioner.

Judith Resnik, Dennis E. Curtis, New Haven, CT, Thomas J. Munger, Munger & Stone, LLP, Atlanta, GA, Alan B. Morrison, Washington, DC, Deepak Gupta, Brian Wolfman, Public Citizen Litigation Group, Washington, DC, J. Craig Smith, Sean K. McElligott, Koskoff, Koskoff & Bieder, P.C., Bridgeport, CT, for Respondent.

For U.S. Supreme Court briefs, see:2009 WL 1155404 (Pet.Brief)2009 WL 1965294 (Resp.Brief)2009 WL 2418470 (Reply.Brief)

Justice SOTOMAYOR delivered the opinion of the Court.

Section 1291 of the Judicial Code confers on federal courts of appeals jurisdiction to review "final decisions of the district courts." 28 U.S.C. § 1291. Although "final decisions" typically are ones that trigger the entry of judgment, they also include a small set of prejudgment orders that are "collateral to" the merits of an action and "too important" to be denied immediate review. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). In this case, petitioner Mohawk Industries, Inc., attempted to bring a collateral order appeal after the District Court ordered it to disclose certain confidential materials on the ground that Mohawk had waived the attorney-client privilege. The Court of Appeals dismissed the appeal for want of jurisdiction.

The question before us is whether disclosure orders adverse to the attorney-client privilege qualify for immediate appeal under the collateral order doctrine. Agreeing with the Court of Appeals, we hold that they do not. Postjudgment appeals, together with other

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review mechanisms, suffice to protect the rights of litigants and preserve the vitality of the attorney-client privilege.

I

In 2007, respondent Norman Carpenter, a former shift supervisor at a Mohawk manufacturing facility, filed suit in the United States District Court for the Northern District of Georgia, alleging that Mohawk had terminated him in violation of 42 U.S.C. § 1985(2) and various Georgia laws. According to Carpenter's complaint, his termination came after he informed a member of Mohawk's human resources department in an e-mail that the company was employing undocumented immigrants. At the time, unbeknownst to Carpenter, Mohawk stood accused in a pending class-action lawsuit of conspiring to drive down the wages of its legal employees by knowingly hiring undocumented workers in violation of federal and state racketeering laws. See *Williams v. Mohawk Indus., Inc.*, No. 4:04-cv-00003-HLM (ND Ga., Jan. 6, 2004). Company officials directed Carpenter to meet with the company's retained counsel in the *Williams* case, and counsel allegedly pressured Carpenter to recant his statements. When he refused, Carpenter alleges, Mohawk fired him under false pretenses. App. 57a-64a.

After learning of Carpenter's complaint, the plaintiffs in the *Williams* case sought an evidentiary hearing to explore Carpenter's allegations. In its response to their motion, Mohawk described Carpenter's accusations as "pure fantasy" and recounted the "true facts" of Carpenter's dismissal. *Id.*, at 208a. According to Mohawk, Carpenter himself had "engaged in blatant and illegal misconduct" by attempting to have Mohawk hire an undocumented worker. *Id.*, at 209a. The ***604** company "commenced an immediate investigation," during which retained counsel interviewed Carpenter. *Id.*, at 210a. Because Carpenter's "efforts to cause Mohawk to circumvent federal immigration law" "blatantly violated Mohawk policy," the company terminated him. *Ibid.*

As these events were unfolding in the *Williams* case, discovery was underway in Carpenter's case. Carpenter filed a motion to compel Mohawk to produce information concerning his meeting with retained counsel and the company's termination decision. Mohawk maintained that the requested information was protected by the attorney-client privilege.

The District Court agreed that the privilege applied to the requested information, but it granted Carpenter's motion to compel disclosure after concluding that Mohawk had implicitly waived the privilege through its representations in the *Williams* case. See App. to Pet. for Cert. 51a. The court declined to certify its order for interlocutory appeal under 28 U.S.C. § 1292(b). But, recognizing "the seriousness of its [waiver] finding," it stayed its ruling to allow Mohawk to explore other potential "avenues to appeal ..., such as a petition for mandamus or appealing this Order under the collateral order doctrine." App. to Pet. for Cert. 52a.

Mohawk filed a notice of appeal and a petition for a writ of mandamus to the Eleventh Circuit. The Court of Appeals dismissed the appeal for lack of jurisdiction under 28 U.S.C. § 1291, holding that the District Court's ruling did not qualify as an immediately appealable collateral order within the meaning of *Cohen*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528. "Under *Cohen*," the Court of Appeals explained, "an order is appealable if it (1) conclusively determines the disputed question; (2) resolves an important issue completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from a final judgment." 541 F.3d 1048, 1052 (2008)*(per curiam)*. According to the court, the District Court's waiver ruling satisfied the first two of these requirements but not the third, because "a discovery order that implicates the attorney-client privilege" can be adequately reviewed "on appeal from a final judgment." *Ibid.* The Court of Appeals also rejected Mohawk's mandamus petition, finding no "clear usurpation of power or abuse of discretion" by the District Court. *Id.*, at 1055. We granted certiorari, 555 U.S. ----, 129 S.Ct. 1041, 173 L.Ed.2d 468 (2009), to resolve a conflict among the Circuits concerning the availability of collateral appeals in the attorney-client privilege context. [FN1]

FN1. Three Circuits have permitted collateral order appeals of attorney-client privilege rulings. See *In re Napster, Inc. Copyright Litigation*, 479 F.3d 1078, 1087-1088 (C.A.9 2007); *United States v. Philip Morris Inc.*, 314 F.3d 612, 617-621 (C.A.D.C.2003); *In re Ford Motor Co.*, 110 F.3d 954, 957-964 (C.A.3 1997). The remaining Circuits to consider the question have found such orders

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nonappealable. See, *e.g.*, *Boughton v. Cotter Corp.*, 10 F.3d 746, 749-750 (C.A.10 1993); *Texaco Inc. v. Louisiana Land & Exploration Co.*, 995 F.2d 43, 44 (C.A.5 1993); *Reise v. Board of Regents*, 957 F.2d 293, 295 (C.A.7 1992); *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC*, 964 F.2d 159, 162-163 (C.A.2 1992); *Quantum Corp. v. Tandon Corp.*, 940 F.2d 642, 643-644 (C.A.Fed.1991).

II

A

[1][2] By statute, Courts of Appeals "have jurisdiction of appeals from all final decisions of the district courts of the United States, ... except where a direct review may be had in the Supreme Court." 28 U.S.C. § 1291. A "final decisio[n]" is ***605** typically one "by which a district court disassociates itself from a case." *Swint v. Chambers County Comm'n*, 514 U.S. 35, 42, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995). This Court, however, "has long given" § 1291 a "practical rather than a technical construction." *Cohen*, 337 U.S., at 546, 69 S.Ct. 1221. As we held in *Cohen*, the statute encompasses not only judgments that "terminate an action," but also a "small class" of collateral rulings that, although they do not end the litigation, are appropriately deemed "final." *Id.*, at 545-546, 69 S.Ct. 1221. "That small category includes only decisions that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action." *Swint*, 514 U.S., at 42, 115 S.Ct. 1203.

[3][4] In applying *Cohen* 's collateral order doctrine, we have stressed that it must "never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered." *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868, 114 S.Ct. 1992, 128 L.Ed.2d 842 (1994) (citation omitted); see also *Will v. Hallock*, 546 U.S. 345, 350, 126 S.Ct. 952, 163 L.Ed.2d 836 (2006) ("emphasizing [the doctrine's] modest scope"). Our admonition reflects a healthy respect for the virtues of the final-judgment rule. Permitting piecemeal, prejudgment appeals, we have recognized, undermines "efficient judicial administration" and encroaches upon the prerogatives of district court judges, who play a "special role" in managing ongoing litigation. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981); see also *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 436, 105 S.Ct. 2757, 86 L.Ed.2d 340 (1985) ("[T]he district judge can better exercise [his or her] responsibility [to police the prejudgment tactics of litigants] if the appellate courts do not repeatedly intervene to second-guess prejudgment rulings").

[5] The justification for immediate appeal must therefore be sufficiently strong to overcome the usual benefits of deferring appeal until litigation concludes. This requirement finds expression in two of the three traditional *Cohen* conditions. The second condition insists upon "*important* questions separate from the merits." *Swint*, 514 U.S., at 42, 115 S.Ct. 1203 (emphasis added). More significantly, "the third *Cohen* question, whether a right is 'adequately vindicable' or 'effectively reviewable,' simply cannot be answered without a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement." *Digital Equipment*, 511 U.S., at 878-879, 114 S.Ct. 1992. That a ruling "may burden litigants in ways that are only imperfectly reparable by appellate reversal of a final district court judgment ... has never sufficed." *Id.*, at 872, 114 S.Ct. 1992. Instead, the decisive consideration is whether delaying review until the entry of final judgment "would imperil a substantial public interest" or "some particular value of a high order." *Will*, 546 U.S., at 352-353, 126 S.Ct. 952.

[6] In making this determination, we do not engage in an "individualized jurisdictional inquiry." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 473, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978). Rather, our focus is on "the entire category to which a claim belongs." *Digital Equipment*, 511 U.S., at 868, 114 S.Ct. 1992. As long as the class of claims, taken as a whole, can be adequately vindicated by other means, "the chance that the litigation at hand might be speeded, or a 'particular injustic[e]' averted," does not provide a basis for jurisdiction under § 1291. *Ibid.* (quoting ***606***Van Cauwenberghe v. Biard*, 486 U.S. 517, 529, 108 S.Ct. 1945, 100 L.Ed.2d 517 (1988) (alteration in original)).

B

In the present case, the Court of Appeals concluded that the District Court's privilege-waiver order satis-

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fied the first two conditions of the collateral order doctrine-conclusiveness and separateness-but not the third-effective unreviewability. Because we agree with the Court of Appeals that collateral order appeals are not necessary to ensure effective review of orders adverse to the attorney-client privilege, we do not decide whether the other *Cohen* requirements are met.

Mohawk does not dispute that "we have generally denied review of pretrial discovery orders." *Firestone*, 449 U.S., at 377, 101 S.Ct. 669; see also 15B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3914.23, p. 123 (2d ed.1992) (hereinafter Wright & Miller) ("[T]he rule remains settled that most discovery rulings are not final"). Mohawk contends, however, that rulings implicating the attorney-client privilege differ in kind from run-of-the-mill discovery orders because of the important institutional interests at stake. According to Mohawk, the right to maintain attorney-client confidences-the *sine qua non* of a meaningful attorney-client relationship-is "irreparably destroyed absent immediate appeal" of adverse privilege rulings. Brief for Petitioner 23.

[7] We readily acknowledge the importance of the attorney-client privilege, which "is one of the oldest recognized privileges for confidential communications." *Swidler & Berlin v. United States*, 524 U.S. 399, 403, 118 S.Ct. 2081, 141 L.Ed.2d 379 (1998). By assuring confidentiality, the privilege encourages clients to make "full and frank" disclosures to their attorneys, who are then better able to provide candid advice and effective representation. *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). This, in turn, serves "broader public interests in the observance of law and administration of justice." *Ibid.*

The crucial question, however, is not whether an interest is important in the abstract; it is whether deferring review until final judgment so imperils the interest as to justify the cost of allowing immediate appeal of the entire class of relevant orders. We routinely require litigants to wait until after final judgment to vindicate valuable rights, including rights central to our adversarial system. See, *e.g.*, *Richardson-Merrell*, 472 U.S., at 426, 105 S.Ct. 2757 (holding an order disqualifying counsel in a civil case did not qualify for immediate appeal under the collateral order doctrine); *Flanagan v. United States*, 465 U.S. 259, 260, 104 S.Ct. 1051, 79 L.Ed.2d 288 (1984) (reaching the same result in a criminal case, notwithstanding the Sixth Amendment rights at stake). In *Digital Equipment*, we rejected an assertion that collateral order review was necessary to promote "the public policy favoring voluntary resolution of disputes." 511 U.S., at 881, 114 S.Ct. 1992. "It defies common sense," we explained, "to maintain that parties' readiness to settle will be significantly dampened (or the corresponding public interest impaired) by a rule that a district court's decision to let allegedly barred litigation go forward may be challenged as a matter of right only on appeal from a judgment for the plaintiff's favor." *Ibid.*

[8] We reach a similar conclusion here. In our estimation, postjudgment appeals generally suffice to protect the rights of litigants and assure the vitality of the attorney-client privilege. Appellate courts can remedy the improper disclosure of privileged material in the same way they ***607** remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence.

Dismissing such relief as inadequate, Mohawk emphasizes that the attorney-client privilege does not merely "prohibi[t] use of protected information at trial"; it provides a "right not to disclose the privileged information in the first place." Brief for Petitioner 25. Mohawk is undoubtedly correct that an order to disclose privileged information intrudes on the confidentiality of attorney-client communications. But deferring review until final judgment does not meaningfully reduce the *ex ante* incentives for full and frank consultations between clients and counsel.

One reason for the lack of a discernible chill is that, in deciding how freely to speak, clients and counsel are unlikely to focus on the remote prospect of an erroneous disclosure order, let alone on the timing of a possible appeal. Whether or not immediate collateral order appeals are available, clients and counsel must account for the possibility that they will later be required by law to disclose their communications for a variety of reasons-for example, because they misjudged the scope of the privilege, because they waived the privilege, or because their communications fell within the privilege's crime-fraud exception. Most district court rulings on these matters involve the routine application of settled legal principles. They are

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unlikely to be reversed on appeal, particularly when they rest on factual determinations for which appellate deference is the norm. See, *e.g.*, *Richardson-Merrell*, 472 U.S., at 434, 105 S.Ct. 2757 ("Most pretrial orders of district judges are ultimately affirmed by appellate courts."); *Reise v. Board of Regents*, 957 F.2d 293, 295 (C.A.7 1992) (noting that "almost all interlocutory appeals from discovery orders would end in affirmance" because "the district court possesses discretion, and review is deferential"). The breadth of the privilege and the narrowness of its exceptions will thus tend to exert a much greater influence on the conduct of clients and counsel than the small risk that the law will be misapplied.[FN2]

FN2. Perhaps the situation would be different if district courts were systematically underenforcing the privilege, but we have no indication that this is the case.

Moreover, were attorneys and clients to reflect upon their appellate options, they would find that litigants confronted with a particularly injurious or novel privilege ruling have several potential avenues of review apart from collateral order appeal. First, a party may ask the district court to certify, and the court of appeals to accept, an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The preconditions for § 1292(b) review-"a controlling question of law," the prompt resolution of which "may materially advance the ultimate termination of the litigation"-are most likely to be satisfied when a privilege ruling involves a new legal question or is of special consequence, and district courts should not hesitate to certify an interlocutory appeal in such cases. Second, in extraordinary circumstances-*i.e.*, when a disclosure order "amount[s] to a judicial usurpation of power or a clear abuse of discretion," or otherwise works a manifest injustice-a party may petition the court of appeals for a writ of mandamus. *Cheney v. United States Dist. Court for D. C.*, 542 U.S. 367, 390, 124 S.Ct. 2576, 159 L.Ed.2d 459 (2004) (citation and internal quotation marks omitted); see also *Firestone*, 449 U.S., at 378-379, n. 13, 101 S.Ct. 669.[FN3] While these ***608** discretionary review mechanisms do not provide relief in every case, they serve as useful "safety valve[s]" for promptly correcting serious errors. *Digital Equipment*, 511 U.S., at 883, 114 S.Ct. 1992.

FN3. Mohawk itself petitioned the Eleventh Circuit for a writ of mandamus. See *supra*, at 604. It has not asked us to review the Court of Appeals' denial of that relief.

Another long-recognized option is for a party to defy a disclosure order and incur court-imposed sanctions. District courts have a range of sanctions from which to choose, including "directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action," "prohibiting the disobedient party from supporting or opposing designated claims or defenses," or "striking pleadings in whole or in part." Fed. Rule Civ. Proc. 37(b)(2)(i)-(iii). Such sanctions allow a party to obtain postjudgment review without having to reveal its privileged information. Alternatively, when the circumstances warrant it, a district court may hold a noncomplying party in contempt. The party can then appeal directly from that ruling, at least when the contempt citation can be characterized as a criminal punishment. See, *e.g.*, *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 18, n. 11, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992); *Firestone*, 449 U.S., at 377, 101 S.Ct. 669; *Cobbledick v. United States*, 309 U.S. 323, 328, 60 S.Ct. 540, 84 L.Ed. 783 (1940); see also Wright & Miller § 3914.23, at 140-155.

These established mechanisms for appellate review not only provide assurances to clients and counsel about the security of their confidential communications; they also go a long way toward addressing Mohawk's concern that, absent collateral order appeals of adverse attorney-client privilege rulings, some litigants may experience severe hardship. Mohawk is no doubt right that an order to disclose privileged material may, in some situations, have implications beyond the case at hand. But the same can be said about many categories of pretrial discovery orders for which collateral order appeals are unavailable. As with these other orders, rulings adverse to the privilege vary in their significance; some may be momentous, but others are more mundane. Section 1292(b) appeals, mandamus, and appeals from contempt citations facilitate immediate review of some of the more consequential attorney-client privilege rulings. Moreover, protective orders are available to limit the spillover effects of disclosing sensitive information. That a fraction of orders adverse to the attorney-client privilege may nevertheless harm individual litigants in ways that are "only imperfectly reparable" does not justify making all such orders immediately appealable as of right under § 1291. *Digital Equip-*

ment, 511 U.S., at 872, 114 S.Ct. 1992.

In short, the limited benefits of applying "the blunt, categorical instrument of § 1291 collateral order appeal" to privilege-related disclosure orders simply cannot justify the likely institutional costs. *Id.*, at 883, 114 S.Ct. 1992. Permitting parties to undertake successive, piecemeal appeals of all adverse attorney-client rulings would unduly delay the resolution of district court litigation and needlessly burden the Courts of Appeals. See Wright & Miller § 3914.23, at 123 ("Routine appeal from disputed discovery orders would disrupt the orderly progress of the litigation, swamp the courts of appeals, and substantially reduce the district court's ability to control the discovery process."); cf. *Cunningham v. Hamilton County*, 527 U.S. 198, 209, 119 S.Ct. 1915, 144 L.Ed.2d 184 (1999) (expressing concern that allowing immediate appeal as of right from orders fining attorneys for discovery violations would result in "the very sorts of piecemeal appeals and concomitant delays that the final judgment rule was designed to prevent"). Attempting to downplay such concerns, Mohawk asserts that the three ***609** Circuits in which the collateral order doctrine currently applies to adverse privilege rulings have seen only a trickle of appeals. But this may be due to the fact that the practice in all three Circuits is relatively new and not yet widely known. Were this Court to approve collateral order appeals in the attorney-client privilege context, many more litigants would likely choose that route. They would also likely seek to extend such a ruling to disclosure orders implicating many other categories of sensitive information, raising an array of line-drawing difficulties.[FN4]

> FN4. Participating as *amicus curiae* in support of respondent Carpenter, the United States contends that collateral order appeals should be available for rulings involving certain governmental privileges "in light of their structural constitutional grounding under the separation of powers, relatively rare invocation, and unique importance to governmental functions." Brief for United States as *Amicus Curiae* 28. We express no view on that issue.

C

In concluding that sufficiently effective review of adverse attorney-client privilege rulings can be had without resort to the *Cohen* doctrine, we reiterate that the class of collaterally appealable orders must remain "narrow and selective in its membership." *Will*, 546 U.S., at 350, 126 S.Ct. 952. This admonition has acquired special force in recent years with the enactment of legislation designating rulemaking, "not expansion by court decision," as the preferred means for determining whether and when prejudgment orders should be immediately appealable. *Swint*, 514 U.S., at 48, 115 S.Ct. 1203. Specifically, Congress in 1990 amended the Rules Enabling Act, 28 U.S.C. § 2071 *et seq.*, to authorize this Court to adopt rules "defin[ing] when a ruling of a district court is final for the purposes of appeal under section 1291." § 2072(c). Shortly thereafter, and along similar lines, Congress empowered this Court to "prescribe rules, in accordance with [§ 2072], to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under [§ 1292]." § 1292(e). These provisions, we have recognized, "warran[t] the Judiciary's full respect." *Swint*, 514 U.S., at 48, 115 S.Ct. 1203; see also *Cunningham*, 527 U.S., at 210, 119 S.Ct. 1915.

Indeed, the rulemaking process has important virtues. It draws on the collective experience of bench and bar, see 28 U.S.C. § 2073, and it facilitates the adoption of measured, practical solutions. We expect that the combination of standard postjudgment appeals, § 1292(b) appeals, mandamus, and contempt appeals will continue to provide adequate protection to litigants ordered to disclose materials purportedly subject to the attorney-client privilege. Any further avenue for immediate appeal of such rulings should be furnished, if at all, through rulemaking, with the opportunity for full airing it provides.

* * *

In sum, we conclude that the collateral order doctrine does not extend to disclosure orders adverse to the attorney-client privilege. Effective appellate review can be had by other means. Accordingly, we affirm the judgment of the Court of Appeals for the Eleventh Circuit.

It is so ordered.
Justice THOMAS, concurring in part and concurring in the judgment.

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I concur in the judgment and in Part II-C of the Court's opinion because I wholeheartedly agree that "Congress's designation of the rulemaking process as the way to define or refine when a district court ruling is 'final' and when an interlocutory order is appealable warrants the Judiciary's***610** full respect." *Swint v. Chambers County Comm'n*, 514 U.S. 35, 48, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995); *ante*, at 609 (quoting *Swint*, http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1995056069 *supra*; citing *Cunningham v. Hamilton County*, 527 U.S. 198, 210, 119 S.Ct. 1915, 144 L.Ed.2d 184 (1999)). It is for that reason that I do not join the remainder of the Court's analysis.

The scope of federal appellate jurisdiction is a matter the Constitution expressly commits to Congress, see Art. I, § 8, cl. 9, and that Congress has addressed not only in 28 U.S.C. §§ 1291 and 1292, but also in the Rules Enabling Act amendments to which the Court refers. See *ante*, at 609 (citing §§ 2072-2074). The Court recognizes that these amendments "designat[e] rulemaking, 'not expansion by court decision,' as the preferred means of determining whether and when prejudgment orders should be immediately appealable." *Ante*, at 609 (quoting *Swint*, http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1995056069 *supra*, at 48, 115 S.Ct. 1203). Because that designation is entitled to our full respect, and because the privilege order here is not on all fours with orders we previously have held to be appealable under the collateral order doctrine, see *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), I would affirm the Eleventh Circuit's judgment on the ground that any "avenue for immediate appeal" beyond the three avenues addressed in the Court's opinion must be left to the "rulemaking process." *Ante*, at 609; see *ante*, at 607 - 609 (discussing certification under 28 U.S.C. § 1292(b), petitions for mandamus, and appeals from contempt orders).

We need not, and in my view should not, further justify our holding by applying the *Cohen* doctrine, which prompted the rulemaking amendments in the first place. In taking this path, the Court needlessly perpetuates a judicial policy that we for many years have criticized and struggled to limit. See, *e.g.*, *Ashcroft v. Iqbal*, 556 U.S. ----, ----, 129 S.Ct. 1937, 1946, 173 L.Ed.2d 868 (2009); *Will v. Hallock*, 546 U.S. 345, 349, 126 S.Ct. 952, 163 L.Ed.2d 836 (2006); *Sell v. United States*, 539 U.S. 166, 177, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003); *Cunningham*, *supra*, at 210, 119 S.Ct. 1915; *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 884, 114 S.Ct. 1992, 128 L.Ed.2d 842 (1994); *Swint*, *supra*, at 48, 115 S.Ct. 1203; *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 498-501, 109 S.Ct. 1976, 104 L.Ed.2d 548 (1989); *Van Cauwenberghe v. Biard*, 486 U.S. 517, 527, 108 S.Ct. 1945, 100 L.Ed.2d 517 (1988). The Court's choice of analysis is the more ironic because applying *Cohen* to the facts of this case requires the Court to reach conclusions on, and thus potentially prejudice, the very matters it says would benefit from "the collective experience of bench and bar" and the "opportunity for full airing" that rulemaking provides. *Ante*, at 609.

"Finality as a condition of review is an historic characteristic of federal appellate procedure" that was incorporated in the first Judiciary Act and that Congress itself has "departed from only when observance of it would practically defeat the right to any review at all." *Cobbledick v. United States*, 309 U.S. 323, 324-325, 60 S.Ct. 540, 84 L.Ed. 783 (1940). Until 1949, this Court's view of the appellate jurisdiction statute reflected this principle and the statute's text. See, *e.g.*, *Catlin v. United States*, 324 U.S. 229, 233, 65 S.Ct. 631, 89 L.Ed. 911 (1945) (holding that § 128 of the Judicial Code (now 28 U.S.C. § 1291) limits review to decisions that "en[d] the litigation on the merits and leav[e] nothing for the court to do but execute the judgment"). *Cohen* changed all that when it announced that a "small class" of collateral orders that do not meet the statutory definition of finality nonetheless may be immediately appealable if they satisfy certain ***611** criteria that show they are "too important to be denied review." 337 U.S., at 546, 69 S.Ct. 1221.

Cohen and the early decisions applying it allowed § 1291 appeals of interlocutory orders concerning the posting of a bond, see *id.*, at 545-547, 69 S.Ct. 1221, the attachment of a vessel in admiralty, see *Swift & Co. Packers v. Compania Colombiana Del Caribe, S. A.*, 339 U.S. 684, 688-689, 70 S.Ct. 861, 94 L.Ed. 1206 (1950), and the imposition of notice costs in a class action, see *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170-172, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). As the Court's opinion notes, later decisions sought to narrow *Cohen* lest its exception to § 1291 " '

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(Cite as: 130 S.Ct. 599)

swallow' " the final judgment rule. *Ante,* at 605 (quoting *Digital Equipment, supra,* at 868, 114 S.Ct. 1992); see generally *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 467-468, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978). The Court has adhered to that narrowing approach, principally by raising the bar on what types of interests are "important enough" to justify collateral order appeals. See, *e.g., Will, supra,* at 352-353, 126 S.Ct. 952 (explaining that an interlocutory order typically will be "important" enough to justify *Cohen* review only where "some particular value of a high order," such as "honoring the separation of powers, preserving the efficiency of government ..., [or] respecting a State's dignitary interests," is "marshaled in support of the interest in avoiding trial" and the Court determines that denying review would "imperil" that interest); *Digital Equipment, supra,* at 878-879, 114 S.Ct. 1992 (noting that appealability under *Cohen* turns on a "judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement," and that an interest "qualifies as 'important' in *Cohen* 's sense" if it is "weightier than the societal interests advanced by the ordinary operation of final judgment principles"). As we recognized last Term, however, our attempts to contain the *Cohen* doctrine have not all been successful or persuasive. See *Ashcroft, supra,* at ----, 129 S.Ct., at 1946 ("[A]s a general matter, the collateral-order doctrine may have expanded beyond the limits dictated by its internal logic and the strict application of the criteria set out in *Cohen* "). In my view, this case presents an opportunity to improve our approach.

The privilege interest at issue here is undoubtedly important, both in its own right and when compared to some of the interests (*e.g.,* in bond and notice-cost rulings) we have held to be appealable under *Cohen.* Accordingly, the Court's *Cohen* analysis does not rest on the privilege order's relative unimportance, but instead on its effective reviewability after final judgment. *Ante,* at 606 - 609. Although I agree with the Court's ultimate conclusion, I see two difficulties with this approach. First, the Court emphasizes that the alternative avenues of review it discusses (which did not prove adequate in this case) would be adequate where the privilege ruling at issue is "particularly injurious or novel." *Ante,* at 607. If that is right, and it seems to me that it is, then the opinion raises the question why such avenues were not also adequate to address the orders whose unusual importance or particularly injurious nature we have held *justified* immediate appeal under *Cohen.* See, *e.g., Sell,* http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=2003428187 *supra,* at 177, 123 S.Ct. 2174. Second, the facts of this particular case seem in several respects to undercut the Court's conclusion that the benefits of collateral order review "cannot justify the likely institutional costs." *Ante,* at 608.[FN*] The Court responds that these case-specific arguments*612 miss the point because the focus of the *Cohen* analysis is whether the "entire category" or "class of claims" at issue merits appellate review under the collateral order doctrine. *Ante,* at 606 (internal quotation marks omitted). That is exactly right, and illustrates what increasingly has bothered me about making this kind of appealability determination via case-by-case adjudication. The exercise forces the reviewing court to subordinate the realities of each case before it to generalized conclusions about the "likely" costs and benefits of allowing an exception to the final judgment rule in an entire "class of cases." The Court concedes that Congress, which holds the constitutional reins in this area, has determined that such value judgments are better left to the "collective experience of bench and bar" and the "opportunity for full airing" that rulemaking provides. *Ante,* at 609. This determination is entitled to our full respect, in deed as well as in word. Accordingly, I would leave the value judgments the Court makes in its opinion to the rulemaking process, and in so doing take this opportunity to limit-effectively, predictably, and in a way we should have done long ago-the doctrine that, with a sweep of the Court's pen, subordinated what the appellate jurisdiction statute says to what the Court thinks is a good idea.

FN* The Court concludes, for example, that in most cases final judgment review of an erroneous privilege ruling will suffice to vindicate the injured party's rights because the appellate court can vacate the adverse judgment and remand for a new trial in which the protected material is excluded. *Ante,* at 606 - 607. But this case appears to involve one of the (perhaps rare) situations in which final judgment review might not be sufficient because it is a case in which the challenged order already has had "implications beyond the case at hand," namely, in the separate class action in *Williams v. Mohawk Indus., Inc.,* No. 4:04-CV-0003-HLM (ND Ga.). *Ante,* at 608. The Court also concludes that

> the "likely institutional costs" of allowing collateral order review would outweigh its benefits because, *inter alia,* such review would "needlessly burden the Courts of Appeals." *Ibid.* But as the Court concedes, it must speculate on this point because the three Circuits that allow *Cohen* appeals of privilege rulings have not been overwhelmed. See *ante,* at 609.

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TAB 7C

MEMORANDUM

DATE: March 13, 2010

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 10-AP-A

Shortly after the Committee's fall 2009 meeting, the Supreme Court denied certiorari in *CHF Industries, Inc. v. Park B. Smith, Inc.*, 130 S. Ct. 622 (2009), in which the petitioner sought to present the question "Whether the Federal Circuit erred in holding that Fed. R. App. P. 4(a)(2) permits a premature notice of appeal filed from an interlocutory order (that did not decide or dispose of all claims in the case) to operate as a notice of appeal from a subsequently-entered final order," Petition for Writ of Certiorari at i, *CHF Industries*, 130 S. Ct. 622 (No. 08-1378), 2009 WL 1279198. The petitioner contended that "the failure of a number of Courts of Appeals to apply [Appellate] Rule 4(a)(2) as interpreted by *FirsTier* [*Mortgage Co. v. Investors Mortgage Insurance Co.*, 498 U.S. 269 (1991),] has created considerable conflict and confusion." *Id.* at 33. Judge Sutton has placed the issues raised by this petition on the Committee's agenda.

There are two basic sources of doctrinal uncertainty with respect to premature notices of appeal in civil cases. First, there is the"cumulative finality" doctrine, under which some courts have held that a notice of appeal filed after an order disposing of some claims or issues but before another order or orders disposing of the remaining claims or issues relates forward to effect an appeal after the disposition of all remaining claims or issues. This doctrine was first enunciated prior to the 1979 promulgation of Appellate Rule 4(a)(2), and there currently exists a division among the circuits concerning whether the cumulative finality doctrine – as a principle separate from Rule 4(a)(2) – survives the adoption of that Rule and the Supreme Court's decision in *FirsTier*. Second, there is the Supreme Court's decision in *FirsTier*, which then-Judge Roberts characterized as "leav[ing] a vast middle ground of uncertainty" concerning the circumstances under which relation forward is proper under Rule 4(a)(2). *Outlaw v. Airtech Air Conditioning and Heating, Inc.*, 412 F.3d 156, 161 (D.C. Cir. 2005). Some degree of uncertainty may be inherent in a doctrine that includes – as *FirsTier* does – a reasonableness standard.

Part I of this memo provides a brief chronology of events, covering the inception of the cumulative finality doctrine; the adoption of Rule 4(a)(2); and the *FirsTier* decision. Part I also notes lower courts' varying views on whether the cumulative finality doctrine survives *FirsTier*. Part II outlines a taxonomy of scenarios in which an appellant might rely upon a premature notice of appeal. Part II suggests that those scenarios fall at different points upon a spectrum: In some instances, many circuits are likely to recognize the premature notice as relating forward, while in other instances, many circuits are likely to recognize the premature notice as ineffective.

On some of these points, my preliminary review suggests that there is a majority view (subject to a dissenting view expressed by published[1] decisions in some circuits).

This memo does not come close to providing a comprehensive review of relevant circuit caselaw; if the Committee decides that this area of doctrine warrants further consideration, I can deepen my research on these issues during the summer. My goal in this memo is to survey relevant issues, with a view to highlighting questions that may merit further study.

I. A brief history of prematurity

Premature notices of appeal in civil cases implicate Rule 4(a)(2), but in some circuits they may also implicate lines of caselaw that originated in a time, prior to 1979, when Rule 4(a)(2) did not yet exist. This Part briefly reviews the development of the relevant doctrine.

A. The cumulative finality doctrine

Even before the Appellate Rules explicitly addressed premature notices of appeal in civil cases,[2] some courts had developed ways to rescue litigants who filed their notices of appeal too early. One much-cited decision, handed down prior to the adoption of Rule 4(a)(2), came in the *Jetco* case. In *Jetco Electronic Industries, Inc. v. Gardiner*, 473 F.2d 1228 (5th Cir. 1973), *abrogation recognized by United States v. Cooper*, 135 F.3d 960 (5th Cir. 1998), the district court granted one defendant's motion to dismiss, and the plaintiff filed a notice of appeal from that order. "Several months later, the trial court entered an agreed judgment disposing of appellants' claims against the other two defendants, Gardiner and Gardiner Electronics." *Jetco*, 473 F.2d at 1231. The court of appeals held: "[T]hese two orders, considered together, terminated this litigation just as effectively as would have been the case had the district judge gone through the motions of entering a single order formally reciting the substance of the earlier two orders. Mindful of the Supreme Court's command that practical, not technical, considerations are to govern the application of principles of finality ... , we decline appellee's invitation to exalt form over substance by dismissing this appeal." *Id.*

B. Adoption of and amendments to Rule 4(a)(2)

In 1979, the rulemakers introduced a new subdivision (a)(2) into Appellate Rule 4(a). As the 1979 Committee Note explained:

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[1] This memo focuses (for brevity's sake) on published court of appeals decisions.

[2] Ever since its original promulgation in 1968, Appellate Rule 4(b) has included a provision dealing with premature notices of appeal in criminal cases; the Rule 4(b) provision was derived from former Criminal Rule 37.

> The proposed amendment to Rule 4(a)(2) would extend to civil cases the provisions of Rule 4(b), dealing with criminal cases, designed to avoid the loss of the right to appeal by filing the notice of appeal prematurely. Despite the absence of such a provision in Rule 4(a) the courts of appeals quite generally have held premature appeals effective. See, e.g., *Matter of Grand Jury Empanelled Jan. 21, 1975*, 541 F.2d 373 (3d Cir. 1976); *Hodge v. Hodge*, 507 F.2d 87 (3d Cir. 1976); *Song Jook Suh v. Rosenberg*, 437 F.2d 1098 (9th Cir. 1971); *Ruby v. Secretary of the Navy*, 365 F.2d 385 (9th Cir. 1966); *Firchau v. Diamond Nat'l Corp.*, 345 F.2d 269 (9th Cir. 1965).
>
> The proposed amended rule would recognize this practice but make an exception in cases in which a post trial motion has destroyed the finality of the judgment. See Note to Rule 4(a)(4) below.

As originally adopted in 1979, Rule 4(a)(2) read: "Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof." The stated exception fit with the version of Rule 4(a)(4), adopted in 1979, providing that a timely tolling motion nullified a previously-filed notice of appeal. This particular aspect of Rule 4(a)(4) proved perilous for many litigants, and in 1993 Rule 4(a)(4) was amended so that tolling motions no longer nullify previously-filed notices of appeal. The 1993 amendments also included a conforming change to Rule 4(a)(2); the 1993 Committee Note stated:

> The amendment treats a notice of appeal filed after the announcement of a decision or order, but before its formal entry, as if the notice had been filed after entry. The amendment deletes the language that made paragraph (a)(2) inapplicable to a notice of appeal filed after announcement of the disposition of a posttrial motion enumerated in paragraph (a)(4) but before the entry of the order, see *Acosta v. Louisiana Dep't of Health & Human Resources*, 478 U.S. 251 (1986) (per curiam); *Alerte v. McGinnis*, 898 F.2d 69 (7th Cir.1990). Because the amendment of paragraph (a)(4) recognizes all notices of appeal filed after announcement or entry of judgment – even those that are filed while the posttrial motions enumerated in paragraph (a)(4) are pending – the amendment of this paragraph is consistent with the amendment of paragraph (a)(4).

Rule 4(a)(2) has been amended once more, as part of the 1998 restyling of the Appellate Rules. That amendment added the subdivision's heading. Rule 4(a)(2) now reads: "Filing Before Entry of Judgment. 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."

C. The *FirsTier* decision

In *FirsTier*, the plaintiff "filed its notice of appeal after the District Court announced

from the bench that it intended to grant summary judgment for [the defendant], but before entry of judgment and before the parties had, at the court's request, submitted proposed findings of fact and conclusions of law." *FirsTier*, 498 U.S. at 270. A unanimous Court held that the notice related forward, under Rule 4(a)(2), to the subsequent entry of judgment. In reaching this conclusion, the Court did not determine "whether the bench ruling was final." *Id.* at 274.[3] Rule 4(a)(2), the Court explained, "permits a notice of appeal filed from certain nonfinal decisions to serve as an effective notice from a subsequently entered final judgment." *Id.* Based on cases cited in the 1979 Committee Note,[4] the Court concluded that "Rule 4(a)(2) was intended to protect the unskilled litigant who files a notice of appeal from a decision that he reasonably but mistakenly believes to be a final judgment, while failing to file a notice of appeal from the actual final judgment." *Id.* at 276.

The *FirsTier* Court set some outer limits on relation forward under Rule 4(a)(2):

> This is not to say that Rule 4(a)(2) permits a notice of appeal from a clearly interlocutory decision – such as a discovery ruling or a sanction order under Rule 11 of the Federal Rules of Civil Procedure – to serve as a notice of appeal from the final judgment. A belief that such a decision is a final judgment would *not* be reasonable. In our view, Rule 4(a)(2) permits a notice of appeal

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[3] As the Court noted, "[a]lthough the judge stated from the bench his legal conclusions about the case, he also stated his intention to set forth his rationale in a more detailed and disciplined fashion at a later date. Moreover, the judge did not explicitly exclude the possibility that he might change his mind in the interim." *Id.*

[4] The Court described those cases as follows:

> [I]n *Ruby v. Secretary of Navy* ... , the appellant filed his notice of appeal from an order of the District Court that dismissed the complaint without dismissing the action. The Court of Appeals determined that the ruling was not a final decision under § 1291, because the ruling left open an opportunity for the appellant to save his cause of action by amending his complaint.... Nonetheless, the court ruled that the notice of appeal from the nonfinal ruling could serve as a notice of appeal from the subsequently filed final order dismissing the action....
>
> .... In *Firchau*, the District Court dismissed the appellant's complaint without dismissing the action. The appellant then filed a notice seeking to appeal from the District Court's ruling with respect to one of the claims in the complaint. The Court of Appeals noted that the ruling dismissing the complaint might not have been appealable but nonetheless held that the notice of appeal could be regarded as a notice from the subsequent final judgment dismissing the case.

FirsTier, 498 U.S. at 275-76.

> from a nonfinal decision to operate as a notice of appeal from the final judgment only when a district court announces a decision that *would be* appealable if immediately followed by the entry of judgment. In these instances, a litigant's confusion is understandable, and permitting the notice of appeal to become effective when judgment is entered does not catch the appellee by surprise. Little would be accomplished by prohibiting the court of appeals from reaching the merits of such an appeal.

Id.

D. Disagreement over the viability of cumulative finality doctrine post-*FirsTier*

After *FirsTier*, it appears that a number of circuits have concluded that Rule 4(a)(2), as construed in *FirsTier*, occupies the field and displaces any more expansive notions of relation forward on the basis of cumulative finality. *See, e.g.*, *Boudreaux v. Swift Transp. Co., Inc.*, 402 F.3d 536, 539 n.1 (5th Cir. 2005) (stating that the *Jetco* cumulative-finality doctrine "has apparently been abrogated by the Supreme Court's decision in *FirsTier*").

The Third Circuit, however, has concluded that its cumulative-finality doctrine – for which a seminal pre-*FirsTier* decision was *Cape May Greene, Inc. v. Warren*, 698 F.2d 179 (3d Cir. 1983) – exists independently of Rule 4(a)(2):

> We do not believe that *Cape May Greene* has been overruled by *FirsTier*. *FirsTier* simply limited the reach of Rule 4(a)(2)'s proviso. It did not hold that the Rule 4(a)(2) situation – announcement of a final decision followed by notice of appeal and then entry of the judgment – is the *only* situation in which a premature notice of appeal will ripen at a later date. In fact, Rule 4(a)(4) was amended in 1993 to provide that a premature notice of appeal would later ripen if it was filed after entry of a judgment, but while post-trial motions were pending.

Lazy Oil Co. v. Witco Corp., 166 F.3d 581, 587 (3d Cir. 1999). More recently, another Third Circuit panel noted "tension" between the Circuit's cumulative-finality doctrine and "the text of" Rule 4, and observed that "[s]everal other circuits have either declined to adopt or repudiated the sort of ripening analysis we first sanctioned in *Cape May Greene*." *DL Resources, Inc. v. FirstEnergy Solutions Corp.*, 506 F.3d 209, 215 & n.4 (3d Cir. 2007). The *DL Resources* court noted, however, that it was "bound by our prior interpretation regarding the scope and effect of Rule 4 unless and until we revisit that determination en banc." *Id.* at 215. In a still more recent decision, another Third Circuit panel decided a prematurity issue without mentioning the *Cape May Greene / Lazy Oil* cumulative finality doctrine. *See DeJohn v. Temple University*, 537 F.3d 301, 307 & n.3 (3d Cir. 2008).

II. A taxonomy of prematurity

Whether a court is applying cumulative-finality precedents or Rule 4(a)(2), the salient question for the litigants will be whether a premature notice of appeal relates forward to the entry of the document that renders an appeal possible (i.e., either a Civil Rule 54(b) certification or a final judgment disposing of all claims with respect to all parties). This section reviews the treatment of prematurity in a range of typical scenarios, roughly ordered from those that seem the easiest cases for recognizing relation forward to those that seem the easiest cases for denying relation forward.

A. Decision announced, proposed findings yet to be submitted

This was the scenario in *FirsTier*, and the unanimous Court held the notice of appeal to relate forward under Rule 4(a)(2). *FirsTier* presented few complications because the case involved a single plaintiff suing a single defendant, and the district court had announced its disposition of all the plaintiff's claims.

B. Decision announced, contingent on a future event

A number of cases hold that a notice of appeal filed after the announcement of a contingent decision but before the expiration of the contingency period can relate forward. An example would be a case in which the district court dismisses the complaint with leave to re-plead within a certain time period. A notice of appeal filed after the contingent decision but before the expiration of the contingency period should relate forward to the time when the plaintiff has failed (or, in some instances, has disclaimed intent) to fulfil the relevant condition.[5] The *Ruby* and *Firchau* cases, cited in the 1979 Committee Note to Rule 4(a)(2) and cited with approval in *FirsTier*, *see supra* note 4, provide support for such a view.

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), the Seventh Circuit took a different approach. The district court in mid-November issued an order dismissing the complaint but granting the plaintiffs a limited time to re-file the complaint and to serve certain defendants. The plaintiffs did not re-file the complaint within the deadline, but instead filed a notice of appeal. The district court then entered final judgment dismissing the complaint with prejudice. The court of appeals relied on two alternative theories to hold that the prior notice of appeal did not relate forward to the entry of final judgment. The first rationale was that "[t]he plaintiffs

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[5] *See, e.g., Slayton v. American Exp. Co.*, 460 F.3d 215, 225 (2d Cir. 2006) ("The judgment from which the notice of appeal was filed was non-final but would become final when the plaintiffs disclaimed their intent to amend the complaint.... Appellants made this disclaimer, thereby rendering the dismissal a final order and causing their premature notice of appeal to ripen within the meaning of Rule 4(a)(2)."); *Harris v. Milwaukee County Circuit Court*, 886 F.2d 982, 983-84 (7th Cir. 1989) (district court ordered plaintiff to pay filing fee within 20 days, in an order stating that after 20 days of nonpayment it would "ripen into a final judgment of dismissal without further order"; notice of appeal filed prior to expiration of the 20 days related forward).

could not reasonably have thought that the result was settled: the order expressly conditioned the final disposition of the suit," *id.* at 472.[6] The *Strasburg* court's second rationale was that "[e]ven if the plaintiffs' initial belief as to the appealability of the November 15 order was reasonable when they filed their notice of appeal, their refusal to refile became unreasonable when they were expressly informed by the district court on December 27 that the November 15 order was not a final judgment and that their notice of appeal was a 'nullity.'" *Id.*

C. Judgment as to fewer than all claims or parties, with belated certification under Civil Rule 54(b)

In this scenario, the notice of appeal is filed after the issuance of an order that would qualify for certification under Civil Rule 54(b), but no certification is provided until after the notice of appeal is filed. My preliminary search disclosed six or seven circuits that allow the notice of appeal to relate forward to the later certification and one circuit that has both a precedent that supports and a precedent that weighs against permitting relation forward in this context.

The circuits that allow relation forward to the later Civil Rule 54(b) certification are the

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[6] This rationale might rest in some tension with the *FirsTier* Court's approving reference to the *Ruby* and *Firchau* cases (which the *Strasburg* court did not cite).

The *Strasburg* court distinguished *Harris* (a case cited in footnote 5 above) thus: "We do not decide today whether *Harris* survives *FirsTier*. In any event, we believe that our decision in this case can peacefully coexist with *Harris*. There, the district court's statement that 'this order will ripen into a final judgment of dismissal without further order' could easily have misled the appellant into thinking that the decision disposed of the case without further action by the court – that the outcome was already settled. The appellant in *Harris* never knew that his notice of appeal was premature." *Strasburg*, 1 F.3d at 473.

Federal,[7] First,[8] Fourth,[9] Fifth,[10] Sixth,[11] Ninth, and Tenth[12] Circuits. (The relevant Ninth Circuit precedent predates *FirsTier*, but I have seen nothing to indicate that the Ninth Circuit has

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[7] *See State Contracting & Engineering Corp. v. State of Florida*, 258 F.3d 1329, 1335 (Fed. Cir. 2001) ("We elect to follow the majority of other circuits and hold that a premature notice of appeal ripens upon entry of a proper Rule 54(b) certification.").

[8] "The primary difference between the December 31, 1992, decision in this case and the bench ruling in *FirsTier* was that the district court here could not perfunctorily enter judgment under Fed.R.Civ.P. 58. Rather, it had to satisfy itself and certify that the decision was, in effect, appropriate for immediate appeal, pursuant to Fed.R.Civ.P. 54(b), notwithstanding its failure to resolve all claims made in the lawsuit.... This difference, however, does not make the district court's December 31, 1992, amended judgment so dissimilar from the district court's bench ruling in *FirsTier* that Storage Tank should lose the protection of the savings clause of Fed.R.App.P. 4(a)(2)." *Clausen v. Sea-3, Inc.*, 21 F.3d 1181, 1186-87 (1st Cir. 1994).

[9] The relevant precedential opinion in the Fourth Circuit was issued pre-*FirsTier*. *See Harrison v. Edison Bros. Apparel Stores, Inc.*, 924 F.2d 530, 532 (4th Cir. 1991) (adopting view that "absent prejudice to the appellee, the district court's Rule 54(b) certification may follow the notice of appeal"). The Fourth Circuit has followed *Harrison* in non-precedential opinions after *FirsTier*. *See, e.g., Kyle v. Coleman*, 67 Fed. Appx. 781, 782 n* (4th Cir. May 30, 2003) (unpublished opinion). In a case that involved a discussion of an analogous certification provision in the Criminal Rules, the Fourth Circuit considered the impact of *FirsTier* and quoted with approval the Tenth Circuit's view that "a notice of appeal from an order disposing of all claims of one party 'filed before the district court disposes of all claims [of all parties] is nevertheless effective if the appellant obtains either certification pursuant to [Rule] 54(b) or final adjudication before the court of appeals considers the case on its merits.'" In re *Bryson*, 406 F.3d 284, 288 (4th Cir. 2005) (quoting *Ruiz v. McDonnell*, 299 F.3d 1173, 1179 (10th Cir. 2002)).

[10] *See Cousin v. Small*, 325 F.3d 627, 631 (5th Cir. 2003) ("Defendants contend that Cousin's notice of appeal is defective because it was filed before the court entered the rule 54(b) judgment and that, as a result, we lack appellate jurisdiction. We disagree."); *Brown v. Mississippi Valley State University*, 311 F.3d 328, 332 (5th Cir. 2002) ("The district court's judgment dismissing the claims against Abraham did not become final until the district court entered the appropriate Rule 54(b) certification on remand, at which point Brown's initial notice of appeal matured.").

[11] *See Good v. Ohio Edison Co.*, 104 F.3d 93, 96 (6th Cir. 1997) ("The notice of appeal ripens as of the date of the Rule 54(b) certification.").

[12] *See Kelley v. Michaels*, 59 F.3d 1055, 1057 (10th Cir. 1995) ("[T]he premature appeal matures upon the entry of the Rule 54(b) certification.").

repudiated it since *FirsTier*.)[13]

The only contrary authority I have found is from the Eleventh Circuit. The leading Eleventh Circuit case for the proposition that a prior notice of appeal cannot relate forward to the subsequent Rule 54(b) certification is *Useden v. Acker*, 947 F.2d 1563 (11th Cir. 1991), in which the published opinion quotes without criticism a prior unpublished Eleventh Circuit order concluding that "[t]he district court's Rule 54(b) certification did not cure the premature appeal; a new notice of appeal following the certification order is necessary to perfect an appeal from the summary judgment order," *id.* at 1570. It is not entirely clear to me that the quoted matter constitutes a holding in the published opinion, given that the published opinion held that the court of appeals had jurisdiction over all issues that the appellant sought to appeal.[14]

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[13] *See Freeman v. Hittle*, 747 F.2d 1299, 1302 (9th Cir. 1984) ("[I]f neither party is prejudiced, a 54(b) certification is sufficient to validate a premature notice of appeal."). The Ninth Circuit appears to have followed this general approach in at least one unpublished post-*FirsTier* decision. *See Watt v. Brink's Inc.*, 114 F.3d 1197, 1997 WL 284805, at *1 n.1 (9th Cir. May 23, 1997) (unpublished opinion). *See also National Ass'n of Home Builders v. Norton*, 325 F.3d 1165, 1167 n.1 (9th Cir. 2003) ("Although a notice of appeal had already been filed, the district court had jurisdiction to enter an *initial* Rule 54(b) certification.").

[14] *Useden* was a multi-defendant lawsuit. In a March 30 order the district court granted summary judgment to two of the defendants on certain issues. Plaintiff appealed those dispositions, and then in mid-May the district court entered a Civil Rule 54(b) certification. The plaintiff did not file a new notice of appeal at that point. Next, the two relevant defendants pointed out that the March 30 order left some issues unresolved as to the claims against them. In late July the court of appeals dismissed the appeal as premature, stating that "The district court's March 30, 1989 order was not final and appealable because it did not dispose of all the claims of all the parties to the action. This appeal filed prior to the entry of the district court's Rule 54(b) certification was premature and ineffective. The district court's Rule 54(b) certification did not cure the premature appeal; a new notice of appeal following the certification order is necessary to perfect an appeal from the summary judgment order." *Useden*, 947 F.2d at 1569-70. In an August 31 order the district court vacated its earlier Rule 54(b) certification; ruled on the remaining issues relating to the claims against those two defendants; and issued a new Rule 54(b) certification. *See Useden v. Acker*, 734 F. Supp. 978, 981 (S.D. Fla. 1989). The plaintiff filed a new notice of appeal that was timely as measured from the date of entry of the August 31 order. The court of appeals ruled that the new notice of appeal brought up for review not only the issues newly decided in the late August order but also the issues the district court had previously sought to certify in its mid-May order. *See* 947 F.2d at 1570-71. The court reasoned that shortly after the entry of the mid-May order the district court had acknowledged that the initial Civil Rule 54(b) certification may not have been appropriate; thus, during the 30-day period after entry of the initial Rule 54(b) certification "appellant's failure to file a second notice of appeal was understandable, especially considering that this court had not yet ruled on the prematurity of the March 30 Notice of Appeal." *Id.* at 1571.

Nonetheless, *Useden* is cited by other circuits as stating the minority view on belated Civil Rule 54(b) certifications and relation forward.

On the other hand, a more recent Eleventh Circuit case appears not to have read *Useden* as necessarily foreclosing the relation-forward mechanism. In *Wilson v. Navistar Intern. Transp. Corp.*, 193 F.3d 1212 (11th Cir. 1999), *overruled on other grounds by Saxton v. ACF Industries, Inc.*, 254 F.3d 959 (11th Cir. 2001), the Eleventh Circuit provided two alternative grounds for finding the appeal proper: first, that a notice of appeal filed prior to the Civil Rule 54(b) certification could relate forward and second (citing *Useden*), that a second, later-filed notice of appeal cured any problem that would otherwise exist.[15]

D. Judgment as to fewer than all claims or parties, with later disposition of all remaining claims with respect to all parties

This is the scenario that was at issue in *CHF Industries*: The district court enters judgment as to fewer than all claims or parties but does not certify the judgment under Civil Rule 54(b); a notice of appeal is filed; and then the district court finally disposes of all remaining claims in the action. As to this scenario, authority from nine circuits supports the view that the premature notice relates forward to the date of entry of the final judgment. One of those circuits

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[15] The *Wilson* court reasoned as follows:

> On June 8, 1999 the Davidsons filed a motion with the district court to certify the May 11 order as a final judgment under Rule 54(b). On June 10, 1999, the thirtieth day after May 11, the plaintiffs filed a notice of appeal from the order dismissing Fontaine. On June 14, 1999 the district court certified the May 11 order for immediate appeal. On July 1, 1999 the Davidsons filed a second notice of appeal. Fontaine incorrectly contends that the appeal should be dismissed because the appeal was filed before a Rule 54(b) certificate was issued.
>
> .... First, when a notice of appeal is filed between the time of a decision or order and the time that the order is rendered appealable by the entry of judgment the otherwise premature notice of appeal is treated as if filed on the date of and after entry of judgment. See Fed. R.App. P. 4(a)(2). Second the Davidsons filed a second notice of appeal on July 1, 1999. A successive notice of appeal filed after a 54(b) certification is effective to confer appellate jurisdiction. *Useden v. Acker*, 947 F.2d 1563, 1569 (11th Cir.1991) (jurisdiction proper when appellant files a second notice of appeal following a certification order); *McLaughlin v. City of La Grange*, 662 F.2d 1385 (11th Cir.1981). Therefore, even if we determined that the initial notice of appeal was ineffective, the second notice of appeal would give this court jurisdiction.

Wilson, 193 F.3d at 1213.

– the Seventh – has issued precedential opinions that might be read to take varying views on this issue, and the petitioner in *CHF Industries* stated that another of those circuits – the Federal Circuit – has issued non-precedential opinions that take a contrary view.[16] But as far as my preliminary searches disclose, only one circuit – the Eighth – has held unequivocally to the contrary in a precedential opinion.

The circuits that permit relation forward in this scenario include the D.C.,[17] Federal,[18]

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[16] In the interests of brevity I generally do not focus on unpublished decisions in this memo. It does appear, on a quick glance, that some unpublished decisions in the Federal Circuit take a different approach than the Circuit's published decisions.

[17] *See Outlaw v. Airtech Air Conditioning and Heating, Inc.*, 412 F.3d 156, 158 (D.C. Cir. 2005) ("Here the nonfinal decision would have been appealable if followed by entry of judgment under Federal Rule of Civil Procedure 54(b), and accordingly we conclude that we have appellate jurisdiction.").

[18] *See E-Pass Technologies, Inc. v. 3Com Corp.*, 343 F.3d 1364, 1367 (Fed. Cir. 2003) ("On April 30, 2003, after E-Pass filed an appeal of the district court's grant of summary judgment in favor of 3Com, the district court issued an order dismissing 3Com's invalidity counterclaims without prejudice. As in *State Contracting & Engineering Corp. v. Florida*, 258 F.3d 1329 (Fed.Cir.2001), '[the] premature notice of appeal ripen[ed] upon' subsequent action by the district court, here the dismissal of 3Com's counterclaims.").

First,[19] Second,[20] Fourth,[21] Fifth,[22] Seventh, Ninth,[23] and Tenth[24] Circuits.

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[19] *See Barrett* ex rel. *Estate of Barrett v. United States*, 462 F.3d 28, 35 (1st Cir. 2006) ("Defendants concede that 'the district court could have certified a final judgment as to th[e relevant] defendants under [Rule 54(b)], and that partial judgment would have been appealable.' In other words, the decision 'would have been appealable immediately' by virtue of Rule 54(b). Therefore, Plaintiff's premature notice of appeal ripened upon the entry of final judgment.").

[20] *Smith* ex rel. *Smith v. Half Hollow Hills Cent. School Dist.*, 298 F.3d 168, 172 (2d Cir. 2002) (District court failed to provide reasons for its Rule 54(b) certification, but this defect did not matter because by time appeal was heard all remaining claims had been dismissed. "The district court entered a final judgment before this appeal was heard and we see no prejudice to appellees resulting from appellants' failure to file a second notice of appeal."). *See also McManus v. Gitano Group, Inc.*, 59 F.3d 382, 383 (2d Cir. 1995) (after court of appeals sua sponte questioned its jurisdiction because claims against another party were still pending, plaintiff "dismissed Gitano from the action nunc pro tunc to the date of the grant of summary judgment with prejudice"; this cured the jurisdictional problem).

In *Welch v. Cadre Capital*, 923 F.2d 989, 992 (2d Cir. 1991), the Second Circuit relied on circuit precedent stating that "a premature notice of appeal from a nonfinal order may ripen into a valid notice of appeal if a final judgment has been entered by the time the appeal is heard and the appellee suffers no prejudice." (In *Welch*, the notice of appeal was filed after dismissal of all federal claims but prior to dismissal of state-law claims; this presented an easy case for relation forward, in the court's view, because the district court had previously announced its intention to dismiss the state-law claims if all the federal-law claims were dismissed. *See id.*) The Supreme Court vacated and remanded for reconsideration of questions relating to the retroactive application of a statute of limitations ruling. *See Northwest Sav. Bank, PaSa v. Welch*, 501 U.S. 1247 (1991). Given that the Court had decided *FirsTier* earlier that same Term, the Court's evident assumption that appellate jurisdiction existed in *Welch* may be significant.

[21] *See Equipment Finance Group, Inc. v. Traverse Computer Brokers*, 973 F.2d 345, 347-48 (4th Cir. 1992) ("In this case, the district court granted Traverse's motion for summary judgment, Equipment Finance filed its appeal, then two months later the district court dismissed the claims against Synchronized.... [W]e join those circuits recognizing cumulative finality where all joint claims or all multiple parties are dismissed prior to the consideration of the appeal."). The *Equipment Finance* court noted: "We are particularly disposed to this view under the circumstances of this case. There is no indication that Traverse was prejudiced by the dismissal. In fact, Traverse neither objected to nor appealed the dismissal. Furthermore, we perceive no violence to the rationale underlying Rule 54(b). Synchronized neither appeared nor participated in the proceedings, and because the action against it was ultimately dismissed, it is not vulnerable to judgment. There are no overlapping claims or issues of joint liability, nor are there any outstanding motions." *Id.* at 348.

The Seventh Circuit is worth discussing separately because its caselaw does present some variation. In Part II.B. I discussed *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). More closely on point, for purposes of the issues discussed here, is the Seventh Circuit's pre-*FirsTier* decision in *United States v. Ettrick Wood Products, Inc.*, 916 F.2d 1211 (7th Cir. 1990). There the court of appeals found that the district court's mid-November order served as a Civil Rule 54(b) certification, thus rendering an early-December notice of appeal effective. The court made clear, however, that if there had not been a valid Civil Rule 54(b) certification, the early-December notice of appeal would not have related forward to the ensuing final judgment. *See id.*

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[22] *See, e.g., Young v. Equifax Credit Information Services, Inc.*, 294 F.3d 631, 634 n.2 (5th Cir. 2002) ("Young's notice of appeal of the summary judgment in favor of Penney was technically premature; the district court's order was not a final judgment because it neither disposed of the claims against all the defendants nor was it certified as a final judgment pursuant to Fed.R.Civ.P. 54(b).... However, because the order would have been appealable if the district court had certified it pursuant to Rule 54(b) and because the district court did subsequently (and prior to oral argument herein) dispose of all remaining parties and claims, this court has jurisdiction over the appeal of the summary judgment in favor of Penney.").

[23] *See Rano v. Sipa Press, Inc.*, 987 F.2d 580, 584 (9th Cir. 1993) ("Although Rano filed his notice of appeal based on the district court's summary judgment order, more than two weeks before the district court issued its final order dismissing the remaining pendent state claims, we will treat the notice of appeal as timely.... [T]here is no danger of piecemeal review because no issue or claim remains in the district court."); *Fadem v. United States*, 42 F.3d 533, 535 (9th Cir. 1994) ("In this case, although Rule 54(b) certification would ordinarily be required, its absence was cured when the district court dismissed Fadem I and no appeal was taken from that dismissal. Both parties fully briefed the appeal and both request that we exercise jurisdiction in this case; thus, neither party is prejudiced. Consequently, we hold that we have jurisdiction."). The Supreme Court subsequently granted certiorari in *Fadem* and remanded for the consideration of a merits question (concerning the statute of limitations). *See United States v. Fadem*, 520 U.S. 1101 (1997).

[24] *See Fields v. Oklahoma State Penitentiary*, 511 F.3d 1109, 1111 (10th Cir. 2007) ("A premature notice of appeal may ripen ... upon entry of a subsequent final order ... , so long as the order leading to the premature notice of appeal has some indicia of finality and is likely to remain unchanged during subsequent court proceedings.... Those conditions were satisfied, when the district court completely disposed of the case by dismissing the unserved defendants, so the notice of appeal ripened."); *Jackson v. Volvo Trucks North America, Inc.*, 462 F.3d 1234, 1238 (10th Cir. 2006) ("[W]here parties appeal non-final orders, the court's subsequent issuance of an order 'explicitly adjudicating all remaining claims' may cause a case to ripen for appellate review.... As noted above, this is exactly what happened here.") (quoting *Lewis v. B.F. Goodrich Co.*, 850 F.2d 641, 645 (10th Cir.1988) (en banc)).

at 1216-19.[25] On the other hand, more recent Seventh Circuit caselaw on belated dismissal of remaining claims accords with the majority view.[26]

The Eighth Circuit, by contrast, has rejected the majority view. In *Miller v. Special Weapons, L.L.C.*, 369 F.3d 1033, 1035 (8th Cir. 2004), it dismissed the plaintiff's appeal for lack of jurisdiction, holding that the plaintiff's notice of appeal – filed while the defendant's counterclaim was still pending – could not relate forward to the ultimate final judgment. *See id.* at 1035 ("[W]e do not believe that the summary judgment order entered in this case 'would be appealable' and accordingly Rule 4(a)(2) is inapplicable.").

E. Amount of damages or interest yet to be determined

There is some diversity of views among the circuits concerning situations where damages or interest questions remain to be determined at the time the notice of appeal is filed. Some of the variations are reconcilable on closer examination, while others are not.

When the notice of appeal is filed after liability is determined but before the amount of damages has been set, there is division concerning whether the notice of appeal can ripen once

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[25] *United States v. Hansen*, 795 F.2d 35, 38 (7th Cir. 1986), which denied relation forward to defendants' notice of appeal filed prior to final disposition of their counterclaims, is distinguishable from other cases discussed in this portion of the memo because the court of appeals expressed doubt as to whether a Civil Rule 54(b) certification would have been appropriate for the order that was filed prior to the notice of appeal and because the court of appeals stressed that "the defendants do not challenge just the [prior] decree; they also challenge the dismissal of their counterclaims, and the dismissal came later." *Id.*

[26] In *McCoy v. Harrison*, 341 F.3d 600, 604 (7th Cir. 2003), the plaintiff appealed from the district court's order resolving her claims against defendant Harrison; only thereafter did the district court enter judgment dismissing her case as against all defendants. Citing *FirsTier*, the court of appeals held that it had jurisdiction "even though the notice of appeal was filed prior to the entry of the final order." *Id. See also Garwood Packaging, Inc. v. Allen & Co., Inc.*, 378 F.3d 698, 701 (7th Cir. 2004) (stating as an alternative ground for appellate jurisdiction that "[h]ere a decision was announced and a notice of appeal filed (the first notice). It took effect when, the last defendant having been dismissed, the decision became final").

the amount of damages has been fixed. The Third[27] and Ninth[28] Circuits have held that it does not. Perhaps oddly – in the light of its approach to the scenario discussed in Part II.D. above – the Eighth Circuit has taken the view that a notice of appeal filed after an award of sanctions but before the reduction of that award to a sum certain ripened once the court determined the amount of the sanctions award.[29] And the Tenth Circuit has held that a notice related forward, in the context of an appeal by a defendant wishing only to challenge the prior liability determination and not the subsequent damages determination.[30]

The Eighth and Ninth Circuits have held that a notice of appeal filed after a liability determination but before the determination of pre-judgment interest did not relate forward.[31] The Fourth Circuit has held, though, that a notice of appeal filed after the liability determination but before the determination of post-judgment interest did relate forward.[32] Perhaps these

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[27] In the *DeJohn* case discussed in Part I.D., the Third Circuit held that a notice of appeal filed after the grant of injunctive relief on two counts of the plaintiff's complaint, but before the determination of damages on those claims and before disposition of the plaintiff's other claims, did not relate forward. The *DeJohn* court relied both on the fact that the would-be appellant did not request Rule 54(b) certification and on the fact that Rule 54(b) certification would have been inappropriate because the court had not yet determined damages with respect to the relevant claims. *See DeJohn*, 537 F.3d at 307 n.3.

[28] *See Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1483 (9th Cir. 1996) ("Kennedy could not be said to have reasonably confused the court's February 6 order with a final judgment when the amount of attorney fees and costs was undetermined and the court was still requesting submissions.").

[29] *See Hill v. St. Louis University*, 123 F.3d 1114, 1120-21 (8th Cir. 1997).

[30] *See Harbert v. Healthcare Services Group, Inc.*, 391 F.3d 1140, 1145-46 (10th Cir. 2004).

[31] *See Dieser v. Continental Cas. Co.*, 440 F.3d 920, 924 (8th Cir. 2006) ("Because the August 2004 order expressly left unresolved the amounts of additional statutory penalties, pre-judgment interest and attorney's fees and costs, and the March 2005 order called for further submissions from the parties to determine the method of calculation and the amount of pre-judgment interest, these orders could not reasonably be believed to be final within the meaning of § 1291."); In re *Jack Raley Const., Inc.*, 17 F.3d 291, 294 (9th Cir. 1994) ("The premature notice here was not valid because the matter of pre-judgment interest was not decided until October, long after the notice of appeal had been filed. Making this decision was more than a ministerial act to be performed by the Clerk of Court and routinely executed by the judge, it required adjudication of a contested issue not raised or resolved in the July 23 order.").

[32] *See International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 415 n.1 (4th Cir. 2000) ("Schwabedissen maintains International Paper has failed to

contrasting views are reconcilable based on the notion that the calculation of post-judgment interest – though it may sometimes present difficult questions[33] – ordinarily leaves less room for debate than might the calculation of pre-judgment interest.[34]

F. Magistrate judge's conclusions not yet reviewed by district court

Except when the parties have consented to trial before a magistrate judge, *see* 28 U.S.C. § 636(c)(1), the magistrate judge is authorized only to make a report and recommendation concerning the disposition of a civil case; it is the district judge who renders the final disposition, *see id.* § 636(b)(1). It is therefore unsurprising that the Fifth and Ninth Circuits have held that a notice of appeal filed after a magistrate judge issues recommendations but before the district court determines whether to adopt those recommendations does not relate forward to the final judgment entered by the district court. As the Fifth Circuit explained when interpreting Rule 4(b)'s relation-forward provision in a criminal case,

> The magistrate judge's report is nothing like a jury verdict or the oral disposition of a district judge, for the magistrate's role under § 636(b) is advisory, not adjudicatory. Any party may object to the magistrate judge's proposed findings and recommendations, and thereby compel the district court to review the subject of those objections de novo. 28 U.S.C. § 636(b)(1)(C). The judge may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." *Id.* The judge may receive more evidence on the matter, or recommit the matter to the magistrate judge with instructions. *Id.* In short, "the magistrate has no authority to make a final and binding disposition." *United States v. Raddatz*, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980).

United States v. Cooper, 135 F.3d 960, 963 (5th Cir. 1998). *See also Serine v. Peterson*, 989 F.2d 371, 372-73 (9th Cir. 1993).

The Second Circuit did hold in *Sutton v. New York City Transit Authority*, 462 F.3d 157 (2d Cir. 2006), that a notice of appeal filed after a magistrate judge's disposition but prior to

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invoke our jurisdiction over all of the issues in the case because International Paper noted an appeal from the district court's order enforcing the arbitral award, not its final order assessing post-judgment interest. The contention is meritless. *See FirsTier....*").

[33] *See generally* Susan Margaret Payor, Comment, *Post-Judgment Interest in Federal Courts*, 37 Emory L. J. 495 (1988).

[34] *See generally* 28 U.S.C. § 1961 (providing formula for computing postjudgment interest); *compare, e.g.*, Michael S. Knoll, *A Primer on Prejudgment Interest*, 75 Tex. L. Rev. 293 (1996); *Matter of Oil Spill by Amoco Cadiz Off Coast of France on March 16, 1978*, 954 F.2d 1279, 1333 (7th Cir. 1992) (discussing framework for determining prejudgment interest).

disposition of the case by the district court related forward, but it appears likely that the court was swayed by the facts of the case: The magistrate judge's disposition was entered as a "judgment," which made it reasonable for the pro se appellant to think that it was time to file a notice of appeal. *See id.* at 160 n.3.

G. Various clearly interlocutory orders that would not qualify for certification under Civil Rule 54(b)

In this category one may list, for example, the discovery orders and Rule 11 sanctions rulings mentioned by the *FirsTier* court, *see* 498 U.S. at 276. There should be little confusion on this score; Rule 4(a)(2)'s relation forward provision cannot save an appeal when the only notice of appeal is filed after the interlocutory order and prior to the announcement of the final judgment.

Even in the Third Circuit, which (as noted above in Part I.D.) takes a broad view of relation forward by supplementing Rule 4(a)(2) with the older cumulative finality doctrine, such a notice of appeal will not relate forward. *See ADAPT of Philadelphia v. Philadelphia Housing Authority*, 433 F.3d 353, 365 (3d Cir. 2006) ("Concluding that the *Cape May Greene* and *Lazy Oil* rule is not applicable to discovery or similar interlocutory orders, we hold that appeals from discovery orders do not qualify as premature appeals that may ripen upon entry of final judgment.").

Admittedly, even in this relatively straightforward corner of the doctrine, there may be outliers. Thus, a Tenth Circuit panel held – citing *FirsTier* with little discussion – that a notice of appeal from a Rule 11 sanctions order ripened after entry of the final judgment.[35] But that decision is the only one of its kind of which I am aware (though I have not searched specifically for this sort of scenario).

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[35] The court's discussion of this issue read:

> We have held that generally parties and attorneys sanctioned during litigation "must bear the burden of sanctions to the conclusion of the case and appeal on the merits of a fully adjudicated case." *D & H Marketers, Inc. v. Freedom Oil & Gas*, 744 F.2d 1443, 1446 (10th Cir.1984) (en banc). Nevertheless, we have jurisdiction of the appeal because the district court subsequently entered a final judgment disposing of all issues, which causes the prematurely filed notice of appeal to ripen and save the appeal. *Lewis v. B.F. Goodrich Co.*, 850 F.2d 641, 645 (10th Cir.1988) (en banc). *See also Firstier Mortgage Co. v. Investors Mortgage Ins. Co.*, 498 U.S. 269, 111 S.Ct. 648, 652, 112 L.Ed.2d 743 (1991) (premature notice of appeal ripens once final judgment is entered).

Dodd Ins. Services, Inc. v. Royal Ins. Co. of America, 935 F.2d 1152, 1154 n.1 (10th Cir. 1991).

III. Assessment of the doctrinal landscape

Having reviewed various points along the spectrum of prematurity, we are now in a position to assess the various circuits' interpretations of *FirsTier*. If we assess the question from the conceptual perspective of analyzing *FirsTier*'s effect on pre-1991 lines of caselaw concerning cumulative finality, we find that the Third Circuit views its cumulative-finality doctrine as supplementing Rule 4(a)(2) – in contrast to the Fifth Circuit, which appears to view Rule 4(a)(2) as occupying the field and displacing prior cumulative-finality doctrine. Further analysis might usefully focus on whether circuits holding those different views reach different outcomes when presented with the same fact pattern. Here it is worthwhile to note that while the Fifth Circuit has disavowed its prior cumulative-finality doctrine, it has reaffirmed the vitality of relation forward under Rule 4(a)(2).

If we assess the circuit-split question from the practical perspective of a lawyer faced with a given scenario who wishes to determine whether relation forward will occur, we find that in a number of common scenarios there are both majority and minority viewpoints. With respect to the particular scenario at issue in *CHF Industries* – namely, a notice of appeal filed prior to disposition of all claims concerning all parties, followed not by entry of a Civil Rule 54(b) certification but rather by entry of final judgment as to all claims and parties – the circuit split appears to be as follows: The Eighth Circuit unequivocally finds no relation forward, the Seventh Circuit more recently has found relation forward (against a backdrop of contrary prior decisions), and other circuits have found relation forward. With respect to the closely related scenario of a notice of appeal filed prior to the district court's issuance of a Rule 54(b) certification, a similar circuit split appears, with only the Eleventh Circuit (among the circuits that have addressed the issue) refusing to find relation forward. The scenario of liability determination, followed by the notice of appeal, followed by determination of damages – and the related scenario of liability and damages determination, followed by the notice of appeal, followed by determination of pre- or post-judgment interest – present some inter-circuit variation.

When assessing whether these inter-circuit variations provide grounds for a rulemaking response, the Committee may wish to consider a number of factors. Does the doctrine in any of these circuits offend the goals of the final judgment rule (by interfering with the district court's case management or burdening the courts of appeals with duplicative appeals)? It is not apparent to me that this would be the case, because in none of the relation-forward instances would an appeal proceed to appellate adjudication absent (1) a Rule 54(b) certification) or (2) final disposition of all matters in the district court.[36] Does the doctrine in any circuit offend the

[36] There is, of course, the possibility that the question of appellate jurisdiction might remain in flux for a period of time – e.g., between the time that the court of appeals notices that there is not yet a final disposition of all claims with respect to all parties and the time that the district court either disposes of all remaining claims or issues a Civil Rule 54(b) certification. However, it seems likely that the majority practice of permitting relation forward in such

Griggs principle that only one court – trial or appellate – should have control of the case at a given time?[37] Does the doctrine in any circuit threaten an untutored appellant with a loss of appeal rights? One might argue that the Eighth and Eleventh Circuit cases that bar relation forward may lead unsophisticated would-be appellants to lose appeal rights on occasion. Of course, there is a relatively simple safeguard for one who is unsure whether relation forward will occur: The would-be appellant should file a new or amended notice of appeal, after the entry of the final judgment. But it is predictable that some litigants will overlook this safeguard. Conversely, does the doctrine in any circuit threaten unfairness to the appellee? Judge Wiggins, dissenting in a Ninth Circuit case, argued that unfairness could result from permitting relation back when fewer than all claims were adjudicated prior to the filing of the notice of appeal and no subsequent Civil Rule 54(b) certification has been entered.[38]

In short, there exist a number of interesting questions concerning relation forward of premature notices of appeal. This memo has not attempted a full description and analysis of the doctrinal landscape, but I hope it has sketched enough detail to assist the Committee in assessing whether further exploration is warranted. If so, then the summer will provide an opportunity for

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situations may actually conserve appellate resources by permitting the court of appeals to avoid dismissing, on jurisdictional grounds, appeals in which the appellate judges have already invested substantial effort.

[37] *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982).

[38] Judge Wiggins argued as follows:

> Under a rule clearly requiring 54(b) certification, appellant and appellee are both aware of any pending motion and are equally positioned to assess its chances of success. The same is not true of settlement or other disposition of remaining claims that might validate the appeal. The outstanding claims or parties may concern only the appellant or appellee. While one party is conducting negotiations or arguing summary judgment motions on the remaining claims with third parties, the other party to the appeal may be unaware that settlement or disposition is likely. If the subsequent settlement is allowed to validate the appeal, the other party may not realize that this court has jurisdiction until the day of the hearing-or after, as in the current appeal.
>
> Inquiring whether the parties are prejudiced by subsequent validation of the appeal may not fully correct the imbalance created by a system in which 54(b) certification may be dispensed with. First, one party will generally know sooner than the other that argument on the merits will be necessary. Second, the fact that the validity of the appeal depends on the actions of one party but not the other gives one party unequal negotiating power during the pendency of the appeal.

Fadem v. United States, 42 F.3d 533, 536-37 (9th Cir. 1994) (Wiggins, J., dissenting).

additional research. As the Committee is, of course, aware, the issues treated in this memo are not the only appellate-jurisdiction questions on the Committee's docket. The manufactured-finality doctrine is the subject of an inquiry currently ongoing in the Civil / Appellate Subcommittee, while issues relating to the Court's decision in *Mohawk Industries* form the subject of another memo in this agenda book. It may be useful to consider whether all of these jurisdictional questions warrant pursuit and, if so, in what order the Committee may wish to approach them.

TAB 7D

MEMORANDUM

DATE: March 13, 2010

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 10-AP-B

This item arises from an inquiry by Judge Sutton concerning the history of the provisions in Appellate Rule 28 that direct the appellant to provide separate statements of the case and of the facts. Judge Sutton has observed that it seems intuitively more sensible to permit the appellant to weave those two statements together and present the relevant events in chronological order. As a point of comparison, it is interesting to note that Supreme Court Rule 24 does not separate the two requirements; rather, Supreme Court Rule 24(g) requires "[a] concise statement of the case, setting out the facts material to the consideration of the questions presented, with appropriate references to the joint appendix, *e.g.*, App. 12, or to the record, *e.g.*, Record 12."

Part I of this memo recounts the history of the relevant provisions in Rule 28. Rule 28 has always required the appellant to state the case's procedural history separately from the underlying facts. Discussions of Rules 28(a)(6) and (7) in 2002 and 2003 touched upon this issue but did not lead the Committee to propose a change in those subdivisions. Part II reviews local rules from three circuits that vary the requirements of Rules 28(a)(6) and (7).

I. The evolution of Appellate Rule 28

Original Appellate Rule 28 treated both requirements in the same subdivision, but did seem to require them to be discussed seriatim. Specifically, original Rule 28(a)(3) required: "A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. There shall follow a statement of the facts relevant to the issues presented for review, with appropriate references to the record (see subdivision (e))." The Committee Note explained that the rule was based upon Supreme Court Rule 40 (the predecessor to today's Supreme Court Rule 24). Original Rule 28(a)(3) became subdivision (a)(4) as a result of the 1991 amendments.[1]

[1] Those amendments added "a new subparagraph (2) that requires an appellant to include a specific jurisdictional statement in the appellant's brief to aid the court of appeals in

The 1998 restyling split subdivision (a)(4) into two new subdivisions (a)(6) and (a)(7). The 1998 Committee Note explains: "The current rule requires a brief to include a statement of the case which includes a description of the nature of the case, the course of proceedings, the disposition of the case -- all of which might be described as the procedural history -- as well as a statement of the facts. The amendments separate this into two statements: one procedural, called the statement of the case; and one factual, called the statement of the facts. The Advisory Committee believes that the separation will be helpful to the judges."

In 2002, the ABA Council of Appellate Lawyers submitted a comment on subdivisions (a)(6) and (a)(7). This comment was discussed in the fall 2002 meeting:

> The Council stated that, in drafting briefs, practitioners are often confused about the difference between the "statement of the case" required by Rule 28(a)(6) and the "statement of facts" required by Rule 28(a)(7). The Council also argued that practitioners are confused about the difference between, on the one hand, the "statement of the case" and the "statement of facts," and, on the other hand, the "summary of the argument" and "argument."
>
> Several members expressed disagreement with the Council about the latter matter. However, a couple of members agreed that there seems to be confusion about what is supposed to appear in the "statement of the case." Many litigants file briefs that contain no such statement, indicating that they are not even aware that it is required. Other litigants file a statement that is several pages long. Still other litigants file the type of short summary that seems to be envisioned by Rule 28(a)(6). Confusion does exist.
>
> Some members expressed doubts about whether the Appellate Rules should be amended to address this confusion. They pointed out that Rule 28(a)(6) already instructs practitioners that the statement of the case should "briefly indicat[e] the nature of the case, the course of proceedings, and the disposition below." They also pointed out that, because the statement of the case counts toward the page limits applicable to briefs, it really does not matter if some litigants draft short statements and others draft long statements.
>
> The practitioner members of the Committee said that, as far as they were concerned, this was not a problem for attorneys. They said that they would favor amending Rule 28(a)(6) only if the judge members thought that there was a serious problem with statements of the case. The judge members responded that they did not. By consensus, Item No. 02-12 was removed from the Committee's study agenda.

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determining whether it has both federal subject matter and appellate jurisdiction." 1991 Committee Note to Rule 28(a).

Minutes of Fall 2002 Meeting of Advisory Committee on Appellate Rules, November 18, 2002, at 35-36.

Though this specific item was removed from the study agenda, the general topic recurred during the Committee's discussion, a year later, about circuit-specific requirements for briefs, appendices and the like. In response to the Council's complaints about circuit-specific briefing requirements, the Committee had asked the Department of Justice to study those requirements and offer the Committee some recommendations. As described in the fall 2003 minutes, Doug Letter (on behalf of the DOJ) recommended no action on some of the issues identified by the Council, but did recommend action on the question of briefing requirements:

> Mr. Letter said that the Department does recommend that Rule 28 be amended to bring about more uniformity in the rules governing briefs and to require circuits to accept briefs that comply with Rule 28. Mr. Letter explained that there are more than a dozen differences in the local rules regarding briefs -- and, because there is nothing like Rule 32(e) in Rule 28, practitioners have no choice but to follow each circuit's local rules. The Department recommends that Rule 28 be amended to incorporate the most popular of the local variations and to add a provision similar to Rule 32(e) that would force every circuit to accept briefs that comply with Rule 28, even if those briefs do not comply with the circuit's local rules. Specifically, the Department recommends that Rule 28 be amended as follows:
>
> (1) A new provision would require briefs to begin with an "introductory statement." The statement would include the identity of the judge or agency whose decision was being appealed, a citation to the decision being appealed if it was included in a federal reporter, a description of related cases, and, at the option of the party submitting the brief, a statement about whether oral argument is appropriate.
>
> (2) The statement of the case -- now required by Rule 28(a)(6) -- would no longer include a description of "the course of proceedings."
>
> (3) The statement of facts -- now required by Rule 28(a)(7) -- would include a description of the "prior proceedings."
>
> (4) Copies of all unpublished decisions cited in the brief would have to be attached to the brief or included in an addendum that accompanies the brief.
>
> The Committee gave extended consideration to the Department's recommendations....
>
> There was considerable disagreement among members of the Committee regarding the Department's proposal on briefs. Some members argued that the

Committee was going too far in "micro-managing" appellate practice -- in trying to make every brief look the same. Other members warned that judges feel as strongly about their local rules regarding briefs as they do about their local rules regarding appendices -- and judges are likely to oppose attempts to impose different rules on them or to force them to accept briefs that do not comply with their local rules. Two of the appellate judges on the Committee said that their colleagues would surely oppose the Department's proposal.

Other members disagreed. They pointed out that the changes being proposed by the Department to the rules regarding briefs were much more modest than the kind of changes that would have to be made to the rules regarding appendices. They also pointed out that circuits might welcome some of the changes. The fact that a local variation has been adopted by, say, two-thirds of the circuits is strong evidence that the variation is a good idea. A circuit that does not follow the variation may never have considered it and might not object if a national rule imposed it.

One member asked whether a middle road was possible. He said that, as far as he was concerned, the most serious problem was that clerks reject briefs that do not comply with local rules, rather than filing them and asking the parties to make corrections. Perhaps the rules could be amended so that circuits could still apply their local rules, but clerks could not reject briefs that do not comply with them. The Reporter pointed out that this is precisely what the rules provide; under Rule 25(a)(4), clerks are already barred from rejecting a brief "solely because it is not presented in proper form as required by . . . any local rule." Ms. Waldron said that, in the Third Circuit, noncompliant briefs are filed and attorneys are asked to correct the deficiencies. The member responded that, in his experience, not all clerks are honoring Rule 25(a)(4).

One member asked whether Rule 28 could be amended to incorporate all of the local variations identified by the Department. In that way, a uniform national rule could be imposed, and every circuit would be happy because briefs would include everything that it wants. Mr. Letter and the Reporter responded that such an approach would require at least a dozen amendments to Rule 28, which amendments would likely make Rule 28 ungainly. The Reporter also pointed out that, just as judges might object to a rule that omits from briefs information that they want, so too judges might object to a rule that requires briefs to include information that they do not want.

In the course of the Committee's discussion, several members commented on some of the specific changes that the Department had proposed to Rule 28.

...

Regarding the proposal to strike "the course of proceedings" from the statement of the case: Members disagreed over the merits of the Department's proposal. Some members favored the proposal. They argued that there is widespread confusion among practicing attorneys about what is supposed to be included in the statement of the case. That confusion gives rise to two problems. The first is that many attorneys file statements that are much too long and that include a great deal of irrelevant information about the proceedings below. The second is that many attorneys include in their statements of facts the same information about the proceedings below that they include in their statements of the case. One member said that the D.C. Circuit expects parties to include a very brief description of the proceedings below in their statements of the case and then to expand upon that description in their statements of the facts.

Other members opposed the proposed change. They argued that the rule was clear as written. In the statement of the case, a party should describe the proceedings before the district court or agency whose decision is being reviewed. In the statement of facts, a party should describe the facts that gave rise to the legal dispute. As to the variations in practice, these members argued that the variations were harmless; if a party wants to devote several pages to the proceedings below, then the only one being harmed is that party. Members also argued against using Rule 28 to "micro-manage" briefs -- to essentially write the briefs of attorneys for them.

One member said that, in his state, the Supreme Court merely requires a "statement of facts and proceedings below" and gives attorneys the freedom to decide how much to say about the facts giving rise to the litigation and how much to say about the proceeding below. Attorneys sometimes use that freedom unwisely, but attorneys are going to make mistakes no matter how specifically the rules dictate the contents of briefs. The member urged that Rule 28 be amended to condense the "statement of the case" and the "statement of facts" into a similarly straightforward directive. Other members expressed support for the suggestion.

In the end, the DOJ's proposal concerning Rules 28(a)(6) and (7) appears to have been subsumed into a discussion of larger questions concerning national uniformity and local variation:

Judge Levi agreed that any proposed changes to Rule 28 were likely to be resisted by members of the Judicial Conference. He said that the Conference was unlikely to be persuaded simply by arguments that national uniformity is important or that a particular change is thought by a majority of the Advisory Committee to be a good idea. Rather, if proposed changes to Rule 28 are to stand a chance of gaining Conference approval, the Committee will have to present solid empirical support for the changes. For example, the Judicial Conference is likely to be impressed by evidence that, say, two-thirds of the circuits have

adopted a particular practice that the Committee seeks to make uniform -- or, alternatively, that only one circuit has adopted a practice that the Committee seeks to preclude. The Conference is also likely to be impressed if members of the bar get behind a proposal. In short, before the Committee proposes any changes to Rule 28, it needs to do some empirical work.

Several members concurred with Judge Levi. By consensus, the Committee agreed to table further discussion of Item Nos. 02-16 and 02-17 and to request the Federal Judicial Center to collect further information for the Committee. Specifically, the Committee would like the FJC to identify every local circuit rule regarding the contents of briefs that varies from Rule 28. The Committee would also like to get some sense of the reason for each variation. Does the variation reflect a recent decision by the circuit's judges or is it a longstanding rule whose purpose can no longer be recalled by any member of the court? Does the variation address a serious problem that the circuit was experiencing or does it exist because of a request made by a long-retired member of the court? Is the variation rigorously enforced by the clerk's office or does the office look the other way? Judge Alito said that he would draft a formal request to the FJC.

Minutes of Fall 2003 Meeting of Advisory Committee on Appellate Rules, November 7, 2003.

The ensuing FJC study led the Committee to decide that the best way to approach the question of briefing requirements was for Judge Stewart to write to the Chief Judge of each circuit, on the Committee's behalf, to suggest that idiosyncratic local briefing requirements be reconsidered. To my knowledge, the specific topic of Rules 28(a)(6) and (7) did not recur.

II. Local rules

The table at the end of this memo sets forth local circuit rules concerning the statement of the case and/or the statement of facts.[2] Most circuits do not vary the requirements of Rules 28(a)(6) and (7). The starkest variation is by the D.C. Circuit: D.C. Circuit Rule 28(a)(4) provides that "The parties need not include in their briefs a statement of the case." Eleventh Circuit Rule 28-1(i) directs that the statement of facts be included as part of the statement of the case, but the local rule orders the contents of the statement of the case in the same way as Appellate Rules 28(a)(6) and (7). Eighth Circuit Rule 28A(f)(1) requires a "summary of the case" that would presumably include some of the information also demanded by Appellate Rule

[2] The table does not include local provisions that require a statement concerning related cases. *See, e.g.*, Tenth Circuit Rule 28.2(C)(1) ("At the end of the table of cases, the first brief filed by each party must list all prior or related appeals, with appropriate citations, or a statement that there are no prior or related appeals."); *see also* Ninth Circuit Rule 28-2.6.

28(a)(6).

Circuit rule	Provision
D.C. Circuit Rule 28(a)(4)	The parties need not include in their briefs a statement of the case.
Fourth Circuit Rule 28(f)	Every opening brief filed by appellants in this Court shall include a separate section, the title of which is STATEMENT OF FACTS. In this section the attorneys will prepare a narrative statement of all of the facts necessary for the Court to reach the conclusion which the brief desires. The said STATEMENT OF FACTS will include exhibit, record, transcript, or appendix references showing the source of the facts stated. An appellee's brief shall also include a STATEMENT OF FACTS so prepared unless appellee is satisfied with appellant's statement of facts.
Fifth Circuit Rules 28.3(g) & (h)	[These rules incorporate the requirements of Appellate Rules 28(a)(6) and (7).]
Seventh Circuit Rule 28(c)	The statement of the facts required by Fed. R. App. P. 28(a)(7) shall be a fair summary without argument or comment. No fact shall be stated in this part of the brief unless it is supported by a reference to the page or pages of the record or the appendix where that fact appears.
Eighth Circuit Rule 28A(f)(1)	Each appellant must file a statement not to exceed one page providing a summary of the case, the reasons why oral argument should or should not be heard, and the amount of time (15, 20, or 30 minutes, or in an extraordinary case, more than 30 minutes) necessary to present the argument. The summary must be placed as the first item in the brief.

Eleventh Circuit Rule 28-1(i)	Statement of the Case. In the statement of the case, as in all other sections of the brief, every assertion regarding matter in the record shall be supported by a reference to the volume number (if available), document number, and page number of the original record where the matter relied upon is to be found. The statement of the case shall briefly recite the nature of the case and shall then include: (i) the course of proceedings and dispositions in the court below. IN CRIMINAL APPEALS, COUNSEL MUST STATE WHETHER THE PARTY THEY REPRESENT IS INCARCERATED; (ii) a statement of the facts. A proper statement of facts reflects a high standard of professionalism. It must state the facts accurately, those favorable and those unfavorable to the party. Inferences drawn from facts must be identified as such; (iii) a statement of the standard or scope of review for each contention. For example, where the appeal is from an exercise of district court discretion, there shall be a statement that the standard of review is whether the district court abused its discretion. The appropriate standard or scope of review for other contentions should be similarly indicated, e.g., that the district court erred in formulating or applying a rule of law; or that there is insufficient evidence to support a verdict; or that fact findings of the trial judge are clearly erroneous under Fed.R.Civ.P. 52(a); or that there is a lack of substantial evidence in the record as a whole to support the factual findings of an administrative agency; or that the agency's action, findings and conclusions should be held unlawful and set aside for the reasons set forth in 5 U.S.C. § 706(2).
Federal Circuit Rule 28(a)	[Appellants' briefs must] contain the following in the order listed: ... (7) the statement of the case, including the citation of any published decision of the trial tribunal in the proceedings; (8) the statement of the facts ....

TAB 7E

MEMORANDUM

DATE: March 13, 2010

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 10-AP-C

Effective February 16, 2010, the Supreme Court revised its Rule 33 to lower the word limit for reply briefs on the merits from 7,500 words to 6,000 words. This memo describes that change and considers whether it provides a reason to alter Appellate Rule 32's length limits. Part I reviews the history of the Appellate Rules' length limits on principal and reply briefs, Part II reviews the history of such limits in the Supreme Court Rules, and Part III concludes by briefly suggesting that the amendment to Supreme Court Rule 33.1 does not appear to provide support for amending Appellate Rule 32.

I. History of length limits in the FRAP

Ever since their adoption, the Appellate Rules have followed a pattern of setting the permitted length of reply briefs at half the permitted length of principal briefs. The details have varied, as shown in the chart below, but the 50 % ratio has remained constant:

Years	Provision	Principal brief limit	Reply brief limit
1968-1979	FRAP 28(g)	50 pages of standard typographic printing or 70 pages of printing by any other process of duplicating or copying	25 pages of standard typographic printing or 35 pages of printing by any other process of duplicating or copying
1979-1998	FRAP 28(g)	50 pages	25 pages
1998-	FRAP 32(a)(7)	30 pages / 14,000 words / monospaced: 1,300 lines	15 pages / 7,000 words / monospaced: 650 lines

II. History of length limits in the Supreme Court Rules

The Supreme Court first set length limits on briefs in 1980.[1] Prior to the 2007 revisions to the Supreme Court Rules, the length limit on principal merits briefs was 50 pages and the length limit on reply briefs on the merits was 20 pages. (I have not specifically verified the limits in effect throughout the period from 1980 to 2007, but the leading treatise on Supreme Court practice states that "[f]or many years the Supreme Court imposed limits of 50 pages for merits briefs and 20 pages for reply briefs.")[2] Thus, prior to 2007 the Supreme Court set length limits that yielded a ratio of 40 % when comparing the permitted length of reply briefs to that of principal briefs.

In May 2007, the Supreme Court published for comment proposed revisions to a number of rules, including Supreme Court Rule 33.1 (concerning brief format and length limits). The proposed revisions – loosely inspired by the 1998 changes to the Appellate Rules – adopted word limits instead of page limits. The existing page limits were translated to word limits by multiplying each page count by 300. Thus, in the original May 2007 proposal, principal merits briefs were limited to 15,000 words and merits reply briefs were limited to 6,000 words – preserving the existing 40 % ratio.[3]

Judging from a blogger's account of an event held at the Georgetown Supreme Court Institute in late May 2007, commentators argued that the Supreme Court should increase the proposed length limit for reply briefs:

> Several in attendance expressed the view that the word limit seemed to be most restrictive with respect to reply briefs. Just how this could be so – given that the Court apparently just multiplied the current page limits for all briefs by 300 words – initially poses a bit of a mystery. Perhaps given the quite short page limits for reply briefs, counsel more often turn to the tricks outlined above to squeeze extra words per page into a reply brief.
>
> Whatever the explanation, the word limits for reply briefs caused the most concern at the meeting. It was apparent that many have believed for some time that the Supreme Court's limits (page or word) for reply briefs are too short. They pointed out that in the courts of appeals, a reply brief can be half the length of the

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[1] See Eugene Gressman et al., Supreme Court Practice § 13.3, at 702 (9th ed. 2007).

[2] See Gressman et al.§ 13.3, at 702.

[3] See Press Release dated May 14, 2007, attaching Proposed Revisions to Rules of the Supreme Court of the United States, showing proposed revisions to Rule 33.1. The Clerk's Comment stated in part that the purpose of revising Rule 33.1 was "to ensure that documents are more readable, to provide clear guidelines for preparing documents, and to limit the length of documents while eliminating any incentive to increase the number of words on a page."

briefs in chief, whereas the Supreme Court rules permit a reply of no more than one-third the length of the main briefs.

> The limitations on the length of reply briefs (particularly at the merits stage) has become more problematic, many argued, in light of the increasing number of amicus briefs being filed. Several participants expressed the view that amicus briefs are becoming not only more numerous, but also longer. Moreover, because parties have been taking a more active role in coordinating amicus briefs in recent years, there is less overlap among amicus briefs than there used to be. The net result is that petitioners have much more to respond to in their reply briefs than they used to. A somewhat higher word limit, it was thought, might facilitate a more thorough discussion of the issues raised in those amicus briefs.[4]

It seems plausible to infer that these arguments carried the day, because when the Supreme Court ultimately adopted the 2007 revisions to its Rules, the word limit for merits reply briefs was set at 7,500 words. The other word limits were unchanged from those set in the version published for comment, and thus the ratio of reply brief length to principal brief length increased to 50 %.[5]

Effective February 16, 2010, the Supreme Court amended Rule 33.1 to reduce the merits reply brief word limit to 6,000. The Clerk's Comment explains: "The Revised Rule restores the volume limit in effect for reply briefs on the merits prior to the 2007 Rule revisions. Experience has shown that the increased volume limit has allowed for the filing of some briefs that repeat previous arguments rather than address only new material presented in intervening briefs."

III. Is it worth considering changes to Appellate Rule 32's length limit for reply briefs?

The Supreme Court's change to its Rule 33.1 provides an occasion to consider whether Appellate Rule 32 sets the appropriate ratio of reply brief length to principal brief length. However, it is worth noting that the Supreme Court's decision to set a 6,000-word limit for reply briefs merely restores the 40 % length ratio that existed for many years prior to 2007. The Appellate Rules have maintained the 50 % ratio since 1968, and therefore the 2010 amendment to Supreme Court Rule 33.1 might not in itself provide a reason to consider altering Appellate Rule 32. The real question is whether judges and/or practitioners are unhappy with the current

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[4] Kevin Russell, "Practitioners' Reactions To Proposed Revisions To Supreme Court Rules," posted Friday, May 25th, 2007, available at http://www.scotusblog.com/2007/05/practitioners-reactions-to-proposed-revisions-to-supreme-court-rules/ .

[5] The Clerk's Comment did not mention the reason for expanding the merits reply brief word limit to 7,500.

length limits in Appellate Rule 32, and, if so, why.

TAB 8

TAB 8

September 2010						
S	M	T	W	T	F	S
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30		

November 2010						
S	M	T	W	T	F	S
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30				

December 2010						
S	M	T	W	T	F	S
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30	31	

October 2010

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
					1	2
3	4	5	6	7	8	9
10	11 Columbus Day Thanksgiving (Canada)	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30
31 Halloween						U.S. Federal Holidays are in Red.

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