ADVISORY COMMITTEE
ON
APPELLATE RULES

March 29, 2023

ADVISORY COMMITTEE ON APPELLATE RULES
Meeting of March 29, 2023
West Palm Beach, FL

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RULES COMMITTEES — CHAIRS AND REPORTERS

Committee on Rules of Practice and Procedure
(Standing Committee)

Chair	Reporter
Honorable John D. Bates United States District Court Washington, DC	Professor Catherine T. Struve University of Pennsylvania Law School Philadelphia, PA

Secretary to the Standing Committee

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Administrative Office of the U.S. Courts
Office of the General Counsel – Rules Committee Staff
Washington, DC

Advisory Committee on Appellate Rules

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Advisory Committee on Bankruptcy Rules

Chair	Reporter
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Associate Reporter

Professor Laura B. Bartell
Wayne State University Law School
Detroit, MI

Advisory Committee on Civil Rules

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	Associate Reporter
	Professor Andrew Bradt University of California, Berkeley Berkeley, CA

Advisory Committee on Criminal Rules

Chair	Reporter
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	Associate Reporter
	Professor Nancy J. King Vanderbilt University Law School Nashville, TN

Advisory Committee on Evidence Rules

Chair	Reporter
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Chair	Reporter
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Honorable Elizabeth B. Prelogar Solicitor General (ex officio) United States Department of Justice Washington, DC	Danielle Spinelli, Esq. Wilmer Cutler Pickering Hale and Dorr LLP Washington DC
Honorable Paul J. Watford United States Court of Appeals Pasadena, CA	Honorable Richard C. Wesley United States Court of Appeals Geneseo, NY
Lisa B. Wright, Esq. Office of the Federal Public Defender Washington, DC	

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Honorable Daniel A. Bress (*Bankruptcy*) United States Court of Appeals San Francisco, CA	Andrew J. Pincus, Esq. (*Standing*) Mayer Brown LLP Washington, DC

Clerk of Court Representative

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Advisory Committee on Appellate Rules

Members	Position	District/Circuit	Start Date	End Date
Jay S. Bybee Chair	C	Ninth Circuit	2017 Member: 2020 Chair:	---- 2023
George W. Hicks, Jr.	ESQ	Washington, DC	2022	2025
Bert Huang	ACAD	New York	2022	2025
Leondra R. Kruger	JUST	California	2021	2024
Carl J. Nichols	D	District of Columbia	2021	2024
Elizabeth Prelogar*	DOJ	Washington, DC	----	Open
Danielle Spinelli	ESQ	Washington, DC	2017	2023
Paul J. Watford	C	Ninth Circuit	2018	2024
Richard C. Wesley	C	Second Circuit	2020	2023
Lisa Burget Wright	ESQ	Assistant Federal Public Defender (Appellate) (DC)	2019	2025
Edward Hartnett Reporter	ACAD	New Jersey	2018	2023

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SUBCOMMITTEES
(2022–2023)

AMICUS Act Subcommittee Prof. Bert Huang Danielle Spinelli, Esq. Lisa Wright, Esq.	**Direct Appeals in Bankruptcy** Justice Leondra Kruger Danielle Spinelli, Esq. Prof. Bert Huang
E-Filing Deadline Joint Subcommittee Hon. Jay Bybee, Chair Hon. Catherine McEwen Hon. Cathy Bissoon Hon. Carl Nichols Catherine Recker, Esq. Jeremy Retherford, Esq. Joshua Gardner, Esq.	**IFP Subcommittee** Hon. Paul Watford Lisa Wright, Esq.
Rules 35 & 40 Subcommittee Mark Freeman, Esq. Hon. Richard Wesley Danielle Spinelli, Esq.	**Rule 39 Subcommittee** Hon. Carl Nichols, Chair Hon. Richard Wesley Mark Freeman, Esq.

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Liaison for the Advisory Committee on Criminal Rules	TBD (*Standing*)
Liaisons for the Advisory Committee on Evidence Rules	Hon. Robert J. Conrad, Jr. (*Criminal*) Hon. Carolyn B. Kuhl *(Standing)* Hon. M. Hannah Lauck (*Civil*)

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TAB 1B

	FRAP Item	Proposal	Source	Current Status
7	16-AP-D	Rule 3(c)(1)(B) and the Merger Rule	Neal Katyal	Discussed at 11/17 meeting and a subcommittee formed Discussed at 4/18 meeting and continued review Discussed at 10/18 meeting and continued review Draft approved for submission to Standing Committee 4/19 Draft approved for publication by Standing Committee 6/19 Discussed at 10/19 meeting Final approval for submission to Standing Committee 4/20 Approved by Standing Committee 6/20 Approved by Judicial Conference 9/20 Submitted to Supreme Court 10/20 Approved by Supreme Court 4/21 Effective 12/21
7	17-AP-G	Rule 42(b)–discretionary "may" dismissal of appeal on consent of all parties	Christopher Landau	Discussed at 11/17 meeting and a subcommittee formed Discussed at 4/18 meeting and continued review Discussed at 10/18 meeting and continued review Draft approved for submission to Standing Committee 4/19 Draft approved for publication by Standing Committee 6/19 Discussed at 10/19 meeting Final approval for submission to Standing Committee 4/20 Remanded by Standing Committee 6/20 Discussed at 10/20 meeting Final approval for submission to Standing Committee 4/21 Approved by Standing Committee 6/21 Approved by Judicial Conference 9/21 Submitted to Supreme Court 10/21 Approved by Supreme Court 4/22 Effective 12/22
7	18-AP-E	Provide privacy in Railroad Retirement Act cases as in Social Security cases	Railroad Retirement Board	Discussed at 4/19 meeting and subcommittee formed Discussed at 10/19 meeting and continued review Draft approved for submission to Standing Committee 4/20 Draft approved for publication by Standing Committee 6/20 Discussed at 10/20 meeting Final approval for submission to Standing Committee 4/21 Approved by Standing Committee 6/21 Approved by Judicial Conference 9/21 Submitted to Supreme Court 10/21

	FRAP Item	Proposal	Source	Current Status
				Approved by Supreme Court 4/22 Effective 12/22
6	None assigned	Rules for Future Emergencies Rules 2 and 4	Congress (CARES Act)	Initial consideration and subcommittee formed 4/20 Discussed at 10/20 meeting Draft approved for submission to Standing Committee 4/21 Draft approved for publication by Standing Committee 6/21 Discussed at 10/21 meeting Final approval for submission to Standing Committee 3/22 Approved by Standing Committee 6/21 Approved by Judicial Conference 9/22 Submitted to Supreme Court 10/22
6	None assigned	Add Juneteenth to Rule 26	Congress	Initial consideration 3/22 Final approval for submission to Standing Committee 3/22 Approved by Standing Committee 6/21 Approved by Judicial Conference 9/22 Submitted to Supreme Court 10/22
3	18-AP-A	Rules 35 and 40 – Comprehensive review	Department of Justice	Discussed at 4/18 meeting and subcommittee formed Discussed at 10/18 meeting Discussed at 4/19 meeting Discussed at 10/19 meeting Discussed at 4/20 meeting Discussed at 10/20 meeting Draft approved for submission to Standing Committee 4/21 Remanded by Standing Committee 6/21 Draft approved for resubmission to Standing Committee 10/21 Draft approved for publication by Standing Committee 1/22 Correction approved for submission to Standing Committee 3/22 Correction approved for publication by Standing Committee 6/21 Discussed at 10/22 meeting
1	19-AP-E	Electronic Filing Deadlines	Hon. Michael Chagares	Discussed at 6/19 meeting of Standing Committee and joint committee formed Discussed at 10/19 meeting Discussed at 4/20 meeting Discussed at 10/20 meeting

	FRAP Item	Proposal	Source	Current Status
				Discussed at 4/21 meeting Discussed at 10/21 meeting Discussed at 3/22 meeting Discussed at 10/22 meeting
1	19-AP-C	IFP Standards	Sai	Initial consideration 10/19 Discussed at 4/20 meeting and subcommittee formed Discussed at 10/20 meeting Discussed at 4/21 meeting Discussed at 10/21 meeting Discussed at 3/22 meeting Discussed at 10/22 meeting and held
1	20-AP-D	IFP Forms	Sai	Initial consideration 10/20 and referred to IFP subcommittee Discussed at 4/21 meeting Discussed at 10/21 meeting Discussed at 3/22 meeting Discussed at 10/22 meeting and held
1	21-AP-B	IFP Forms	Sai	Initial consideration and referred to IFP subcommittee 4/21 Discussed at 10/21 meeting Discussed at 3/22 meeting Discussed at 10/22 meeting and held
1	21-AP-C	Amicus Disclosures	Senator Whitehouse & Representative Johnson	Issue noted and subcommittee formed 10/19 Initial consideration of suggestion 4/21 Discussed at 10/21 meeting Discussed at 3/22 meeting Discussed at 10/22 meeting
1	21-AP-D	Costs on Appeal	Alan Morrison	Initial consideration of suggestion and subcommittee formed 10/21 Discussed at 3/22 meeting Discussed at 10/22 meeting
1	21-AP-E	Electronic Filing by Pro Se Litigants	Sai	Initial consideration of suggestion and referred to reporters 10/21 Discussed at 3/22 meeting Discussed at 10/22 meeting
1	20-AP-C	Pro Se Electronic Filing	Usha Jain	Initial consideration 10/20 and tabled pending consideration by Civil Rules Committee Referred to reporters 10/21 Discussed at 3/22 meeting Discussed at 10/22 meeting

	FRAP Item	Proposal	Source	Current Status
1	21-AP-G	Comment on 21-AP-C	Chamber of Commerce	Initial consideration 3/22 See 21-AP-C
1	21-AP-H	Comment on 21-AP-C	Senator Whitehouse & Representative Johnson	Initial consideration 3/22 See 21-AP-C
1	22-AP-A	Comment on 21-AP-C	Senator Whitehouse & Representative Johnson	Initial consideration 3/22 See 21-AP-C
1	22-AP-C	Third-Party Litigation Funding Disclosure	Lawyers for Civil Justice	Initial consideration 10/22
1	None assigned	Rules 4 & 6; Resetting Time to Appeal in Bankruptcy Cases	Bankruptcy Committee	Initial consideration 4/23
1	22-AP-D	Comment on 22-AP-C	International Legal Finance Association	Initial consideration 4/23 See 22-AP-C
1	22-AP-E	Social Security Numbers in Court Filings	Senator Widen	Initial consideration 4/23
1	22-AP-F	Rule 46; Admission to the Bar	Erwin Rosenberg	Initial consideration 4/23
1	22-AP-G	Intervention on Appeal	Stephen Sachs	Initial consideration 4/23
1	23-AP-A	Rule 29; Amicus Briefs	DRI Center	Initial consideration 4/23
1	23-AP-B	Rule 29; Amicus Briefs	Atlantic Legal Foundation	Initial consideration 4/23
0	None assigned	Review of rules regarding appendices	Committee	Discussed at 11/17 meeting and a subcommittee formed to review Discussed at 4/18 meeting and removed from agenda Will reconsider in 4/21 Discussed at 4/21 meeting and postponed until 4/24
0	19-AP-B	Decisions on Unbriefed Grounds	AAAL	Initial consideration 10/19 and subcommittee formed Discussed at 4/20 meeting and to be considered in 4/23

	FRAP Item	Proposal	Source	Current Status
0	22-AP-B	Striking Amicus Briefs; Identifying Triggering Person	Reporters Committee for Freedom of the Press	Initial consideration 10/22 Discussed at 10/22 meeting and removed from agenda

0 recently moved from agenda or deferred to future meeting
1 pending before Advisory Committee prior to public comment
2 approved by Advisory Committee and submitted to Standing Committee for publication
3 out for public comment
4 pending before Advisory Committee after public comment
5 final approval by Advisory Committee and submitted to Standing Committee
6 approved by Standing Committee
7 approved by SCOTUS

TAB 1C

Effective December 1, 2022

Current Step in REA Process:

- Effective December 1, 2022

REA History:

- Adopted by Supreme Court and transmitted to Congress (Apr 2022)
- Transmitted to Supreme Court (Oct 2021)
- Approved by Judicial Conference (Sept 2021 unless otherwise noted)
- Published for public comment (Aug 2020 – Feb 2021 unless otherwise noted)
- Approved by Standing Committee (June 2021 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 25	The amendment to Rule 25 extends the privacy protections afforded in Social Security benefit cases to Railroad Retirement Act benefit cases.	
AP 42	The amendment to Rule 42 clarifies the distinction between situations where dismissal is mandated by stipulation of the parties and other situations. (These proposed amendments were published Aug 2019 – Feb 2020).	BK 8023
BK 3002	The amendment allows an extension of time to file proofs of claim for both domestic and foreign creditors if "the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim."	
BK 5005	The changes allow papers to be transmitted to the U.S. trustee by electronic means rather than by mail, and would eliminate the requirement that the filed statement evidencing transmittal be verified.	
BK 7004	The amendments add a new Rule 7004(*i*) clarifying that service can be made under Rule 7004(b)(3) or Rule 7004(h) by position or title rather than specific name and, if the recipient is named, that the name need not be correct if service is made to the proper address and position or title.	
BK 8023	The amendments conform the rule to pending amendments to Appellate Rule 42(b) that would make dismissal of an appeal mandatory upon agreement by the parties.	AP 42(b)
SBRA Rules (BK 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2 (new), 3018, 3019)	The SBRA Rules make necessary rule changes in response to the Small Business Reorganization Act of 2019. The SBRA Rules are based on Interim Bankruptcy Rules adopted by the courts as local rules in February 2020 in order to implement the SBRA which went into effect February 19, 2020.	
Official Form 101	Updates are made to lines 2 and 4 of the form to clarify how the debtor should report the names of related separate legal entities that are not filing the petition.	

Effective December 1, 2022

Current Step in REA Process:

- Effective December 1, 2022

REA History:

- Adopted by Supreme Court and transmitted to Congress (Apr 2022)
- Transmitted to Supreme Court (Oct 2021)
- Approved by Judicial Conference (Sept 2021 unless otherwise noted)
- Published for public comment (Aug 2020 – Feb 2021 unless otherwise noted)
- Approved by Standing Committee (June 2021 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
Official Forms 309E1 and 309E2	Form 309E1, line 7 and Form 309E2, line 8, are amended to clarify which deadline applies for filing complaints to deny the debtor a discharge and which applies for filing complaints seeking to except a particular debt from discharge.	
CV 7.1	An amendment to subdivision (a) was published for public comment in Aug 2019 – Feb 2020. As a result of comments received during the public comment period, a technical conforming amendment was made to subdivision (b). The conforming amendment to subdivision (b) was not published for public comment. The amendments to (a) and (b) were approved by the Standing Committee in Jan 2021, and approved by the Judicial Conference in Mar 2021. The amendment to Rule 7.1(a)(1) requires the filing of a disclosure statement by a nongovernmental corporation that seeks to intervene. This change conforms the rule to the recent amendments to FRAP 26.1 (effective Dec 2019) and Bankruptcy Rule 8012 (effective Dec 2020). The amendment to Rule 7.1(a)(2) creates a new disclosure aimed at facilitating the early determination of whether diversity jurisdiction exists under 28 U.S.C. § 1332(a), or whether complete diversity is defeated by the citizenship of a nonparty individual or entity because that citizenship is attributed to a party.	AP 26.1 and BK 8012
CV Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g)	Set of uniform procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g).	
CR 16	Amendment addresses the lack of timing and specificity in the current rule with regard to expert witness disclosures, while maintaining reciprocal structure of the current rule.	

Effective (no earlier than) December 1, 2023

Current Step in REA Process:

- Transmitted to Supreme Court (Oct 2022)

REA History:

- Published for public comment (Aug 2021 – Feb 2022 unless otherwise noted)
- Approved by Standing Committee (June 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 2	Proposed amendment developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	BK 9038, CV 87, and CR 62
AP 4	The proposed amendment is designed to make Rule 4 operate with Emergency Civil Rule 6(b)(2) if that rule is ever in effect by adding a reference to Civil Rule 59 in subdivision (a)(4)(A)(vi) of Appellate Rule 4.	CV 87 (Emergency CV 6(b)(2))
AP 26	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 45, BK 9006, CV 6, CR 45, and CR 56
AP 45	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, BK 9006, CV 6, CR 45, and CR 56
BK 3011	Proposed new subdivision (b) would require courts to provide searchable access to unclaimed funds on local court websites.	
BK 8003 and Official Form 417A	Proposed rule and form amendments are designed to conform to amendments to FRAP 3(c) clarifying that the designation of a particular interlocutory order in a notice of appeal does not prevent the appellate court from reviewing all orders that merged into the judgment, or appealable order or degree.	AP 3
BK 9038 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, CV 87, and CR 62
BK 9006(a)(6)(A)	Technical amendment approved by Advisory Committee without publication add Juneteenth National Independence Day to the list of legal holidays.	AP 26, AP 45, CV 6, CR 45, and CR 56
CV 6	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, AP 45, BR 9006, CR 45, and CR 56
CV 15	The proposed amendment to Rule 15(a)(1) is intended to remove the possibility for a literal reading of the existing rule to create an unintended gap. A literal reading of "A party may amend its pleading once as a matter of course within . . . 21 days after service of a responsive pleading or [pre-answer motion]" would suggest that the Rule 15(a)(1)(B) period does not commence until the service of the responsive pleading or pre-answer motion – with the unintended result that there could be a gap period (beginning on the 22nd day after service of the pleading and extending to service of the responsive pleading or pre-answer	

Effective (no earlier than) December 1, 2023

Current Step in REA Process:

- Transmitted to Supreme Court (Oct 2022)

REA History:

- Published for public comment (Aug 2021 – Feb 2022 unless otherwise noted)
- Approved by Standing Committee (June 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
	motion) within which amendment as of right is not permitted. The proposed amendment would preclude this interpretation by replacing the word "within" with "no later than."	
CV 72	The proposed amendment would replace the requirement that the magistrate judge's findings and recommendations be mailed to the parties with a requirement that a copy be served on the parties as provided in Rule 5(b).	
CV 87 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, BK 9038, and CR 62
CR 45	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, AP 45, BR 9006, CV 6, and CR 56
CR 56	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, AP 45, BR 9006, CV 6, and CR 45
CR 62 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, BK 9038, and CV 87
EV 106	The proposed amendment would allow a completing statement to be admissible over a hearsay objection and cover unrecorded oral statements.	
EV 615	The proposed amendment limits an exclusion order to the exclusion of witnesses from the courtroom. A new subdivision would provide that the court has discretion to issue further orders to "(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and (2) prohibit excluded witnesses from accessing trial testimony." Finally, the proposed amendment clarifies that the existing provision that allows an entity-party to designate "an officer or employee" to be exempt from exclusion is limited to one officer or employee.	
EV 702	The proposed amendment would amend Rule 702(d) to require the court to find that "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." In addition, the proposed amendment would explicitly add the preponderance of the evidence standard to Rule 702(b)–(d).	

Effective (no earlier than) December 1, 2024

Current Step in REA Process:

- Published for public comment (Aug 2022 – Feb 2023 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (Jan and June 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 32	Conforming proposed amendment to subdivision (g) to reflect the proposed consolidation of Rules 35 and 40.	AP 35, 40
AP 35	The proposed amendment would transfer the contents of the rule to Rule 40 to consolidate the rules for panel rehearings and rehearings en banc together in a single rule.	AP 40
AP 40	The proposed amendments address panel rehearings and rehearings en banc together in a single rule, consolidating what had been separate provisions in Rule 35 (hearing and rehearing en banc) and Rule 40 (panel rehearing). The contents of Rule 35 would be transferred to Rule 40, which is expanded to address both panel rehearing and en banc determination.	AP 35
Appendix: Length Limits Stated in the Federal Rules of Appellate Procedure	Conforming proposed amendments would reflect the proposed consolidation of Rules 35 and 40 and specify that the limits apply to a petition for initial hearing en banc and any response, if requested by the court.	AP 35, 40
BK 1007(b)(7) and related amendments	The proposed amendment to Rule 1007(b)(7) would require a debtor to submit the course certificate from the debtor education requirement in the Bankruptcy Code. Conforming amendments would be made to the following rules by replacing the word "statement" with "certificate": Rules 1007(c)(4), 4004(c)(1)(H), 4004(c)(4), 5009(b), 9006(b)(3) and 9006(c)(2).	
BK 7001	The proposed amendment would exempt from the list of adversary proceedings in Rule 7001, "a proceeding by an individual debtor to recover tangible personal property under § 542(a)."	
BK 8023.1 (new)	This would be a new rule on the substitution of parties modeled on FRAP 43. Neither FRAP 43 nor Fed. R. Civ. P. 25 is applicable to parties in bankruptcy appeals to the district court or bankruptcy appellate panel, and this new rule is intended to fill that gap.	AP 43
BK Restyled Rules	The third and final set of current Bankruptcy Rules, consisting of Parts VII-IX, are restyled to provide greater clarity, consistency, and conciseness without changing practice and procedure. The first set of restyled rules (Parts I & II) were published in 2020, and the second set (Parts III-VI) were published in 2021. The full set of restyled rules is expected to go into effect no earlier than December 1, 2024.	
BK Form 410A	The proposed amendments are to Part 3 (Arrearage as of Date of the Petition) of Official Form 410A and would replace the first line (which currently asks for "Principal & Interest") with two lines, one for "Principal" and one for "Interest."	

Effective (no earlier than) December 1, 2024

Current Step in REA Process:

- Published for public comment (Aug 2022 – Feb 2023 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (Jan and June 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
	The amendments would put the burden on the claim holder to identify the elements of its claim.	
CV 12	The proposed amendment would clarify that a federal statute setting a different time should govern as to the entire rule, not just to subdivision (a).	
EV 611(d)	The proposed new subdivision (d) would provide standards for the use of illustrative aids.	EV 1006
EV 613	The proposed amendment would require that, prior to the introduction of extrinsic evidence of a witness's prior inconsistent statement, the witness receive an opportunity to explain or deny the statement.	
EV 801	The proposed amendment to paragraph (d)(2) would provide that when a party stands in the shoes of a declarant or declarant's principal, hearsay statements made by the declarant or declarant's principal are admissible against the party.	
EV 804	The proposed amendment to subparagraph (b)(3)(B) would provide that when assessing whether a statement is supported by corroborating circumstances that clearly indicate its trustworthiness, the court must consider the totality of the circumstances and evidence, if any, corroborating the statement.	
EV 1006	The proposed changes would permit a properly supported summary to be admitted into evidence whether or not the underlying voluminous materials have been admitted. The proposed changes would also clarify that illustrative aids not admitted under Rule 1006 are governed by proposed new subdivision (d) of Rule 611.	EV 611

TAB 1D

Legislation That Directly or Effectively Amends the Federal Rules
118th Congress
(January 3, 2023–January 3, 2025)

(Ordered by most recent legislative action; bills with more recent actions first.)

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
Write the Laws Act	**S. 329** *Sponsor:* Paul (R-KY)	All	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s329/BILLS-118s329is.pdf **Summary:** Would prohibit "delegation of legislative powers" to any entity other than Congress. Definition of "delegation of legislative powers" could be construed to extend to the Rules Enabling Act. Would not nullify previously enacted rules, but anyone aggrieved by a new rule could bring action seeking relief from its application.	• 02/09/2023: Introduced in Senate; referred to Homeland Security & Government Affairs Committee
Supreme Court Ethics, Recusal, and Transparency Act of 2023	**S. 359** *Sponsor:* Whitehouse (D-RI) *Cosponsors:* 13 Democratic or Democratic-caucusing cosponsors	AP, CV, CR	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s359/BILLS-118s359is.pdf **Summary:** Requires rulemaking (through Rules Enabling Act process) of gifts, income, or reimbursements to justices from parties, amici, and their affiliates, counsel, officers, directors, and employees, as well as lobbying contracts and expenditures of substantial funds by these entities in support of justices' nomination, confirmation, or appointment. Requires expedited rulemaking (through Rules Enabling Act process) to allow court to prohibit or strike amicus brief resulting in disqualification of justice, judge, or magistrate judge.	• 02/09/2023: Introduced in Senate; referred to Judiciary Committee
Relating to a National Emergency Declared by the President on March 13, 2020	**H. J. Res. 7** *Sponsor:* Gosar (R-AZ) *Cosponsors:* 68 Republican cosponsors	CR	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hjres7/BILLS-118hjres7rfs.pdf **Summary:** Terminates the national emergency declared March 13, 2020, by President Trump. Would terminate authority under CARES Act to hold certain criminal proceedings by videoconference or teleconference.	• 02/02/2023: Received in Senate; referred to Finance Committee • 02/01/2023: Passed House (229–197) • 01/09/2023: Introduced in House

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
Federal Police Camera and Accountability Act	**H.R. 843** *Sponsor:* Norton (D-DC) *Cosponsors:* Beyer (D-VA) Torres (D-NY)	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr843/BILLS-118hr843ih.pdf **Summary:** Among other things, bars use of certain body-cam footage as evidence after 6 months if retained solely for training purposes; creates evidentiary presumption in favor of criminal defendants and civil plaintiffs against the government if recording or retention requirements not followed; bars use of federal body-cam footage from use as evidence if taken in violation of act or other law.	• 02/06/2023: Introduced in House; referred to Judiciary Committee
Restoring Judicial Separation of Powers Act	**H.R. 642** *Sponsor:* Casten (D-IL) *Cosponsor:* Blumenauer (D-OR)	AP	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr642/BILLS-118hr642ih.pdf **Summary:** Would give the D.C. Circuit certiorari jurisdiction over cases in the court of appeals and direct appellate jurisdiction over three-district-judge cases. A D.C. Circuit case "in which the United States or a Federal agency is a party" and cases "concerning constitutional interpretation, statutory interpretation of Federal law, or the function or actions of an Executive order" would be assigned to a multicircuit panel of 13 circuit judges, of which a 70% supermajority would need to affirm a decision invalidating an act of Congress. Would likely require new rulemaking for the panel and its interaction with the D.C. Circuit and new appeals structure.	• 01/31/2023: Introduced in House; referred to Judiciary Committee
Protecting Individuals with Down Syndrome Act	**S. 18** *Sponsor:* Daines (R-MT) *Cosponsors:* 24 Republican cosponsors	CV 5.2; BK 9037; CR 49.1	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s18/BILLS-118s18is.pdf **Summary:** Would require use of pseudonym for and redaction or sealing of filings identifying women upon whom certain abortions are performed.	• 01/23/2023: Introduced in Senate; referred to Judiciary Committee
Lunar New Year Day Act	**H.R. 430** *Sponsor:* Meng (D-NY) *Cosponsors:* 57 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr430/BILLS-118hr430ih.pdf **Summary:** Would make Lunar New Year Day a federal holiday.	• 01/20/2023: Introduced in House; referred to Oversight & Accountability Committee

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
Back the Blue Act of 2023	**H.R. 355** *Sponsor:* Bacon (R-NE) *Cosponsors:* 17 Republican cosponsors	§ 2254 Rule 11	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr355/BILLS-118hr355ih.pdf **Summary:** Would amend Rule 11 of the Rules Governing Section 2254 Cases to bar application of Civil Rule 60(b)(6) in proceedings under 28 U.S.C. § 2254(j).	• 01/13/2023: Introduced in House; referred to Judiciary Committee
Rosa Parks Day Act	**H.R. 308** *Sponsor:* Sewell (D-AL) *Cosponsors:* 31 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr308/BILLS-118hr308ih.pdf **Summary:** Would make Rosa Parks Day a federal holiday.	• 01/12/2023: Introduced in House; referred to Oversight & Accountability Committee
Fourth Amendment Restoration Act	**H.R. 237** *Sponsor:* Biggs (R-AZ)	CR 41; EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr237/BILLS-118hr237ih.pdf **Summary:** Would require warrant under Crim. Rule 41 to electronically surveil U.S. citizen, search premises or property exclusively owned or controlled by a U.S. citizen, use of pen register or trap-and-trace device against U.S. citizen, production of tangible things about U.S. citizen to obtain foreign intelligence information, or to target U.S. citizen for acquiring foreign intelligence information. Would require amendment of 41(c) to add these actions as actions for which warrant may issue. Would bar use of information about U.S. citizen collected under E.O. 12333 in any criminal, civil, or administrative hearing or investigation, as well as information acquired about a U.S. citizen during surveillance of non-U.S. citizen.	• 01/10/2023: Introduced in House; referred to Judiciary and Intelligence Committees
Limiting Emergency Powers Act of 2023	**H.R. 121** *Sponsor:* Biggs (R-AZ)	CR	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr121/BILLS-118hr121ih.pdf **Summary:** Would limit emergency declarations to 30 days unless affirmed by act of Congress. Current COVID-19 emergency would end no later than 2 years after enactment date; would terminate authority under CARES Act to hold certain criminal proceedings by videoconference or teleconference.	• 01/09/2023: Introduced in House; referred to Transportation & Infrastructure, Foreign Affairs, and Rules Committees:

TAB 2

TAB 2A

MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
January 4, 2023

The Judicial Conference Committee on Rules of Practice and Procedure (the "Standing Committee") met in a hybrid in-person and virtual session in Fort Lauderdale, Florida, on January 4, 2023. The following members attended:

Judge John D. Bates, Chair
Elizabeth J. Cabraser, Esq.
Robert J. Giuffra, Jr., Esq.
Judge William J. Kayatta, Jr.
Judge Carolyn B. Kuhl
Dean Troy A. McKenzie
Judge Patricia A. Millett
Hon. Lisa O. Monaco, Esq.[*]
Andrew J. Pincus, Esq.
Judge Gene E.K. Pratter
Kosta Stojilkovic, Esq.
Judge D. Brooks Smith
Judge Jennifer G. Zipps

The following attended on behalf of the Advisory Committees:

Advisory Committee on Appellate Rules –
Judge Jay S. Bybee, Chair
Professor Edward Hartnett, Reporter

Advisory Committee on Bankruptcy Rules –
Judge Rebecca Buehler Connelly, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Laura B. Bartell, Associate Reporter

Advisory Committee on Civil Rules –
Judge Robin L. Rosenberg, Chair
Professor Richard L. Marcus, Reporter
Professor Andrew Bradt, Associate Reporter
Professor Edward H. Cooper, Consultant

Advisory Committee on Criminal Rules –
Judge James C. Dever III, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter

Advisory Committee on Evidence Rules –
Judge Patrick J. Schiltz, Chair
Professor Daniel J. Capra, Reporter

Others who provided support to the Standing Committee, in person or remotely, included Professor Catherine T. Struve, the Standing Committee's Reporter; Professors Daniel R. Coquillette, Bryan A. Garner, and Joseph Kimble, consultants to the Standing Committee; H. Thomas Byron III, Secretary to the Standing Committee; Allison A. Bruff, Esq., Bridget M. Healy, Esq., and S. Scott Myers, Esq., Rules Committee Staff Counsel; Brittany Bunting–Eminoglu and Shelly Cox, Rules Committee Staff; Christopher I. Pryby, Law Clerk to the Standing Committee; Hon. John S. Cooke, Director of the Federal Judicial Center (FJC); and Dr. Tim Reagan, Senior Research Associate, FJC.

[*] Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice (DOJ) on behalf of Deputy Attorney General Lisa O. Monaco.

OPENING BUSINESS

Judge Bates called the meeting to order. He welcomed new Standing Committee members Judge D. Brooks Smith and Andrew Pincus; the new chairs of the Advisory Committees on Bankruptcy and Civil Rules, Judge Rebecca Connelly and Judge Robin Rosenberg; and the new Associate Reporter for the Civil Rules Committee, Professor Andrew Bradt. Judge Bates noted the departures of Judge Gary Feinerman from the Standing Committee and former Civil Rules Committee Chair Judge Robert Dow. He stated that he would work to find new members to fill the vacancies on the Standing and Civil Rules Committees. In addition, Judge Bates welcomed the members of the public who were attending remotely or in person.

Upon motion by a member, seconded by another, and without dissent: **The Standing Committee unanimously approved the minutes of the June 7, 2022, meeting.**

Judge Bates highlighted pending rules amendments, including new emergency rules arising out of the CARES Act and amendments to Evidence Rules 106, 615, and 702. These amendments will take effect on December 1, 2023, assuming that the Supreme Court approves them and absent any contrary action by Congress.

For the legislative update, Judge Bates observed that with the end of the 117th Congress, all pending legislation had expired. Law clerk Christopher Pryby noted that, of the Fiscal Year 2023 National Defense Authorization Act provisions that he had highlighted at earlier Advisory Committee meetings, none remained in the enacted version of the bill.

JOINT COMMITTEE BUSINESS

Electronic Filing by Self-Represented Litigants

Judge Bates introduced this agenda item, which is under consideration by the Appellate, Bankruptcy, Civil, and Criminal Rules Committees. He thanked Professor Struve for her leadership on this project and her coordination among the Advisory Committees, and he invited her to provide an update on those discussions.

Professor Struve began by acknowledging the group effort that had gone into the project so far, especially from the FJC team, including Tim Reagan, Carly Giffin, and Roy Germano, who had done phenomenal work that culminated in a study released in 2022.

This project originated from several proposals about electronic filing for self-represented litigants. The current rules provide for electronic filing as a matter of course by those who are represented by lawyers, but self-represented litigants must file nonelectronically unless allowed to file electronically by court order or local rule. The proposals take two main forms: one advocates a national rule presumptively allowing self-represented litigants to file electronically, while the other advocates disallowing categorical bans on, and setting a standard for granting permission for, electronic filing by self-represented litigants.

Recounting the FJC's findings, Professor Struve noted that, in the courts of appeals, there is a close split between the circuits that presumptively give self-represented litigants access to the Case Management/Electronic Case Filing system ("CM/ECF") and those that allow that access

with permission; one outlier circuit currently has a local provision prohibiting self-represented litigants from filing electronically. In the district courts, the picture is more mixed—the bulk of districts allow self-represented litigants to file electronically with permission, a bit less than 10% presumptively permit self-represented litigants to file electronically, and about 15% do not allow it at all. And in the bankruptcy courts, it is rare for self-represented litigants to have access to CM/ECF.

The fall Advisory Committee meetings provided an opportunity to get members' senses about the current situation and their reactions to the possibility of adopting a default rule of presumptive access to CM/ECF for self-represented litigants. Those discussions also considered potential alternate means of electronic access for self-represented litigants, like those that courts experimented with during the COVID-19 pandemic. The discussions also included the possibility of policy changes not based on rules amendments as well as the need for coordination with other committees of the Judicial Conference.

A second question concerns the rules governing service of papers during a lawsuit. As between any pair of litigants who are both users of CM/ECF, service is simple, because the notice of electronic filing produced when the paper is filed in CM/ECF constitutes service. By contrast, a form of service other than the notice of electronic filing is necessary when the party to be served is not a CM/ECF user. But when a party that is not a CM/ECF user files a paper by some other means, must that party separately serve the parties who *are* users of CM/ECF? Those parties will receive the notice of electronic filing after the court clerk scans and uploads the nonelectronic filing to CM/ECF. The rules nevertheless appear to require the non-CM/ECF user to serve these parties. The questions before the committees were: Why? Is this burden on self-represented litigants necessary? Should the rules be amended to eliminate this requirement? Some districts have eliminated the requirement for service on parties who are CM/ECF users, and those districts have generally reported positive experiences with that change.

Professor Struve reported a fair amount of interest in investigating the possibility of eliminating that requirement. But there are still some details to be worked out: (1) How does the court make clear to a nonelectronic filer which parties are, and which are not, on CM/ECF—and, thus, who does and does not need separate service? (2) Would the three-day rule work seamlessly with this change, or would it need some wording adjustments? For example, the time calculation might need to be clarified or adjusted to ensure no unfairness to a party if there is some delay between when the clerk receives a filing and when the clerk dockets it in CM/ECF. Professor Struve believes this proposal contains the germ of an idea that may be appropriate for a possible rule amendment, and she expressed her hope that the Advisory Committees would continue working on the project in the spring.

Returning to whether there should be a change in the default rule governing self-represented litigants' access to CM/ECF, Professor Struve surveyed the reactions of the Advisory Committees on that proposal. The Bankruptcy Rules Committee took a positive view of the overall idea, viewing it as a matter of access to the courts. Notably, the court-clerk representative on that committee supported the proposal, saying that it is helpful for filings to be electronic whenever possible. But there was some division of views on the committee, with a couple of members expressing the need for caution and raising important questions that are detailed in the committee's minutes and reports.

The Appellate Rules Committee took a somewhat positive view of the overall concept of access to CM/ECF for self-represented litigants, in line with the current policies of the courts of appeals. Professor Struve thought that the interesting question for this committee was whether the Appellate Rules should be amended to reflect or encourage that outcome, given that the courts of appeals are already increasing CM/ECF access for self-represented litigants (with greater celerity than the lower courts). A default rule of access to CM/ECF for self-represented litigants might be easiest to adopt in the Appellate Rules, given the movement in that direction in the courts of appeals. A question for the Appellate Rules Committee may be how to balance that consideration against the value of uniformity across the national sets of rules.

Professor Struve reported that there were more skeptical voices in the Civil Rules Committee on the proposal relating to CM/ECF access. Some members wondered whether the matter might be more appropriately treated by another Judicial Conference actor such as the Committee on Court Administration and Case Management ("CACM"). Overall, there was much less momentum on the Civil Rules Committee for a rule change.

Turning to the Criminal Rules Committee, Professor Struve first noted that this committee's interest was different from that of the other Advisory Committees. There are very few nonincarcerated, self-represented litigants appearing in situations covered by the Criminal Rules. (Professor Struve noted that, even in the districts that presumptively allow self-represented litigants CM/ECF access, that presumption of access typically excludes incarcerated litigants because of the logistical particulars of carceral settings. So, at least in the near future, even the most expansive grant of electronic-filing permission to self-represented litigants would likely not encompass incarcerated self-represented litigants.) But the committee had an excellent discussion of the service issue, and the committee would be open to exploring that question further.

Professor Struve concluded by welcoming the input of the Standing Committee members on any of these topics. She noted that the project continues to operate in an information-gathering mode, especially on the service issue and the various ways by which electronic-filing access could be expanded for self-represented litigants, including by working in tandem with other Judicial Conference actors.

Judge Bates thanked Professor Struve and opened the floor to comments and questions.

A practitioner member suggested that greater access for self-represented litigants is a good thing, but also that some fraction of self-represented litigants would abuse electronic-filing access. This member asked which would be easier for courts to administer: a rule requiring courts to deal with requests for permission, or a rule granting access by default and leaving the courts to deal with the task of revoking that access in particular cases? Professor Struve noted that Dr. Reagan and his colleagues at the FJC had talked with clerk's offices around the country and would be in a good position to answer that question. Dr. Reagan reported that, in speaking with personnel in several districts that had recently expanded self-represented litigants' access to CM/ECF, he and his colleagues heard that court personnel's fears were not particularly realized. He also observed that self-represented litigants can disrupt the work of the court regardless of their filing method. In fact, some courts appreciated receiving documents electronically because they did not have to receive things in physical form that would be unpleasant to handle. And every court is quite capable of limiting improper litigant behavior.

A judge member appreciated the thoroughness of the FJC report in obtaining input from clerk's offices and considering the pros and cons of a change in the rules and other issues that would arise. The member thought that the primary focus of this project ought to be learning about the experiences of clerk's offices. The clerk's office of the member's court had strong views on this matter, especially on who should bear the burden of the work generated by noncompliant self-represented litigants.

Ms. Shapiro asked whether the FJC report looked at whether self-represented litigants complied with redaction and privacy-protection rules. Dr. Reagan responded that the report did not get into the weeds with this question, but he did note that this same problem occurs with represented litigants as well. One appellate clerk had mentioned locking a document and later posting a corrected version; he was not sure whether that had to do with redaction problems. He stated that there is a way to configure CM/ECF so that the court must "turn the switch" before a submitted filing is made available in the record.

Judge Rosenberg reiterated her comments from the October Civil Rules Committee meeting, which reflected feedback from her court's clerk: Most courts are not equipped to accept self-represented litigants' filings through CM/ECF. So, while it is a good idea to expand electronic filing to all litigants, until all courts can comply, it is not advisable to amend the federal rules to establish a presumption in favor of allowing electronic filing. Additionally, different courts use different versions of CM/ECF, and the version used affects both the court and the filer. Further, there is not a unique identifier for many self-represented litigants. By contrast, attorneys have unique bar numbers.

Professor Struve responded that, if a court would not be able to function with a presumption in favor of electronic access for self-represented litigants, then that court could adopt a local rule to opt out of the presumption. It is true that, if the bulk of districts opted out, that might lead one to question the wisdom of the rule. As to the point about identifiers, Professor Struve suggested that the districts currently allowing presumptive or permissive electronic access by self-represented litigants would have had to solve that problem, so it would be helpful to ask those districts for their experiences with that issue.

Judge Bates concluded by recognizing that cases involving self-represented litigants make up a large part of the civil and bankruptcy dockets in federal court, and this is a project that the committees will continue to work on. He hoped that the committees and reporters would continue to provide a high level of participation, and he thanked Professor Struve and everyone else who had worked on the project with her so far.

Presumptive Deadline for Electronic Filing

Judge Bates reported on a joint committee project that arose from a suggestion by Chief Judge Chagares of the Third Circuit, the former chair of the Appellate Rules Committee, that the committees consider changing the presumptive deadline for electronic filing from midnight to an earlier time. Judge Bates observed that the FJC had done excellent research for this project, and that one of the relevant FJC reports was included in the agenda book. The status of the project is uncertain. The Civil Rules Committee has recommended that the project be dropped. But the Appellate Rules Committee recommended that the question of how to proceed be posed, in the

first instance, to the Joint Subcommittee on E-filing Deadlines, because that Subcommittee has not convened recently. Judge Bates agreed that the Joint Subcommittee should be asked to undertake a careful review of the project, and he noted that he would also continue to seek Chief Judge Chagares's input.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Bybee and Professor Hartnett presented the report of the Advisory Committee on Appellate Rules, which last met in Washington, D.C., on October 13, 2022. The Advisory Committee presented several information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 134.

Information Items

Amicus Disclosures. Judge Bybee reported on this item. He described it as perhaps the highest-profile matter before the Advisory Committee. There has been a long exchange of correspondence between the Clerk of the Supreme Court and the chairs of the Senate and House Judiciary Committees over amicus practice, and, during the previous Congress, legislation was introduced in each house that would regulate amicus practice. The Supreme Court and its Clerk referred the matter to the Advisory Committee. The Advisory Committee has made some progress, but it seeks input from the Standing Committee on some important policy questions.

Judge Bybee directed the Standing Committee's attention to draft Rules 29(c)(3) and (c)(4) as set out in the agenda book; he noted that this was a working draft, not yet a proposal. Draft Rule 29(c)(3) would require an amicus to disclose any party that has a majority interest in or control of the amicus. Draft Rule 29(c)(4) would require the amicus to disclose any party that has contributed 25% or more of the amicus's gross annual revenue over the last 12 months. The Advisory Committee sought input on two questions: (1) Is 25% the right number? (2) Is the last 12 months the right lookback period, or should it be the previous calendar year? As to question (1), at the October 2022 Advisory Committee meeting, some members had expressed concern that, if the rule set one particular percentage—such as 25%—as the trigger for disclosure, then where a party's contributions were anywhere above that single threshold the amicus might not file a brief out of concern that the court would assign the brief little weight. An alternative suggestion was to require an amicus to disclose that the contribution percentage lay within some "band" of amounts—such as from 20% to 30%, 30% to 40%, and so on.

A practitioner member wondered whether there was a need to regulate this area. However, given that Congress has expressed an interest in the topic, the member suggested that perhaps it did make sense for the committees to consider possible rule amendments. The member thought 25% was a reasonable number because, in the member's experience, that contribution level would be highly unusual and could indicate that the amicus is acting as a front for a party. The member also thought it more administratively feasible to use the last calendar year than the last 12 months.

Judge Bates asked whether the current draft Rule 29(c)(3) would capture a situation in which a party and the party's counsel each had a one-third interest in the amicus. Should the rule capture that situation? The draft wording—"whether a party or its counsel has (or two or more

parties or their counsel collectively have) a majority ownership interest"—addresses a situation in which "two or more parties or their counsel" have a collective interest, but it is not clear if it captures situations in which a single party and its counsel have a collective interest. Should "a party or its counsel has" be "a party and/or its counsel have"?

Professor Garner opined that a hard contribution threshold might encourage parties to structure their contributions in such a way as to avoid meeting the threshold. He suggested that the Advisory Committee instead consider a rule requiring disclosure of "the extent to which" a party has contributed to the amicus. The court could decide for itself what contribution amount was de minimis. And an organization that goes to the trouble of preparing an amicus brief would be able to answer the contribution question with a fair degree of certainty.

Professor Hartnett responded that the Advisory Committee had some concern about requiring that amount of precision. Instead, requiring disclosure within a band of contribution percentages tried to address the structuring issue. The Advisory Committee also wanted to build into the rule a floor beneath which amici need not worry about having to make a disclosure.

Judge Bates noted that the rule could also be tweaked to require disclosure of a precise percentage above a floor. Those below that floor would not have to make a disclosure.

A practitioner member commented on the general view of practitioners in this area: If an amicus must make a disclosure, then its brief will probably not get much attention. A rule that requires a disclosure suggests that a brief containing that disclosure is tainted in some way. In many of these situations, an amicus would likely choose not to file a brief rather than to make a disclosure. So there should almost certainly be a floor before disclosures are required. There is also a First Amendment interest in this area (the member noted the decision in *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021))—and whatever rule is adopted must be examined through that lens. That interest further weighs in favor of a floor below which no disclosure is required. Because the disclosure requirement will change the dynamics of amicus filings, the calculus on whether and how to amend the rule should consider whether the benefits of disclosure outweigh the harm of deterring amicus filings.

Judge Bates agreed that the goal is not to dissuade the filing of amicus briefs but rather to provide information to the courts and public with respect to those who file these briefs.

A judge member had difficulty recalling any amicus briefs as to which it was not obvious who was filing the brief and as to which more information about the amicus would have made a difference. It is the brief's contents that matter, not its author. If other appellate judges feel similarly, then the member would not worry about trying to craft a rule that would require complete disclosure of all details about the amicus.

Judge Bybee noted that one concern is that parties are evading their own page limits by inserting their arguments into amicus filings. The judge member suggested skepticism about the gravity of that particular concern. He conceded that Congress's interest in the amicus-disclosure issue weighs in favor of careful consideration of a possible rule amendment. But, he suggested, if the courts of appeals generally feel that they are not being hoodwinked by amici or deluded into believing something about which they otherwise would have been more suspicious had amici's

relationships with the parties been apparent, that should temper the rulemakers' zeal for pursuing an all-encompassing, exhaustive disclosure requirement.

Another judge member disclaimed knowledge as to whether the 25% figure was "right," but stated that this figure was "not wrong." The member suggested that searching for the precisely "right" number was not worthwhile. Responding to Professor Garner's prior suggestion, this member warned against building into the rule any subjectivity that would allow a court to decide whether to require disclosure based on who the participants are. If a proposal is adopted, it should use an objective number rather than a moving target. As to the lookback period, the member suggested that the prior fiscal or calendar year would be more administrable than a moving 12-month period; the latter would require a lot of research and calculation.

A practitioner member acknowledged the focus on drawing a line between helpful disclosure requirements and unhelpful, unwarranted disclosure requirements. But the member also wondered whether a lower threshold might normalize disclosure, making it not such a negative thing. A lower threshold like 5% or 10% would generate a lot more disclosures, but such a disclosure would not necessarily discredit a brief as much as a disclosure in response to a higher threshold that is only infrequently met.

A judge member thought that a threshold above 25% would be too high. And if the threshold were set higher than 25%, a disclosure would really mark the amicus brief because it would be extremely unusual. The member also suggested that judges' views on the optimal level of disclosure are not the only consideration. Members of the public may not have the same information or reactions that judges do. Part of the value of the disclosures was to let the public know who is responsible for filing amicus briefs. This transparency concern is particularly strong when amicus filings are cited by judges as persuasive in their decisionmaking.

A practitioner member expressed doubt about the idea of normalizing disclosures. The purpose of a disclosure is to flag something relevant about a brief. The member questioned whether lowering the threshold would serve that purpose. Instead, the goal should be to identify a category of briefs to treat with caution.

Another practitioner member thought that more regulation of amicus briefs was not a good idea. If a relevant industry group files an amicus brief in a case on appeal, that tells the court that the industry is concerned about some issue—it does not matter only to the parties. The rule should encourage filing amicus briefs. Judges can pay attention to what they want to in those briefs. The member thought that 25% was the right threshold because it is objective and because, if a party is paying for 25% or more of the amicus organization's cost, it is largely a party-controlled organization. As to most big organizations that routinely file amicus briefs, the number would probably be 5% or less. The member also agreed that required disclosures may chill the filing of amicus briefs.

Professor Garner suggested that a rule requiring disclosure of "the extent to which" a party has contributed to the amicus could be combined with a provision stating a presumption that any contribution over 25% would be excessive. Judge Bates noted that this presumption would change the thrust of the rule by expressly stating how the court would view the brief. Judge Bybee did not think the Advisory Committee had been going in that direction; he could not remember a judge

having said anything like, "if the party contributes over 50%, I won't consider the brief." Instead, some judges have suggested that it is important to have more information, not less. Professor Hartnett agreed that the rule has governed only when disclosure is required; discounting a brief's weight has not been addressed in the rule's text. This kind of modification would significantly change how the rule operates.

Professor Hartnett sought more comment on the banding idea. He thought it might mitigate the risk of using a single number—if that number is too high, it works like an on–off switch; if too low, it does not give enough information because a court cannot tell how far the contribution amount is above the threshold. Banding would provide more information than a single threshold, while not requiring the same degree of precise calculation as the "extent to which" option. Would this idea work as a compromise?

Judge Bates agreed that using banding would require more information from an amicus than would a single percent threshold above which disclosure is required.

A practitioner member stressed that the disclosure requirement would need to include a floor beneath which disclosure is not required. This member suggested that, once there is a floor, having banding in addition would not do much work, especially if the floor is as high as 25%.

Another practitioner member liked the banding approach because it would provide more information to the courts and public. The question would then be where to start and end each band. More disclosure is better, and so long as it remains up to the judges to decide at what level a disclosure matters, then the rule introduces no presumption of taint.

A third practitioner member remarked that a member of a big amicus organization generally must undergo a rigorous application process before the organization will sign onto an amicus brief for that member. That process is useful because courts can then take that organization's reputation as a signal—if it signs a brief, then the issue is one that matters to more than just the litigants. The member liked the 25% threshold because it indicates that the amicus is not really a broad-based group that represents the industry. Lowering the threshold defeats the purpose of having amicus briefs and introduces a false perception of taint if there is a disclosure of a low percentage. The lower threshold would lead to too much micromanaging of amici. The member also expressed concern that a lower threshold could disadvantage plaintiff-side amici because bigger organizations tend to be on the defense side. And one can look at the website of a large organization to see if a party is a member.

An academic member expressed a preference for keeping the rule as simple as possible. That militates in favor of a single number. The member liked 25%—it is high enough that if an amicus is above that threshold, it will raise eyebrows. The difficulty with banding is that compliance could be complicated, particularly if there is no lower bound. Without a lower bound, if a party had bought a single table at a fundraiser for the amicus, the amicus would then have to divide the value of the contribution associated with buying that table by the amicus's overall revenue in order to determine the percentage value of its contribution. A disclosure requirement without a lower bound would discourage potential amici from filing. It would signal that courts do not want to hear their voices.

The conversation then turned to draft Rule 29(e). Judge Bybee introduced this draft rule, which appeared on page 137 of the agenda book. The draft rule would require an amicus to disclose any nonparty that contributed over $1,000 to the amicus with the intent to fund the amicus brief. Judge Bybee asked two questions: (1) Is the $1,000 figure the right threshold? This figure was meant to exclude disclosures for crowdfunded briefs. (2) Should the draft rule contain provisions like those in draft Rules 29(c)(3) and (c)(4), requiring disclosures of contributions even if they are not earmarked for funding an amicus brief?

Judge Bates remarked that a $1,000 cutoff, although high enough to address the crowdfunding issue, seems very low.

A judge member thought that this draft rule would require amici to make greater disclosures than parties themselves must. Parties may obtain funding from undisclosed sources, raising issues about third-party litigation funding. The draft rule overemphasizes the importance of amicus briefs and mistakenly suggests that courts are more concerned with who is speaking than with the merits of the argument. The member also thought that this is a policy question that should be deferred until the discussion of third-party litigation funding of parties; in the meantime, this member suggested, subpart (e) should be deleted from the draft. Professor Hartnett observed that the current rule requires disclosure if someone other than the amicus, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief. The member acknowledged that fact, but argued that proposed subdivision (e) would heighten the issue.

Judge Bates remarked that there may be greater First Amendment issues in requiring disclosure of nonparty contributions than in requiring disclosure of party contributions.

A practitioner member stated that adopting draft Rule 29(e) would be a mistake. It would open up a hornet's nest concerning intentionality. How can you determine whether someone intended to fund a brief? Suppose an organization told potential donors the topics of ten amicus briefs it intended to file over the coming year. Or suppose that a donor bought a ticket to a dinner at which a representative of the organization discussed some of its amicus filings. The member also thought that $1,000 was a low threshold.

Another practitioner member commented that the innovation in draft Rule 29(e) is really about contributions by members of amicus organizations—there is already a disclosure requirement as to contributions by nonmembers. The member differentiated two types of amicus organizations: larger organizations with annual budgets that include a chunk of money for amicus briefs, and organizations (typically smaller) that "pass the hat" to fund a particular amicus brief. Draft Rule 29(e), this member suggested, would unfairly burden such smaller organizations by requiring them to make disclosures, whereas dues payments probably would not have to be disclosed. Draft Rule 29(e) would make it harder for those smaller amici to file briefs.

A judge member thought that the draft rule could lead to an escalation of corporate screens and shielding to evade required disclosures. A would-be funder might set up an LLC to make the donation; would the rule also have to require disclosure of the LLC's funding? This judge sees briefs from a number of amici for which the funding is unknown. The draft rule aims for more disclosure than is currently required for dark-money contributions to political campaigns. There is a public interest in disclosure, but there are practical limitations on what the committees can do.

The member cautioned against increasing the complexity of the disclosure scheme (for example, with banding)—such new hurdles could be leapt over as easily as the current ones.

A practitioner member supported omitting draft Rule 29(e). Congress, this member suggested, is concerned about parties, not nonparties. Nonparties do not implicate the same concerns. The member also noted that, under the current Rule (as well as under draft Rule 29(c)(2)), if a party contributes any money intended to fund an amicus brief, the fact of the contribution must be disclosed.

Judge Bates asked why, in draft Rule 29(d), the language is limited to only a *party*'s awareness. Draft Rule 29(c) is worded in terms of *party or counsel*; why should 29(d) be different? Judge Bybee agreed with that wording change and, more generally, thanked the Standing Committee for its input.

Rule 39 (Costs). Judge Bybee briefly covered this and the remaining items. The Supreme Court suggested in *City of San Antonio v. Hotels.com, L.P.*, 141 S. Ct. 1628, 1638 (2021), that "the current Rules . . . could specify more clearly the procedure that . . . a party should follow" to bring its arguments about costs to the court of appeals. The real problem in this situation is a narrow one that is nevertheless important in some big cases. It involves the disclosure to parties of the consequences for costs on appeal if a supersedeas bond is filed or another means of preserving rights pending appeal is used. A subcommittee is currently working on this issue. It may be useful for the Appellate Rules Committee to coordinate with the Civil Rules Committee to see whether the Civil Rules might also require changes.

Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis ("IFP")). Form 4 concerns the disclosures required of a party seeking IFP status on appeal. The Advisory Committee has tried to simplify the form. Many of the circuits have ignored the form for years and have their own forms. The Advisory Committee is not purporting to change that fact, only to simplify the current national form. Also, the Supreme Court has incorporated the form by reference in Supreme Court Rule 39.1, so it would be advisable to ask if the Court has any input on changing the form.

Appellate Rule 6 (Appeal in a Bankruptcy Case) and Direct Appeals in Bankruptcy. Judge Bybee adverted briefly to this project, which dovetails with the Bankruptcy Rules Committee's project (discussed later in the meeting) to amend Bankruptcy Rule 8006(g) to clarify that any party may request permission to appeal directly from the bankruptcy court to the court of appeals. He noted that the Appellate and Bankruptcy Rules Committees are coordinating their work on Bankruptcy Rule 8006(g) and Appellate Rule 6.

Striking Amicus Briefs; Identifying Triggering Person. Rule 29(a)(2) allows a court to refuse to file or to strike an amicus brief that would lead to a judge's disqualification. A suggestion was made to modify this rule to require the court to identify the amicus or counsel who would have triggered a disqualification. After extensive discussion, the Advisory Committee removed this item from its agenda.

Appeals in Consolidated Cases. A suggestion to amend Rule 42 arose following *Hall v. Hall*, 138 S. Ct. 1118 (2018). After thorough discussion, the Advisory Committee removed this item from its agenda.

Judge Bates asked for comments on the other information items outlined in the Advisory Committee's report. Hearing none, he invited the Bankruptcy Rules Committee to give its report.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Connelly and Professors Gibson and Bartell presented the report of the Advisory Committee on Bankruptcy Rules, which last met in Washington, D.C., on September 15, 2022. The Advisory Committee presented one action item and three information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 175.

After Judge Connelly recognized the work of Judge Dennis Dow, the Advisory Committee's previous chair, the committee began its report.

Action Item

Publication of Proposed Amendment to Official Form 410 (Proof of Claim). Judge Connelly reported on this item. The Advisory Committee sought the Standing Committee's approval to publish for public comment an amendment to Official Form 410. A creditor must file this form for the creditor's claim to be recognized in a bankruptcy case. Official Form 410 contains a field for a uniform claim identifier ("UCI"), which a creditor may fill in for electronic payments in Chapter 13 cases. The Advisory Committee has proposed a revision to remove both the specification of electronic payments and the reference to Chapter 13 cases, allowing a creditor to list a UCI for paper checks or electronic payments in any bankruptcy case.

Upon motion by a member, seconded by another, and without dissent: **The Standing Committee unanimously approved the publication for public comment of the proposed amendment to Official Form 410.**

Information Items

Rule 8006(g) (Certifying a Direct Appeal to a Court of Appeals). Professor Bartell reported on this item. As amended in 2005, 28 U.S.C. § 158 provides for direct appeals of final judgments, orders, or decrees from the bankruptcy court directly to the court of appeals upon appropriate certification and subject to the court of appeals' discretion to hear the appeal. Bankruptcy Rule 8006(g) requires that, within 30 days after certification, "a request for permission to take a direct appeal to the court of appeals must be filed with the circuit clerk in accordance with" Appellate Rule 6(c). The bankruptcy rule is in the passive voice and does not specify who may file that request for permission. Bankruptcy Judge A. Benjamin Goldgar proposed an amendment to clarify what he—and the Advisory Committee—believed to be the meaning of the rule: any party, not just the appellant, may file the request for permission.

At Professor Struve's request, the Bankruptcy and Appellate Rules Committees have worked together to draft amendments to ensure that Rule 8006(g) is compatible with Appellate

Rule 6(c). The Bankruptcy Rules Committee has approved an amendment to Rule 8006(g) that was the product of that collaborative effort. Because the Appellate Rules Committee has created a subcommittee to consider related amendments to Appellate Rule 6(c), the Bankruptcy Rules Committee will wait to seek approval for publication of amended Rule 8006(g) until publication is also sought for an amendment to the appellate rule.

Rule 3002.1 (Notice Relating to Claims Secured by a Security Interest in the Debtor's Principal Residence in a Chapter 13 Case). Professor Gibson reported on this item. Bankruptcy Rule 3002.1 requires the holder of a mortgage claim against a Chapter 13 debtor to provide certain information during the bankruptcy case. This information lets the debtor and the trustee stay up-to-date on mortgage payments. Significant proposed amendments to Rule 3002.1 were published in August 2021, and the Advisory Committee received very valuable comments. The Advisory Committee has improved the proposal in response to those comments. Because the post-publication changes are substantial, re-publication would be helpful. The Advisory Committee still needs to review comments on proposed amendments to related forms. The committee will likely seek approval to republish the amended rule and related forms at the Standing Committee's June 2023 meeting.

Electronic Filing by Self-Represented Litigants. Professor Gibson reported on this item as well. She agreed with Professor Struve that the Advisory Committee had a positive response to the prospect of expanding electronic filing by self-represented litigants. Professor Gibson noted her surprise at this response, given that bankruptcy courts are currently the least likely to allow self-represented litigants to file electronically. She concurred with Professor Struve that there were a couple of committee members who raised concerns, particularly about improper filings. Other committee members noted that self-represented litigants could make improper filings even in paper form. The Advisory Committee needs to think about the serious privacy concerns raised earlier. But, overall, the Advisory Committee supported looking at how to extend electronic-filing access to self-represented litigants in coordination with the other Advisory Committees.

Judge Bates opened the floor to questions or comments regarding the Advisory Committee's report. Hearing none, he invited the Civil Rules Committee to give its report.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenberg and Professors Marcus, Bradt, and Cooper presented the report of the Advisory Committee on Civil Rules, which last met in Washington, D.C., on October 12, 2022. The Advisory Committee presented three action items and several information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 203.

After Judge Rosenberg recognized the work of Judge Robert Dow, the Advisory Committee's previous chair, and welcomed Professor Bradt as the new Associate Reporter, the committee began its report.

Action Items

Publication of Proposed Amendments to Rules 16(b)(3) (Pretrial Conferences; Scheduling; Management) and 26(f)(3) (Duty to Disclose; General Provisions Governing

Discovery). Judge Rosenberg reported on this item. The Advisory Committee sought the Standing Committee's approval of proposed amendments to Rules 16(b)(3) and 26(f) for publication for public comment. These amendments would require the parties to focus at the outset of litigation on the best timing and method for compliance with Rule 26(b)(5)(A)'s privilege-log requirement and to apprise the court of the proposed timing and method. It can be onerous to create and produce a privilege log that identifies each individual document withheld on privilege grounds. The original submissions advocated revising the rule to call for the identification of withheld materials by category rather than identifying individual documents. The Advisory Committee examined that proposal as well as competing arguments for logging individual documents. Judge Rosenberg noted that there is a divide between the views of "requesting" and "producing" parties. The Advisory Committee concluded that the best resolution was to direct the parties to address the question in their Rule 26(f) conference, which would give the parties the greatest flexibility to tailor a privilege-log solution appropriate for their case. Thus, the proposed amendment to Rule 26(f)(3)(D) would add "the timing and method for complying with Rule 26(b)(5)(A)" to the list of topics to be covered in the proposed discovery plan. The proposed amendment to Rule 16(b)(3)(B)(iv) would make a similar addition to the list of permitted contents of a Rule 16(b) scheduling order. The proposed committee notes to the amendments stress the importance of requiring discussion early in the litigation in order to avoid later problems. The committee note to the Rule 26 amendment also references the discussion (in the 1993 committee note to Rule 26(b)(5)(A)) of the Rule's flexible approach.

Professor Cooper added that the privilege-log problem stems from Rule 26(b)(5)(A)'s text, which requires the withholding party to "describe the nature of" the items withheld "in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." That is a beautiful statement of the rule's purpose but it gives no guidance on how to comply. The Civil Rules Committee's Discovery Subcommittee acknowledged the complex policy concerns at play and it consulted widely and at length. The picture that emerged is one in which the producing parties can face significant compliance costs, while the receiving parties are concerned about overdesignation and that the descriptions they receive do not enable them to make informed choices about whether to challenge an assertion of privilege. In addition, problems may surface belatedly because the privilege log is provided late in the discovery process. The subcommittee realized that there would be no easy prescription for every case, and it concluded that parties are in the best position to solve the problem by working together in good faith. The proposed amendment adds only a few words, but it is intended to start a very important process.

Professor Marcus noted that the Advisory Committee has heard from many commenters. The amendment had evolved quite a bit and was now ready for public comment.

Judge Bates observed that, although the changes to the rules' text are modest, the proposed amendments are accompanied by three or four pages of committee notes. Some of that note discussion is historical, and some is explanatory, but some looks like best-practices guidance. He wondered whether this was unusual or a matter of concern.

Professor Marcus acknowledged the importance of that concern. He noted that this is a concise change to a rule that has a large body of contention surrounding it. Because the proposed amendment asks parties to discuss something that is not defined in the rule with great precision, it seems helpful for the committee note to provide some prompts for that discussion. Public comment

often focuses on the committee notes, and such comment might prompt the Advisory Committee to revise the note language after publication. But it seems more desirable to put some guidance into the proposed note rather than to provide a Delphic rule with no guidance.

Professor Cooper added that this issue was considered at the Advisory Committee meeting. The practice on committee notes has varied over time. For example, the 1970 committee notes to the discovery-rule amendments would put a treatise to modest shame, and served a good purpose at the time. And courts of appeals have said that committee notes can provide useful guidance for interpreting the rules. The note is subject to polishing, and public reaction may stimulate and help focus that polishing. It is challenging at best to improve on the present text of Rule 26(b)(5)(A)—how does one express in rule text that what may work in one case may not work in another? The note grew to these proportions in order to capture how the parties might try to alleviate problems that have emerged in practice but that are too varied and complex to incorporate into the rule's text.

Judge Bates expressed concern that, even if the note spurs more comments, because this is a contentious issue, the comments would reflect competing views of what the note should contain. Would the Advisory Committee then intend to resolve those competing views in deciding what goes in the committee note in terms of what is or isn't the best practice? Publication could make this process more complex, especially with so many bits of best-practice advice offered on a subject that is important to many litigants and counsel.

A practitioner member thought that the rule text was elegant and salutary and also noted appreciation of the existing rule's cross-reference to Evidence Rule 502. The long committee note would create the attention that the Advisory Committee wants, would focus practitioners on how to make the process work, and would address the existing problem of privilege logs coming late in the discovery process.

A judge member agreed with Judge Bates and stated that his initial reaction had been that the Standing Committee was being asked to approve a committee note, not a rule change. But then, the member said, he perceived a linkage between the rule text and the committee note. Because the rule was intended to be flexible, not one-size-fits-all, that is why it should be on the agenda early in the case. But the committee note could be greatly reduced to something like: "This was not intended to be an inflexible, one-size-fits-all rule. *See* the 1993 committee notes. This issue should be discussed early on in litigation, hence the proposed change." That might more appropriately focus the public comments.

Another practitioner member thought that the proposed amendment to the rule's text was an excellent addition that would treat both plaintiffs and defendants fairly. The committee note serves a purpose and is evenhandedly written. The note would help parties in privilege-log negotiations to push back against a view that all communications must be logged. A short note runs the risk of accomplishing little. This longer note would allow for good discussion between parties in order to alleviate costs and burdens.

A third practitioner member liked the rule change itself but agreed that the committee note was on the long side. The note is evenhanded but reads like something that would be better found in a treatise, not a committee note. There would be some benefit to stripping some examples out

of the note and allowing litigants and courts to develop the practice. Over time, a treatise would capture the best practices.

Professor Coquillette congratulated the Advisory Committee on an excellent rule, but agreed that the notes were too long and contained too much practical advice. The point is often made that lawyers look to treatises for practical advice. But those sources are behind paywalls, and some lawyers do not even read committee notes. So substantive changes should be in the rule text. Professor Coquillette observed that the committee notes could be revised after public comment.

A judge member suggested striking language in the draft committee note to the amendment to Rule 16(b)(3). Specifically, the clause "these amendments permit the court to provide constructive involvement early in the case" (agenda book page 211, lines 265–66) is inaccurate because a court does not need the rule's permission to be involved in discussions about complying with the privilege-log requirement. Professor Marcus asked the member whether the word "enable" would be better than "permit." The member thought that "enable" might still carry the implication that the court does not otherwise have the authority to manage the case by talking to counsel about what should be in a privilege log. Another judge member suggested replacing "permit" with "acknowledge the ability of."

A practitioner member offered suggestions for shortening the committee note to the Rule 26(f) amendment. The initial paragraphs were background. The paragraph starting on page 209 at line 200 recounted privilege-log practice. The next paragraph listed some examples that were probably worth having in the note. The paragraph discussing technology was useful to have in the note. Then there were the paragraphs about timing of privilege logs. The current draft's ten to twelve paragraphs, this member suggested, could probably be reduced to about four.

Judge Bates asked the representatives of the Advisory Committee whether they wanted to proceed with seeking the Standing Committee's approval for publication or to return to the Advisory Committee with the Standing Committee's feedback first. After conferring, Judge Rosenberg announced that she and the reporters would return to the Advisory Committee and the appropriate subcommittee with the Standing Committee's comments. The Advisory Committee would bring the proposed amendment back to the Standing Committee, with any warranted changes, at its June meeting. **No further action was taken on this item at this time.**

Appeals in Consolidated Cases. Judge Rosenberg reported on this item. This suggestion arose from *Hall v. Hall*, 138 S. Ct. 1118, 1131 (2018), in which the Supreme Court observed that if its holding regarding finality of judgments in actions consolidated under Rule 42(a) "were to give rise to practical problems for district courts and litigants, the appropriate Federal Rules Advisory Committees would certainly remain free to take the matter up and recommend revisions accordingly." After extensive discussion and a thorough FJC study by Dr. Emery Lee, a joint subcommittee of the Appellate and Civil Rules Committees found that there was not a sufficient problem to warrant a rule amendment—that is, litigants were not missing the deadline by which to appeal a final judgment in a consolidated action. The item was therefore removed from the joint subcommittee's and the Civil Rules Committee's agenda.

Judge Rosenberg recommended that the joint subcommittee be dissolved. The Appellate Rules Committee's representatives concurred. Judge Bates noted that he was unsure whether the

joint subcommittee had been formed by a vote of the Standing Committee. Hearing no questions or comments about this item from the Standing Committee, Judge Bates asked whether anyone objected to removing the *Hall v. Hall* issue from ongoing review by the joint subcommittee and the Advisory Committees and dissolving the joint subcommittee. **Without objection, the joint subcommittee was dissolved.**

Presumptive Deadline for Electronic Filing. Judge Rosenberg briefly addressed this item, noting that the Advisory Committee had recommended that the proposal be removed from its agenda. But, based on Judge Bates's comments from earlier in the meeting, the joint subcommittee would reconsider the suggestion. **No further action was taken on this item at this time.**

Information Items

Multidistrict Litigation ("MDL"). Judge Rosenberg introduced this item by remarking that the MDL Subcommittee had first been formed in 2018 in response to comments about how important MDLs had become. No decision has yet been made on whether to recommend a rule change addressing MDLs. The subcommittee has instead focused on the question: if there *were* a rule change, what would the best possible rule be? Every MDL is different, and that has been the guiding principle throughout the iteration of different proposals. The subcommittee has been mindful of the importance of flexibility and of the many factors that bear on MDLs. The subcommittee explored putting MDL provisions into Rules 16 and 26 before ultimately developing the idea for a new Rule 16.1.

There are two versions of the draft rule, currently called Alternatives 1 and 2. The Advisory Committee has not yet considered and discussed the feedback of participants at the transferee judges' conference. Alternative 1 was well-received at the transferee judges' conference by many of the same judges who did not support an MDL-specific rule change four years ago.

MDLs make up anywhere from one-third to one-half of the federal docket. There are many new transferee judges who need to be educated about these cases. These judges also appoint new attorneys to leadership in MDLs, and these attorneys need to have proper direction and expertise. The *Manual for Complex Litigation* is being updated, but even if it were already up-to-date, people always begin by looking at the rules. So there needs to be something about MDLs in the rules.

The draft rule is designed to maintain flexibility. It has a series of guiding principles or prompts. Some prompts will apply in a specific MDL, but others may not. A judge need not go through every point listed in the draft rule. The goal is to put these points on the radar of the judges and counsel so that they start active case management early on.

Professor Marcus remarked that input from the Standing Committee would be extremely valuable to the subcommittee, especially as to the list of topics set out in Alternative 1 on page 219 of the agenda book. Judge Rosenberg agreed that the subcommittee would welcome comments on both Alternative 1 and Alternative 2. The goal is to have a more refined version to take to the full Advisory Committee meeting in March and potentially to the Standing Committee for approval for publication in June.

Judge Bates opened the floor for comments and questions.

An academic member noted that the Standing Committee had previously debated whether guidance on MDLs should go in a rule or in some other resource. This member queried whether it might make sense to wait to see the update of the *Manual for Complex Litigation*. The member suggested that Alternative 1's long list looked more like something that would go in the *Manual* than like rule text. Alternative 2 looked more rule-like, but this member would be more comfortable adopting Alternative 2's more spare approach if more detailed guidance could be found elsewhere, such as in the *Manual*. The academic member also noted others' suggestions that the rulemakers address the question of authority for some of the things that judges have done in managing MDLs, and the member questioned whether either alternative draft tackled that issue.

Judge Bates remarked that the next edition of the *Manual* would be a substantial update and would take a long time to complete. Judge Cooke estimated that it would take two to three years, probably closer to three years. Judge Bates noted that, given the three-year timeline for rule changes, it would take about six years for anything like draft Rule 16.1 to come into effect if the committees awaited the new *Manual*.

Judge Rosenberg observed that the *Manual* is not a quick read, and not every judge has or needs to have a desk copy. But as to whether this is a best-practices or a rules issue, she agreed with former chair Judge Dow's emphasis on making sure to put things in the rules—not every lawyer or judge reads the *Manual* or other resources, but everyone looks at the rules.

A judge member stated that a rule along the lines of Rule 16.1 would be helpful to judges and expressed a preference for Alternative 1 because it provides the information a court would need without having to read through a whole manual. It gives the court a lot of ideas and factors to consider in managing the case. Alternative 2 is too broad and vague to be helpful for a first-time MDL judge. Addressing the bracketed items in Alternative 1, such as the reference to a common benefit fund, the member expressed support for including those items in order to spark thought about what needs to be discussed.

Regarding Alternative 1, another judge member asked how the report called for by the rule would address items 6 through 14 if items 1 through 5 had not yet been resolved. If it is unknown who is leadership counsel or what leadership counsel's authority is, who engages in the discussion of items 6 through 14? Judge Rosenberg responded that draft Rule 16.1(b) discusses the designation of coordinating counsel for the preconference meet-and-confer. Coordinating counsel will not necessarily become permanent leadership counsel. Interim coordinating counsel and the judge can identify issues on which the judge needs feedback. These decisions can be changed, perhaps when leadership counsel is appointed or there is a major development in the MDL. This is not uncommon, that decisions made by leadership counsel need to be changed along the way. The rule contemplates that court-appointed coordinating counsel will help with the meet-and-confer and reporting to the court at the first conference on the first 14 issues or any additional issues the court deems necessary. The judge member asked what happens if there is dissension on the plaintiff side. Can coordinating counsel commit to anything in items 6 through 14? What if plaintiffs' counsel is split 50/50 on those issues?

To answer this question, Judge Rosenberg asked a practitioner member to talk about that member's experience with the issue. The member commented that there have been several large MDLs in which the court has appointed interim coordinating counsel to get the lawyers talking to

each other and resolve or narrow the issues. In situations where there is not unanimity on one side on some procedural priority, coordinating counsel presents the differing views to the court in an organized fashion at the initial conference. That doesn't give coordinating counsel absolute authority to make decisions unless there is a consensus. The emphasis is on the organizational and coordinating functions—to let the court see the range of views and make decisions in an orderly way.

Professor Marcus commented that the rule lets the judge direct counsel to report about the topics listed on page 219 of the agenda book. That would help orient the judge to the case and focus the lawyers on things that matter, even if they do not agree. That is better than a free-for-all. And requiring the lawyers to address relevant issues early on could help to avoid situations where the judge makes decisions based on incomplete information and later comes to question them, as Judge Chhabria described concerning his experience with the *Roundup* case. It may also be sensible to soften the language in proposed Rule 16.1(d) on page 220 to make clear that the management order after the initial conference is subject to revision. Overall, the point is to give the judge guidance in overseeing the case.

A judge member expressed continuing skepticism. There is some merit to the question about the court's authority. But the member asked how often transferee courts are reversed for acting without authority. If there is not a problem, perhaps not so much work needs to be done on a solution. This judge noted that the choice between the two alternative drafts only arises if one is first persuaded that a rule is needed at all.

Judge Bates observed that there might have been an authority question in *In re Nat'l Prescription Opiate Litigation*, 976 F.3d 664 (6th Cir. 2020).

A practitioner member stated that he has a bias because his firm litigates many MDLs on the defense side. The member's sense is that the plaintiffs' bar thinks that the MDL system basically works okay, while the defense bar does not think it is working, at least not in the big pharmaceutical MDLs. Rather, the system leads to settlements of meritless cases for billions of dollars. It is difficult for the rulemakers to work in an environment like that, where some people are relatively happy with the system and some are not. Both alternatives, especially the longer Alternative 1, are really about the plaintiffs' side. They may be potentially helpful, but they do not speak to defense concerns. The primary defense concern is that large MDLs are not vehicles for consolidating existing cases so much as encouraging more cases to be filed. The language coming closest to speaking to defense-side concerns is on page 219 of the agenda book, lines 568–69, about creating an avenue for vetting. But the proposed language ("*[w]hether the parties should be directed to* exchange information about their claims and defenses at an early point in the proceedings") was too agnostic. The member suggested considering deleting "whether the parties should be directed to" and starting with "exchange of information about". At least from an efficiency standpoint and from the defense bar's perspective, vetting is important.

The member also commented that, in previous versions, there had been debate about whether the exchange should be of "information" or "information and evidence." The member agreed that "evidence" seems awkward. But "information" is amorphous and may not be enough to determine whether cases in an MDL are meritorious. One suggestion is "exchange information

about the factual bases of their claims and defenses." That gets at the "evidence" concept without using the word "evidence."

Another practitioner member endorsed the idea of separating items 1 through 5 from items 6 through 13 in Alternative 1. This member expressed concern about the application of Alternative 1 before lead counsel is appointed, because then it would become an opportunity for would-be lead counsel to pontificate about the issues in items 6 through 13—that puts the cart before the horse. One of the most important things in an MDL is the appointment of lead counsel. The rules do not limit a judge's considerations in making that appointment. Does the judge consider the size of the claim? Counsel's experience level? The member has a bias toward the Private Securities Litigation Reform Act because it sets a process and criteria for appointing lead counsel. The member thought that transferee judges like that they can pick whom they want for lead counsel. The member predicted that this would become a controversy one day in a big MDL because there are no standards for that appointment. Perhaps a future Advisory Committee will add meat to that bone, but many of the topics listed in the current draft rule are obvious things that any competent MDL judge or defense counsel would want to consider.

A judge member thought that Alternative 1 is a particularly good framework to organize an MDL and indeed any complex case. The member suggested two big-picture additions. First, direct the parties in preparing their report and discussing the case to adhere to the principles of Civil Rule 1—just, speedy, and inexpensive dispositions. Counsel are not always aware of that rule. Second, there should be an emphasis on early determination of core factual issues—this might be early vetting—and core legal issues. Not necessarily dispositive legal issues, but core issues like a *Daubert* motion, an early motion in limine, or an early motion for summary judgment that will shape the law applicable to the case. Civil Rule 16(c)(2) concludes its long list of matters for consideration at a pretrial conference with "facilitating . . . the just, speedy, and inexpensive disposition of the action," thus referencing Rule 1. But because that is so important in a complex case, the reference to Rule 1 should be at the outset of the new rule, followed by a direction to focus on core issues of fact and law.

Judge Bates asked what the Advisory Committee thinks about the issue of settlement. There are questions concerning the court's role and authority, and settlement is a big issue in MDLs. Transferee judges historically have had different levels of involvement. Some think they have no authority to get involved. That is unlike class actions, where Rule 23 sets forth the judge's very involved oversight role. For normal civil cases, Rule 16(c)(2) tells the judge to focus on settlement and to use special procedures to assist in settlements. The question is what the proposed rule says about settlements in MDLs. In Alternative 1 on page 219, at lines 557–58, there is a reference to addressing a possible resolution. In Alternative 2 on page 220, line 598, there is also a reference to possible resolution. What is the message being sent to the bar and bench if that is where settlement winds up in the rule, especially compared to the more fulsome requirement in Rule 23? It is important to write these rules for the less-experienced judges and practitioners.

A practitioner member thought that another provision could be added to deal specifically with settlement—assessing whether there is a method for a prompt resolution of the claims. Over the years, more would probably be added to the rule, but something specifically dealing with considerations of early resolution, and settlement generally, would certainly be worth listing. But the problem of attorney jousting before the appointment of leadership counsel will still arise.

Another practitioner member thought that different language could solve the sequencing issue. The language would state that not all the considerations should be considered or decided at one initial conference; rather, they should be addressed in a series of conferences. Experienced MDL judges know that case management is an ongoing, iterative process; a single pretrial order is not enough. This language could avoid some confusion about how many of the considerations in the rule need to be addressed at one time. It would tell the court that this is a menu of items and let the court determine which are the priority items for the first conference and which to address in an ongoing fashion.

The previous practitioner member reiterated that, unless leadership counsel is appointed early, it makes no sense to deal with the other topics. It would be helpful, especially to inexperienced judges, to make clear in the rule that the appointment of leadership counsel should be dealt with up front.

Judge Rosenberg remarked that the subcommittee spent a lot of time on the settlement issue. Transferee judges thought that—unlike class actions, which have unrepresented parties—judges did not and should not manage, oversee, or approve settlements in MDLs. Some lawyers who looked at the draft rule may have had similar reactions. The subcommittee ultimately decided to take out that language. Still, it is important for the MDL process to have integrity and transparency, and so the subcommittee considered how a judge could ensure the process has those qualities without having the authority to approve a settlement. The solution was to give the judge a more proactive role in all aspects of case management, including appointing leadership counsel, determining leadership counsel's responsibilities, and having a regular reappointment process. Ensuring that the process is fair can promote trust in the outcome.

Judge Bates acknowledged the distinction between managing the process and reviewing the outcome, but suggested that the draft rule did not contain much guidance about what the judge should consider in appointing leadership counsel or about what other parties and counsel should be doing to create a process that will lead to a fair and just resolution of the claims.

Professor Marcus added that, with respect to settling individual claims asserted by claimants represented by other lawyers, appointment of leadership counsel is dicey. The subcommittee has given that scenario a lot of thought and discussion, including whether there could be a process by which a judge could "approve" the negotiation process for any settlements that come about. That is also dicey. On page 219 of the agenda book, in item 13, in brackets, another possibility is mentioned, which is to use a master to assist with possible resolution. Another question is: what happens if leadership counsel's own cases are settled—must different leadership counsel be appointed? MDLs involve different situations from Rule 23(e), and there is a "third-rail" aspect to this subject, so it is very valuable to have the Standing Committee's feedback while addressing it.

Judge Bates asked whether special masters have been widely used in managing and reaching settlements in MDLs. A practitioner member said yes, absolutely. In some of the biggest cases, special masters run the whole settlement process. Judge Bates asked if such a master reports to the court. A practitioner member gave an affirmative answer to this question, but remarked that these masters are not typically Rule 53 special masters. They are called "settlement masters" or "court-appointed mediators." It is an ad hoc appointment in terms of the roles and duties, but those

duties do typically include reporting to the court. The extent to which the master can report to the court on the substance of the negotiations is usually worked out among the parties. In the *Opiate* MDL, there were Rule 53 appointments of special masters who ultimately became involved in mediation and settlement. In the *Volkswagen* MDL, Judge Breyer invented a position called "settlement master," which was not based on Rule 53 but had many but not all of the same responsibilities and roles. Judge Breyer made the appointments after requesting input from the parties on whether to appoint a master and, if so, whom. The court need not follow the parties' recommendations, but in the member's experience, this topic is discussed with the parties and the court's determinations do not come as a surprise.

Judge Bates thought that judges who appoint masters would communicate with them. Should the master's reporting duty to the judge be one of the considerations under the rule?

Judge Rosenberg mentioned that the subcommittee had received feedback from some groups that did not like having the words "special master" in the draft rule. It might create a presumption that there should be a special master, even if not everyone wants one. This led to some discussion, and some thought it might be better to have the words "special master" in the rule so that the parties will talk about it, even if they disagree.

Judge Bates asked whether the rulemakers should be careful about referring to the appointment of a "special master." Might the reference be viewed as authorizing something outside of Rule 53? He intended no criticism of what any judge has done in the MDL process, but he asked whether the rulemakers want to give, through a casual reference in item 13 of a laundry list, an imprimatur to the idea that a judge can say, "I want a settlement master. Rule 53 doesn't fit, so I'm just going to create this role on my own."

Judge Rosenberg responded that the subcommittee has discussed this topic but has not yet brought it to the full Advisory Committee. The subcommittee is working on tweaking the language in response to feedback on that issue and others. As another example, in line 570 of the report in the agenda book, there is a reference to a "master complaint." The rules do not provide for a master complaint, but the Supreme Court has referred to master complaints, and so has the subcommittee. One piece of feedback was that the term should not be used. Does using it somehow give credibility to a form of complaint that the rules otherwise do not mention?

Judge Bates commented that one could go pretty far back in this line of thought. The rules do not authorize the appointment of leadership counsel, for example. There are a lot of things that may not have a specific basis in the existing rules.

A judge member noted that the draft rule does not make any reference to the transferor court. It rarely happens that the case is sent back, but the MDL framework does contemplate that the work of the transferee court ends at some point. An item could be added to suggest that the transferee court and lawyers should consider when a case should be sent back to the transferor court.

Professor Cooper commented that a suggestion had arisen that the rule should address remand. But it was unclear whether the suggestion meant addressing motions to remand to state court, in cases plaintiffs thought improperly removed, or remand to transferor courts.

The judge member thought that it sounds like there is a never-ending list of items that could be considered or called into question. At what point do we return to the concept of "first do no harm"? Is there a need for this rule? What is its usefulness?

Professor Marcus commented that there has been a decades-long debate about whether the transferor court, if a case goes back, can simply start from scratch and throw out what the transferee judge did with the case. Putting a time limit on transferee activities might produce some behaviors that should not be encouraged. Also, as Professor Cooper said, remand means two different things here. Under 28 U.S.C. § 1407, the Judicial Panel on Multidistrict Litigation ("JPML") has authority to remand to the transferor court, but the JPML usually awaits a suggestion from the transferee judge that this would be desirable. The transferee judge cannot do this unilaterally.

Judge Bates commented that there are some things, not listed in the draft rules, that might occur later on before the transferee judge, particularly bellwether trials. If the draft rule is viewed as a continuing conference obligation, should it address other items, such as how to manage and sequence any bellwether proceedings?

Judge Rosenberg responded that bellwether management was not included because it is far along in the MDL process and might be outside the realistic scope of what can and should be discussed in the early conferences.

Professor Marcus added that there are also various views about whether bellwethers are useful. It is probably unwise to urge the judge to map out possible use of bellwethers at the start of an MDL. He predicted that any rule will say that, except for extremely simple and small MDLs, one conference is not enough, and the management plan must be revisited as things move forward. So the rule's focus will probably be on the initial exercise, and the expectation will be that judges continue to oversee other events as they become timely. Bellwethers might be in that latter category.

Judge Rosenberg thanked the Standing Committee for its feedback.

Rule 41(a) (Dismissal of Actions). Judge Rosenberg reported on this item. The Advisory Committee formed a subcommittee to address a conflict about the scope of Rule 41(a)(1)(A), which allows a plaintiff to voluntarily dismiss without prejudice an "action" without obtaining a court order or the defendants' consent. The subcommittee's research showed that courts approach Rule 41 dismissals in different ways. The primary disagreement is whether Rule 41(a)(1)(A) requires dismissal of an entire action against all parties or whether it may be used to dismiss only certain claims or only claims against certain parties. The subcommittee has not reached a consensus on whether to pursue an amendment or what amendment to propose. An additional wrinkle is Rule 15, through which a plaintiff can amend a complaint to remove certain claims or defendants. The subcommittee is considering whether Rule 15 should be the vehicle by which a party should dismiss something short of the entire action.

Judge Bates remarked that this is a complex issue, and he solicited comments or feedback from the Standing Committee. Hearing none, Judge Rosenberg turned to the remainder of the report, and invited Professor Cooper to present the next item.

Rule 7.1 (Disclosure Statement). Professor Cooper addressed two suggestions made to the Advisory Committee about recusal disclosures. One suggestion, about "grandparent corporations," contemplates a company that owns a stake in a second company, which in turn has a stake in a third company. If, say, Orange Julius is a party to an action, then the current rule requires it to disclose that Dairy Queen is its owner. But the rule does not require Orange Julius to disclose that Berkshire Hathaway owns Dairy Queen. So if the judge in the action owns shares of Berkshire Hathaway, that judge may not have notice of a potential financial interest in the case's outcome. Should something be done to address this in the rule?

The other suggestion proposed a rule directing all parties and their counsel to consult the assigned judge's publicly available financial disclosures. The parties would either flag any interests that may raise a recusal issue or certify that they have checked and do not know of any. The Advisory Committee has not really dived into this. Rule 7.1 covers only nongovernmental corporate parties. There are all sorts of business organizations with complicated ownership structures that may involve interests a judge is not aware of. Should the Advisory Committee just say it is too complicated to try to go further than corporations?

In response to a question posed by Professor Cooper, Judge Bates suggested that, unless the Appellate or Bankruptcy Rules Committees feel otherwise, it makes sense for the Civil Rules Committee to take the lead in considering proposed amendments to Rule 7.1.

Other Items Considered. At this point, Judge Bates opened the floor for any remaining issues raised in the Civil Rules Committee's report. He asked a question about service awards for class-action representatives. Does the Advisory Committee view this issue as a matter of procedure or of substantive law? Judge Rosenberg responded that the issue was not a subject of much discussion at the last Advisory Committee meeting. Professor Marcus thought that there was no need to worry about the issue yet. There was a pending certiorari petition on the issue, so there might be more to learn by waiting.

Professor Marcus turned to Rule 45, about which a question had arisen: what does it mean to "deliver" a subpoena? By hand? By email? It may be that, in civil litigation, counsel can work this out. Is it worth trying to devise specifics on a method of delivery?

A judge member drew attention to the information item on standards and procedures for deciding in forma pauperis ("IFP") status, and suggested that that item warranted action. The member remarked that a *Yale Law Journal* article had described disparate practices on IFP status, which raised important issues of access to justice. The Appellate Rules Committee is looking at a standardized form for IFP status on appeal. The member suggested that someone should review this—if not the rulemakers, then a different committee of the Judicial Conference.

Judge Bates commented that the current view of the Advisory Committee was that it was not going to take any specific action on standards for IFP status. If the Rules Committees are not going to look further at this, should they encourage another Judicial Conference committee to do so? The only other logical Judicial Conference committee is CACM. Judge Rosenberg remarked that there is an Administrative Office pro se working group that may also be appropriate. Judge Bates suggested that perhaps the rulemakers could communicate to these entities that the Advisory Committee is not going to do anything with the topic for now but views it as an important question.

Another judge member informally asked the Advisory Committee to consider whether there is a need to address the Supreme Court decision in *Kemp v. United States*, 142 S. Ct. 1856 (2022), which held that a judge's error of law is a "mistake" under Rule 60(b).

Items Removed from Agenda. Judge Rosenberg concluded by noting items removed from the Advisory Committee's agenda. These included proposed amendments to Rule 63 (Successor Judge), Rule 17(a) (Real Party in Interest) and Rule 17(c) (Minor or Incompetent Person). There were no questions or comments from the Standing Committee on these items.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Dever and Professors Beale and King presented the report of the Advisory Committee on Criminal Rules, which last met in Phoenix, Arizona, on October 27, 2022. The Advisory Committee presented two information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 297.

Information Items

Rule 49.1 (Privacy Protection for Filings Made with the Court). Judge Dever reported on this item. He explained that the Advisory Committee had considered and decided to remove from its agenda a proposal by Judge Furman regarding Rule 49.1. The rule's committee note refers to 2004 guidance from CACM that certain documents should remain confidential and not be made part of the public record. In *United States v. Avenatti*, 550 F. Supp. 3d 36 (S.D.N.Y. 2021), Judge Furman held that the common law and the First Amendment required appropriate disclosure of a defendant's CJA Form 23 and accompanying affidavit. Judge Furman suggested amending Rule 49.1(d) and removing the committee note's reference to the CACM guidance. The Advisory Committee concluded that the original committee note did not produce confusion about the constitutional or common-law rights of access, and it also hesitated to venture into potentially substantive issues through rule amendments.

Rule 17 (Subpoena). Judge Dever reported on this item as well. The Advisory Committee is analyzing a proposal by the New York City Bar to amend Rule 17 to allow defendants to more easily subpoena third parties for documents. As part of this process, the Advisory Committee has appointed a subcommittee, chaired by Judge Nguyen, to gather information about how federal courts apply the rule and how states handle these kinds of subpoenas. The goal is to determine whether there is a problem that warrants a rule change. There have been two Supreme Court cases interpreting the rule, both fairly atypical. The subcommittee has heard from a wide variety of experienced practitioners from the defense bar and the Department of Justice. The process is still in its early stages, and the Advisory Committee will continue to study these issues.

Judge Bates commented that the miniconference on the Rule 17 issue at the most recent Advisory Committee meeting had been very informative and had elicited several different perspectives that should be useful in the committee's ongoing study.

Judge Bates opened the floor to questions or comments regarding the Advisory Committee's report. Hearing none, he invited the Evidence Rules Committee to give its report.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Schiltz and Professor Capra presented the report of the Advisory Committee on Evidence Rules, which last met in Phoenix, Arizona, on October 28, 2022. The Advisory Committee presented two information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 365.

Information Items

Rule 611 (Juror Questions for Witnesses). Judge Schiltz reported on this item. This proposal would add a new subsection (e) to Rule 611 to create safeguards if jurors are permitted to ask questions at trial. The proposed amendment was presented to the Standing Committee at the June 2022 meeting. Most comments then had been about whether jury questioning is a good thing at all; some members thought that it was not and that putting safeguards in the rule would only encourage judges to allow jurors to ask questions. The proposed amendment was returned to the Advisory Committee for further study on the pros and cons of juror questioning.

The Advisory Committee held a miniconference on the issue at its fall 2022 meeting in Phoenix, Arizona, which was coincidental but fortunate in that Arizona is a pioneer among the states in allowing juror questioning. The panel included federal and state judges and civil and criminal practitioners, all with a great deal of experience with juror questioning. All of them expressed the view that juror questioning was a positive thing with many benefits and few risks. They all supported the proposed rule. It was difficult to find opponents—one whom Professor Capra did find could not attend the miniconference. Afterward, the Advisory Committee thoroughly discussed the proposal. It will continue to discuss the proposal at its spring 2023 meeting and decide whether to pursue it.

Judge Bates thought the miniconference was a helpful exercise. Although it was one-sided—as it necessarily would be in Arizona—it gave the committee many issues to consider.

Professor Capra reiterated that it was difficult to find someone in Arizona who had anything critical to say about the practice. There were a couple of comments—one from a judge at the miniconference who said that juror questioning sometimes took too much time, and another from a prosecutor who said that sometimes there is a risk that questioning can get out of hand because the lawyers cannot control the witness. But there was a swarm of positive factors indicating that juror questioning is not the problem that some think it would be. Most juror questions are only for clarification, not attempts to take over the case or to pick or fill holes in one party's case.

Judge Bates raised a concern about juror questions in criminal cases. The criminal process is not a pure search for the truth—the prosecutor has the burden to prove guilt. He suggested that a juror question may unfairly help the prosecution by revealing a problem in the case that the prosecutor can then address or cure.

A judge member asked whether there was anecdotal information from actual jurors, such as information from a questionnaire asking whether they liked being able to ask questions. Professor Capra said that the judges reported that they generally discuss the process with jurors

and that reviews had been positive. One juror told a judge that he was glad he could ask questions so that he did not have to look up answers on the internet. Another juror said that it was nice to be able to ask questions; even if the juror did not do so, the juror still became more involved in the process. Judge Schiltz also commented that there have been studies showing that jurors give overwhelmingly positive feedback about the ability to ask questions.

A practitioner member asked whether a 50-state (and multidistrict) survey had been done to learn about the prevalence of the practice. Professor Capra responded that there are some data on that question. The state of Washington has a juror-questioning practice. About 15% to 20% of trials in federal courts allow juror questioning. The member commented that it would be a good idea to identify federal district judges who allow the practice and to get their feedback. Judge Bates observed that it is a judge-by-judge question, not a court-by-court question. The practitioner member reiterated that the Advisory Committee should try to determine the frequency of the practice outside of Arizona and to talk with federal judges who have done juror questioning and find out its pros and cons. Judge Schiltz noted that the Advisory Committee had the same questions and had asked Professor Capra to gather more data on them. Professor King commented that the National Center for State Courts has collected and published data about juror questioning in the states.

Judge Bates asked whether the Advisory Committee had considered whether there is a difference between the civil and criminal contexts and whether a rule might address one but not the other. Professor Capra responded that any safeguard that applies in the civil context would have to apply to the criminal context as well. Perhaps criminal cases could have additional safeguards, but no safeguards would apply only to the civil context.

Judge Schiltz commented that there had been a study in the Ninth Circuit that recommended permitting juror questioning in civil cases but not criminal cases. Judge Bates suggested, however, that there was more recent work in the Ninth Circuit that was more positive about juror questions. And Professor Capra noted that the Ninth Circuit pattern criminal instructions now address juror questions.

Rule 611 (Illustrative Aids). Judge Schiltz reported on this item as well. The Advisory Committee held a second miniconference in Phoenix on illustrative aids. Despite the fact that illustrative aids are used in virtually every trial, there is confusion over the difference between demonstrative evidence, which is admitted into evidence, and illustrative aids, which are not admitted into evidence and are used only to help the jury understand evidence that has been admitted. There are variations among judges' practices about notice requirements to opposing counsel, whether illustrative aids can go to the jury room, and whether the aids become part of the record.

This amendment would add a new subsection (d) to govern the use of illustrative aids. It would clarify the distinction between illustrative aids and demonstrative evidence, require notice, prohibit illustrative aids from going to the jury room absent a court ruling and proper instruction, and require they be made part of the record so that they would be available to the appellate court.

The miniconference featured a large panel of judges, professors, and practitioners, most of whom opposed the proposed rule. Since then, the Advisory Committee has also received about 40

comments on the rule. Most opposition is to the notice requirement. Practitioners adamantly opposed having to show their illustrative aids to their opponents, especially aids they wanted to use at closing. There were also practical concerns. The category of illustrative aids spans a wide variety. For example, if an attorney writes something on a chart as a witness is testifying, how does the attorney give prior notice to opposing counsel of that contemporaneously created illustrative aid? The Advisory Committee did receive a comment in support of the rule—including the notice requirement—from the Federal Magistrate Judges Association. At its spring 2023 meeting, the Advisory Committee will review the comments and decide whether to move forward, perhaps after excising the notice requirement.

Judge Bates, noting that this miniconference had also been very helpful to the Advisory Committee, opened the floor for comment.

A practitioner member raised concerns about the notice requirement from the member's colleagues in trial practice. Attorneys persuade juries in two ways: by words and by visuals. When both are aligned, people retain far more information than when only one method is used. An attorney would never show the outline of an opening statement or witness exam to an opponent—it puts the attorney at a strategic disadvantage because opponents can change what they will say in response. Sharing an illustrative aid is similar. And the effect of taking the notice requirement out would be that there is a transcript, an objection, and a discussion—the rule would treat illustrative aids the same as attorneys' oral statements. Requiring notice would put more disclosure obligation on the visual than the oral. Professor Capra responded that he thinks the Advisory Committee was comfortable with deleting the notice requirement, and it is likely that that is what will happen.

The member also commented that, as illustrative aids are defined—helping the factfinder understand admitted evidence—a strict reading would mean that a PowerPoint presentation could not be used in an opening because no evidence will have been admitted yet. Professor Capra responded that the Advisory Committee needs to decide whether the rule applies to openings and closings. If the rule were to apply to openings and closings, one could revise proposed Rule 611(d)(1)'s "understand admitted evidence" to read "understand admitted evidence or argument."

A judge member mentioned that, as a trial judge, the member would customarily make illustrative aids a part of the record. Now, after 20 years on the court of appeals, the member has had very little occasion to see an illustrative aid that is part of the trial record. The member continues to think that putting aids in the record is the better practice. The appellate courts are so far removed from the trial process that anything that gives them a better feel of what has been before the trier of fact is of great assistance.

A second practitioner member expressed support for rulemaking on this topic and commented on the centrality of slides in modern trials. The member is often concerned that the other side will do something crazy with illustrative aids in openings and closings. The member can sometimes work out an arrangement with the other side to mutually disclose trial materials. But sometimes things like closing slides are made the night before the closing argument—when is it practical to give notice for these aids? Putting aids in the record is an easy decision, as is making it clear that they do not go to jury deliberations. Notice might bother the member less than it does other lawyers because the member has seen people do crazy things at trial, and the damage is done even if the judge says something after the fact. The standard in proposed Rule 611(d)(1)(A)

("[substantially] outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time") gives a judge enormous power over what can be done—that might be good or bad. The member does not know what the standard should be; maybe it should be the same as applies to oral advocacy in a closing argument.

A third practitioner member largely agreed with the previous member's comments. The solution is probably not one-size-fits-all, so the member is not sure what to do about a notice requirement. The second practitioner member suggested that you do not want to show aids to opposing counsel so far in advance that they can change what they will do in response, but you do want to make sure that there are not any slides that are so outrageous that the judge should know about them in advance.

Professor Capra asked whether the solution might be to take out the notice requirement from the text but to put in language that summarizes the two previous members' comments—there is no one-size-fits-all notice requirement, but notice is preferred because it allows judges to decide in advance rather than after the fact. But the rule would leave the determination for the judge to make.

The second practitioner member agreed with Professor Capra's suggestion. The "Wild West" view of trials is dangerous, so having some notice is a good idea. But it should not be so much notice that each side can redo its slides in response to the other's.

The third practitioner member noted that it is much harder to unsee than unhear something. That is a qualitative difference between what is said and shown. Judge Bates observed that it would be valuable for the Advisory Committee to consider preserving judges' discretion to deal with the notice issue.

The first practitioner member reiterated opposition to a notice requirement. Leaving the notice requirement out of the rule does not strip a federal judge of inherent authority. Also, some slides' power comes from not disclosing them in advance. If this rule applies to openings and closings, notice disincentivizes parties from using powerful slides during those key parts of trial.

Professor Capra responded that many judges already use Rule 611(a) to control visual demonstrations in openings and closings. It did not make sense to him to exclude openings and closings from a rule specific to illustrative aids because there would then be two rules covering essentially the same thing, one during trial and one during openings and closings.

Updates on Other Rules Published for Public Comment.

Judge Schiltz briefly mentioned that there are several other proposed rules that are published for comment. The Advisory Committee has received almost no comments on those rules.

Judge Bates called for any further comments from the Standing Committee. Hearing none, Judge Bates thanked the Advisory Committees, their members, reporters, and chairs for their hard work.

OTHER COMMITTEE BUSINESS

Action Item

Judiciary Strategic Planning. This was the last item on the meeting's agenda. Judge Bates explained that the Standing Committee needed to give its recommendations to the Judicial Conference's Executive Committee about the contents of the strategic plan and what should receive priority attention over the next two years. The recommendations were due within a week after the meeting. Judge Bates requested comment on the priorities in the strategic-planning memorandum beginning on page 402 of the agenda book. No comments were offered.

Judge Bates then sought the Standing Committee's authorization to work with the Rules Committee Staff to give comments to the Executive Committee, on behalf of the Rules Committees, about the strategies and goals for the next two years. This procedure had been followed in the past, but he wanted to be sure that no one had any problem with it. **Without objection, the Standing Committee gave Judge Bates that authorization.**

New Business

Judge Bates then opened the floor to new business. No member raised new business.

CONCLUDING REMARKS

Before adjourning the meeting, Judge Bates thanked the Standing Committee members and other attendees for their valuable contributions and insights. The committee will next convene on June 6, 2023, in Washington, D.C.

TAB 2B

Agenda E-19 (Summary)
Rules
March 2023

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

This report is submitted for the record and includes the following for the information of the Judicial Conference:

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on January 4, 2023. All members participated.

Representing the advisory committees were Judge Jay S. Bybee, Chair, and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Rebecca Buehler Connelly, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura B. Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge Robin L. Rosenberg, Chair, Professor Richard L. Marcus, Reporter, Professor Andrew Bradt, Associate Reporter, and Professor Edward H. Cooper, Consultant, Advisory Committee on Civil Rules; Judge James C. Dever III, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, Advisory Committee on Criminal Rules; and Judge Patrick J. Schiltz, Chair, and Professor Daniel J. Capra, Reporter, Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; H. Thomas Byron III, the Standing Committee's Secretary; Bridget Healy, Scott Myers, and Allison Bruff, Rules Committee Staff Counsel; Christopher I. Pryby, Law Clerk to the Standing Committee; John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, Federal Judicial Center; and

Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, Department of Justice.

In addition to its general business, including a review of the status of pending rule amendments in different stages of the Rules Enabling Act process and pending legislation affecting the rules, the Standing Committee received and responded to reports from the five advisory committees. The Committee also received an update on the coordinated work among the Appellate, Bankruptcy, Civil, and Criminal Rules Committees to consider suggestions to allow expanded access to electronic filing by pro se litigants and an update on a suggestion to change the presumptive deadline for electronic filing.

FEDERAL RULES OF APPELLATE PROCEDURE

Information Items

The Advisory Committee on Appellate Rules met on October 13, 2022. The Advisory Committee discussed possible amendments to Rule 29 (Brief of an Amicus Curiae), Rule 39 (Costs), and Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis).

The Advisory Committee has been considering potential amendments to Rule 29 for several years and received helpful feedback from the Standing Committee regarding the need for and scope of any potential additional requirements for disclosures by amici curiae, including disclosure requirements related to ownership, control, or funding by the parties or non-parties. In addition, the Advisory Committee is considering possible amendments to Rule 39 in the light of *City of San Antonio v. Hotels.com*, 141 S. Ct. 1628 (2021), regarding the allocation of costs on appeal, specifically related to supersedeas bonds. The Advisory Committee is also considering possible amendments to Form 4 in response to a suggestion highlighting issues with the current

form, and has consulted clerks and senior staff attorneys in the circuits to determine the most relevant information on the form.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Official Form Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted a proposed amendment to Official Form 410 (Proof of Claim) with a recommendation that it be published for public comment in August 2023. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Official Form 410 (Proof of Claim)

The proposed amendment eliminates the language on the proof-of-claim form that restricts use of a uniform claim identifier ("UCI") to electronic payments in chapter 13, and thereby allows the UCI to be used in cases filed under all chapters of the Bankruptcy Code and for all payments whether or not electronic. Use of the UCI is entirely voluntary on the part of the creditor. The amended language allows a creditor to list a UCI on the proof-of-claim form in any case.

Information Items

The Advisory Committee met on September 15, 2022. In addition to the recommendation discussed above, the Advisory Committee continued consideration of proposed amendments to Rule 3002.1 (Notice Relating to Claims Secured by a Security Interest in the Debtor's Principal Residence in a Chapter 13 Case) and related forms. A version of the amended rule published for comment in 2021 received a number of comments on proposed provisions designed to enhance the likelihood that chapter 13 debtors will emerge from bankruptcy current on their home mortgages. In light of the comments, the Advisory Committee is considering changes that would likely require republication in August 2023.

FEDERAL RULES OF CIVIL PROCEDURE

Information Items

The Advisory Committee on Civil Rules met on October 12, 2022. The Advisory Committee submitted proposed amendments to Rules 16(b)(3) (Pretrial Conferences; Scheduling; Management) and 26(f)(3) (Duty to Disclose; General Provisions Governing Discovery) regarding privilege logs with a recommendation that they be published for public comment in August 2023. The proposed amendments would call for early identification of a method to comply with Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials. Specifically, the proposed amendment to Rule 26(f)(3)(D) would require the parties to address in their discovery plan the timing and method for complying with Rule 26(b)(5)(A). The proposed amendment to Rule 16(b) would provide that the court may address the timing and method of such compliance in its scheduling order. During the Standing Committee meeting, members expressed differing views concerning the length of and level of detail in the committee notes that would accompany the proposed amendments. The Advisory Committee was asked to reexamine the notes in light of that discussion, and to present the proposed amendments to the Standing Committee at its June 2023 meeting.

In addition, the Advisory Committee continues to consider a potential new rule concerning judicial management of multidistrict litigation proceedings. The MDL subcommittee has developed a sketch for a new Rule 16.1 directed to MDL proceedings. The new rule would prompt a meet-and-confer session among counsel before the initial case management conference with the transferee court. In two alternatives, the sketch of the rule provides various topics for discussion by counsel. The Advisory Committee continues to discuss the possibility of proposing a new Rule 16.1.

The Advisory Committee also discussed potential amendments to Rule 7.1 (Disclosure Requirement) regarding disclosure of possible grounds for recusal, Rule 41(a) (Dismissal of Actions) regarding the dismissal of some but not all claims or parties, Rule 45(b)(1) (Subpoena) regarding methods for serving a subpoena, and Rule 55 (Default; Default Judgment) regarding the directive that in some circumstances the clerk "must" enter a default or a default judgment.

FEDERAL RULES OF CRIMINAL PROCEDURE

Information Items

The Advisory Committee on Criminal Rules met on October 27, 2022. The Advisory Committee removed from its agenda a suggestion regarding Rule 49.1 (Privacy Protection For Filings Made with the Court) and considered a suggestion to amend Rule 17 (Subpoena).

The Advisory Committee considered a suggestion to amend Rule 49.1 by adding the phrase "subject to any applicable right of public access" before Rule 49.1(d)'s authorization permitting the court to order that filings be made under seal. This change had been proposed to address certain language in an earlier committee note that included a reference to the *Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files* (March 2004) issued by the Committee on Court Administration and Case Management (CACM). As quoted in the committee note, the CACM guidance provides that certain documents—including "financial affidavits filed in seeking representation pursuant to the Criminal Justice Act"—"shall not be included in the public case file and should not be made available to the public at the courthouse or via remote electronic access." Several reasons factored into the Advisory Committee's decision not to pursue the proposed amendment. One was the concern that the amendment would be perceived as taking a position on an issue of substantive law (that is, whether such financial affidavits are judicial documents subject to disclosure under the First Amendment or a common law right of access). Another was the

observation that such an amendment would not remove the earlier committee note's reference to the CACM guidance.

The Advisory Committee continues to consider a New York City Bar Association suggestion concerning Rule 17. The Advisory Committee formed a subcommittee to study the issue and, to gather more information about Rule 17 in practice, invited a number of experienced attorneys to participate in its fall meeting. The participants included defense lawyers in private practice, federal defenders, and representatives of the Department of Justice. The participants spoke about their experience with Rule 17 subpoena practice, and answered questions regarding the standards for securing third-party subpoenas and the role of judicial oversight in the process.

FEDERAL RULES OF EVIDENCE

Information Items

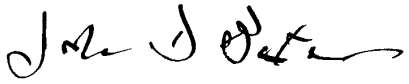
The Advisory Committee on Evidence Rules met on October 28, 2022. In connection with the meeting, the Advisory Committee held panel discussions on two suggestions concerning Rule 611 (Mode and Order of Examining Witnesses and Presenting Evidence). The first panel discussion related to a possible new Rule 611(e) regarding the practice of allowing jurors to pose questions for witnesses. The Advisory Committee will continue its research into juror questions, including how often the practice is used in federal courts and potential safeguards for the practice. The second panel discussion related to proposed new Rule 611(d) regarding illustrative aids, which was published for public comment in August 2022. Proposed Rule 611(d) would state the permitted uses of illustrative aids and would set procedures for their use. Finally, the Advisory Committee provided updates on other rules published for public comment, including Rule 613(b) (Witness's Prior Statement) regarding prior inconsistent statements, Rule 801(d)(2) (Definitions That Apply to This Article; Exclusions from Hearsay) related to hearsay statements by predecessors in interest, Rule 804(b)(3) (Exceptions to the Rule Against Hearsay—When the

Declarant Is Unavailable as a Witness) regarding the corroborating circumstances requirement, and Rule 1006 (Summaries to Prove Content) regarding summaries of voluminous records.

JUDICIARY STRATEGIC PLANNING

The Committee was asked to provide recommendations to the Executive Committee regarding the prioritization of goals and strategies in the 2020 *Strategic Plan for the Federal Judiciary* (*Plan*) to determine which strategies and goals from the *Plan* should receive priority attention over the next two years. The Committee's views were communicated to Chief Judge L. Scott Coogler, the judiciary planning coordinator, by letter dated January 10, 2023.

Respectfully submitted,



John D. Bates, Chair

Elizabeth J. Cabraser	Lisa O. Monaco
Robert J. Giuffra, Jr.	Andrew J. Pincus
William J. Kayatta, Jr.	Gene E.K. Pratter
Carolyn B. Kuhl	D. Brooks Smith
Troy A. McKenzie	Kosta Stojilkovic
Patricia Ann Millett	Jennifer G. Zipps

TAB 3

Minutes of the Fall Meeting of the

Advisory Committee on the Appellate Rules

October 13, 2022

Washington, D.C.

Judge Jay Bybee, Chair, Advisory Committee on the Appellate Rules, called the meeting of the Advisory Committee on the Appellate Rules to order on Thursday, October 13, 2022, at 9:00 a.m. EDT.

In addition to Judge Bybee, the following members of the Advisory Committee on the Appellate Rules were present in person: Justice Leondra R. Kruger, Judge Carl J. Nichols, and Lisa Wright. Solicitor General Elizabeth Prelogar was represented by Mark Freeman, Director of Appellate Staff, Department of Justice. Professor Bert Huang and Judge Richard C. Wesley attended via Teams.

Also present in person were: Judge John D. Bates, Chair, Standing Committee on the Rules of Practice and Procedure; Andrew Pincus, Member, Standing Committee on the Rules of Practice and Procedure, and Liaison to the Advisory Committee on the Appellate Rules; Judge Bernice Donald, Member Advisory Committee on the Bankruptcy Rules and Liaison to the Advisory Committee on the Appellate Rules; H. Thomas Byron III, Chief Counsel, Rules Committee Staff (RCS); Bridget M. Healy, Counsel, RCS; Allison A. Bruff, Counsel, RCS; Scott Myers, Counsel, RCS; Christopher Pryby, Rules Law Clerk, RCS; Shelly Cox, Management Analyst, RCS; Nicole Teo, Intern, RCS; Professor Edward A. Hartnett, Reporter, Advisory Committee on the Appellate Rules; and Professor Catherine T. Struve, Reporter, Standing Committee on the Rules of Practice and Procedure.

Professor Daniel R. Coquillette, Consultant, Standing Committee on the Rules of Practice and Procedure; Molly Dwyer, Clerk of Court Representative, Advisory Committee on the Appellate Rules; Tim Reagan and Marie Leary, both of the Federal Judicial Center, attended via Teams.

I. Introduction

Judge Bybee opened the meeting and welcomed everyone, particularly new members and staff. He invited those participating in the meeting to introduce themselves.

II. Approval of the Minutes

The Reporter corrected a date from 2020 to 2010 in the draft minutes of the March 30, 2022, Advisory Committee meeting. (Agenda book page 121). With that corrected, the minutes were approved.

III. Discussion of Matter Published for Public Comment

Judge Bybee presented information about the proposed amendments to Rules 35 and 40 that have been published for public comment. (Agenda book page 124). So far, we have received few comments, and none of the comments received to date warranted a meeting of the subcommittee. We expect more comments before the deadline on February 16, 2023.

To be prepared to consider any comments, we need to replace members of the subcommittee that are no longer available. Judge Wesley and Mark Freeman will join Danielle Spinelli on this subcommittee.

IV. Discussion of Matters Before Subcommittees

A. Amicus Disclosures (21-AP-C)

Danielle Spinelli, the chair of the subcommittee, was unable to attend the meeting. The Reporter presented the report of the amicus subcommittee. (Agenda book page 152). After emphasizing that, as before, the subcommittee is not yet proposing amendments but instead providing a working draft to help guide the Committee's discussion, he walked through draft Rule 29(c).

That provision deals with disclosure of the relationship between an amicus and a party. The major differences between the current rule and this draft are that the draft would require whether a party or its counsel have a majority ownership or control of an amicus, and whether a party or its counsel contributed 25% or more of the revenue of the amicus during the twelve-month period preceding the filing of the amicus brief.

The Reporter invited discussion of the appropriate percentage, noting that some have argued for a 50% threshold.

A judge member wondered about the workability of the draft rule. Would it be easy to evade? Difficult to administer? Another judge member noted that this provision deals only with parties and asked whether there is a problem there that needs to be addressed. Judge Bybee responded that that the materials submitted raised one such example. The judge member added that he concurs with the subcommittee that requiring disclosure regarding parties is a lot less problematic from a First Amendment perspective than requiring disclosure regarding nonparties.

A liaison member asked for the theory behind the percentage. The Reporter stated that a judge member at a prior meeting had suggested something in the range of 25% to 33%. Judge Bybee added that there was no great place to copy from, noting that the Amicus Act uses a 3% threshold.

A different liaison member stated that, in the real world, briefs don't get filed if they would require the disclosures called for in the current rule. Whatever percentage is chosen will send the message that briefs at that threshold will be viewed skeptically and therefore such briefs will rarely if ever be filed. Mr. Freeman added that this rings true.

Judge Bates asked if there has been an assessment of how this draft would impact briefs that are filed. The Reporter stated that it is very difficult to make such an assessment, precisely because these disclosures are not currently required.

In response to a question by a lawyer member whether briefs with the disclosures would never get filed, the liaison member said not never, but that some funders will not want to disclose and that there will be concern about the credibility of a brief with these disclosures. Judge Bybee noted that this raised a policy question of how much is lost if briefs are not filed.

The liaison member explained that organizations with a broad funding base won't be hurt, but organizations with a narrower focus might be caught. If there is so much skepticism, will the brief be discounted? Other briefs are filed pro bono and won't be affected.

Mr. Freeman noted that in the intellectual property area, there may be broad based funding but still a fear of Astro-turfing. On the one hand, judges may find a brief valuable, but on the other, disclosure could deter some Astro-turfing.

Judge Bates noted that there is a trade-off between getting the information from the disclosure and not getting the brief. A judge member observed that an amicus always has to state its interest, why it has skin in the game. Why not require the disclosure of a dominant role, leaving it to them to decide if they are deterred? Judge Bates, noting that the focus at this point is on parties, stated that the question is how much do we lose in that context.

Another judge member suggested that there might be a way to signal that the percentage chosen is not a threshold beyond which a brief is discounted: require disclosure in various percentage bands.

In response to a question from the Reporter whether it was the existence of a disclosure rule or the underlying funding that would lead to discounting a brief, Mr. Freeman said that he would want to know about funding and the funding would cast doubt on a brief. A liaison member said that that would be especially true if an amicus

purported to speak for an industry but a party was a key funder of the amicus. An academic member suggested articulating the purpose of a rule, at least in the committee note, and that disclosure can be viewed as an extension of the statement of interest.

Judge Bybee invited discussion of the idea of disclosure bands. A liaison member suggested that there should be a band (such as under 25%) where no disclosure is required, and that bands can suggest that disclosure doesn't mean that your goose is cooked. An academic member asked if disclosure could affect the nature of the briefs, perhaps the balance between "me, too" briefs and briefs that provide different information. The liaison member responded that it is hard to tell. Some others think more is better; perhaps disclosure could reduce the arms race. An amicus that made a disclosure could use its statement of interest to counterbalance the disclosure.

Mr. Byron stated that the concern we are trying to address may be broader than money. There are lots of discussions and shared interests. A lawyer member agreed that discussions take place; there are common interests, but also different interests if an amicus is independent. The concern is if there is some kind of control by a party, so the brief is not ultimately one from the amicus. A judge member agreed. There is no need to get into the weeds of conversations between an amicus and a party. Control is important, so we are aware if the amicus is an echo of the party.

Judge Bybee asked about the percentage. A judge member said that there is no science here, but that someone with 25% will be heard.

The Reporter asked for views of the sliding scale approach. In response to a question about how that would work, the judge who floated the idea suggested that each judge could decide independently when the percentage is significant. The inquiring judge saw the virtue of an approach that leaves this determination to individual choice.

A different judge member asked about the relationship between (c)(3)—which deals with ownership or control—and (c)(4)—which deals with funding. The Reporter stated that there could be funders, even at the 50% or higher level, that would not be covered by the ownership or control provision. A liaison member added that ownership or control is not equivalent to percentage of contribution. He also stated that it would be useful to say in the committee note that the idea of the disclosure is not that such a brief would be useless, but that the information might be relevant to a judge. Mr. Freeman suggested that there should be some way to say that the contribution level is zero. The liaison member noted that an amicus can say that in its statement of interest.

The Reporter invited discussion of the look-back period. A calendar year might be easier to administer, but easier to evade. In response to a question about data relevant to this question, the Reporter noted that we would learn through the comment period. Professor Coquillette agreed that we will learn a lot when we publish, and urged that alternatives be included in any publication to avoid the need to republish.

A liaison member suggested adding "or promise to contribute" to paragraph (4). Mr. Freeman suggested building in some "reasonable effort" or "reasonable knowledge" provision because it could be costly to figure out exactly if someone is just on one side or the other of a line.

An academic member asked about requiring disclosure of the date of formation of an amicus and why it was formed. The Reporter stated that the subcommittee had concluded that this would be more burdensome than helpful; one subcommittee member stated that she recalls liking the idea.

The Reporter discussed paragraph (d), which would require a party who is aware that an amicus has failed to make a required disclosure to make that disclosure.

After a short break around 10:30, the Committee resumed its discussion of amicus disclosures. The Reporter described Rule 29(e) of the working draft, which addresses disclosure of the relationship between an amicus and a nonparty. The major changes would be to (1) require disclosure of earmarked contributions by members of the amicus, and (2) to set a $1000 threshold for earmarked contributions whether by a member or nonmember.

A liaison member stated that this provision would have different practical effects on different kinds of organizations. Organizations with more established amicus programs would not be affected because they raise money from general contributions. Organization with less established amicus programs, and who pass the hat for an amicus brief, would be captured. Some may be reluctant to contribute. The existing rule that distinguishes between members and nonmembers seems to work.

In response to a question from Judge Bybee, the liaison member noted that some organizations wouldn't file under this provision because the brief would be perceived as less credible, and some members wouldn't put money in the hat because they did not want their contributions disclosed. Some organizations may change their fundraising structure, but organizations with more established and regular fundraising structures would be more favorably treated by this provision compared to those who don't come to court much.

An attorney member observed that money is fungible and therefore would favor something like (c)(3) and (4) for nonparties as well, perhaps at a higher

percentage. Transparency helps the public have faith in the judiciary. Without a disclosure requirement, when such information is revealed by the media, it looks like the judiciary either doesn't care or was fooled. The member exception in the current rule should be deleted.

The liaison member stated that lawyers are pretty careful; perhaps the phrase "directly or indirectly" would get at the problem. The rule law clerk noted that the text of the New York Court of Appeals amicus disclosure rule does not have an exception for members.

Judge Bates stated that the nonparty issue is important and was the genesis of the suggestion by Senator Whitehouse and Representative Johnson. Most of their examples involved nonparties and would not be captured without robust nonparty disclosure.

The Reporter directed attention to the issue of the exception for members of the amicus. A liaison member said that there is a big difference between members and nonmembers in the existing rule. Is the amicus brief really the view of the organization—as opposed to the view of someone else? Is the organization speaking or is it being used as a front? Was the contributor really a member before the brief was even considered? Perhaps what should matter is the percentage of the cost of the brief.

The Reporter directed attention to the issue of whether there should be a parallel to (c)(3) and (4) for nonparties. At the last meeting, there did not seem to be much support for that idea and the working draft does not include such a provision, but the Committee has not rejected the idea.

A liaison member noted that lots of foundations and wealthy individuals give lots of money to progressive causes. A parallel to (c)(3) would not capture a lot, and it is not clear how it would apply to a nonparty. A parallel to (c)(4) would require significant disclosures not tied to the filing of an amicus brief and would be pretty significant for a lot of organizations. If the concern is with those who join an organization right around the filing of an amicus brief, the member exception could be limited to longstanding members. If an organization doesn't have an amicus budget, it would either reconfigure its budget or not file an amicus brief.

Professor Struve picked up on the idea of a member look-back. One question is how broad-based the organization is; a different question is who the person making the contribution is. Some information can be obtained from tax forms.

Judge Bates posed the question: how relevant is the information that would be disclosed by adding a provision like (c)(4) to (e)?

A judge member responded that it is hard to say. He always takes an industry brief with a grain of salt. The interest is obvious because the viewpoint is obvious. The concern is where control is with a party. A liaison member agreed. Judge Bybee said that he doesn't get a lot of amicus briefs and recognizes the biases. If a case is big enough to attract amici, the principal briefs are usually good.

Judge Bates noted that the Committee had not yet considered the recusal issues that a nonparty relationship to an amicus might raise. The Reporter noted that a suggestion involving amicus briefs and recusals is a later item on the agenda.

He asked if there were any more comments on the question of a parallel to (c)(4) for nonparties. A liaison member noted that such a provision would impact non-business filers and true advocacy organizations. Mr. Freeman expressed doubts about its efficacy: a very wealthy funder in the background could create several different shell organizations for each amicus brief. The liaison member added that it would be possible to structure an 801(c)(4) organization so as not have to disclose, explaining that a single individual could fund several organizations and the Form 990 is not public. A lawyer member observed that layers may protect against disclosure. A judge said that a challenge for the subcommittee is that people find a way.

A different judge member emphasized that there are two different concerns: The first is that appellate judges might be misled about who is really behind a brief; does that really happen in a significant number of cases? The second is whether, as a matter of administering justice, the court and the public should know who is really behind a brief. It is important to be precise about the different concerns.

Judge Bybee responded that, in contrast to the Supreme Court, he doesn't see that many amicus briefs. He is interested in their content.

The judge member wondered, if the disclosure is not of much benefit to judge, whether it is worth running the risks of disclosure.

A different judge member responded that disclosure has relevance to the public and its perspective, even if it doesn't affect the judicial decision. The prior judge agreed, but reiterated that it is important to focus on which justification is being relied on. While the public has an interest in knowing who really is participating, there are countervailing concerns.

The Reporter added that it is important not only to be clear about the reasons supporting any disclosure requirement, but also to focus on narrowly tailoring any disclosure requirement to those reasons.

B. Costs on Appeal—Rule 39 (21-AP-D)

Judge Nichols presented the report of the subcommittee on costs on appeal. (Agenda book page 203). He began by noting that the Supreme Court in the *Hotels.com* case had indicated that rule governing costs on appeal could be cleaned up to better handle the interplay between the court of appeals (which decides who bears the costs on appeal) and the district court (which taxes some of those costs). Sometimes, as in *Hotels.com*, there is a very significant supersedeas bond; the cost of that bond is taxed in the district court, but the district court cannot reallocate who pays the cost. Instead, a party who seeks a different allocation must ask the court of appeals to do so.

At the last meeting, the Advisory Committee discussed how to make it clear that parties should ask the court of appeals and the appropriate timing for such a request. Because the other party and the district court may not always know of the cost of the bond, the subcommittee had previously recommended that an amendment to Appellate Rule 39 be made in conjunction with an amendment to Civil Rule 62 requiring disclosure of the bond premium at the time the bond is approved. But at the last meeting, the Advisory Committee thought that while an amendment to Civil Rule 62 would be valuable, amending Appellate Rule 39 would be worthwhile even without an amendment to Civil Rule 62.

The subcommittee was charged with focusing on two issues: first, where in Rule 39 should an amendment be placed and, second, the timing of a request to the court of appeals to reallocate the costs.

The subcommittee concluded that the best place for an amendment would be as a new, separate subdivision 39(b), immediately following the allocation principles of 39(a).

The subcommittee concluded that while there was no perfect deadline for asking the court of appeals to reallocate the costs, it landed on 14 days after entry of judgment, the same as for filing the bill of costs in the court of appeals. A drawback of a short deadline that is before or simultaneous with the filing of the bill of costs in the court of appeals is that there isn't a target. A drawback of a later deadline is that it runs into the deadline for issuance of the mandate, which shouldn't be delayed for costs.

The subcommittee also thought that it worthwhile to clean up some language in what would become 39(e) to make clear that the bill of costs filed in the court of appeals deals only with the costs taxable in the court of appeals, not the costs taxable in the district court.

In response to a question by Judge Bybee, Judge Nichols explained that setting a deadline after the bill of costs is filed in the court of appeals wouldn't help because the bill of costs filed in the court of appeals does not include the costs taxable in the district court. Absent an amendment to the Civil Rules, a party may not know the

cost of the supersedeas bond until the bill of costs is filed in the district court. It would be possible to allow a party to request the court of appeals to reallocate the costs after everything is done, but that would invite a second round of litigation about costs.

The Reporter echoed the point that the cost of the supersedeas bond is sought in the bill of costs filed in the district court, and that it is worthwhile keeping the concept of the allocation or assessment of costs between the parties separate from the calculation of what those costs are.

A liaison member suggested that the bill of costs filed in the court of appeals could include a good faith estimate of the costs to be sought in the district court and allow some time thereafter. Judge Nichols agreed that could be done, but also noted the prior recommendation that the Civil Rule be amended to require disclosure of the premium paid for the bond at a much earlier date.

Judge Bates asked when the costs are assessed. The Reporter stated that the proposed amendment sought to clarify that the initial assessment of costs is done under Rule 39(a) and that the new 39(b) would allow for reconsideration of that assessment. Judge Nichols added that the assessment is done in the court of appeals opinion or judgment, either by virtue of the default rules of 39(a) or court ordering a departure from those default rules under 39(a). Proposed 39(b) would allow a party to seek an assessment that differs from what was already done under 39(a).

Judge Bybee observed that if a split decision doesn't make clear which party is to bear the costs, the clerk will ask the judges. The response might be that each bears its own costs, without having any idea about the cost of a bond. Judge Nichols stated that proposed 39(b) would allow a party to ask the court of appeals to change that determination. The subcommittee considered dealing with all of these cost issues in the court of appeals after everything was done in the district court, but thought that this created additional litigation in the court of appeals.

In response to questions from a judge member, Judge Nichols stated that there weren't many examples. A court of appeals can delegate the allocation issue to the district court.

Mr. Byron noted that if a good faith estimate is provided, then the deadline can be 21 days, the same as the date for issuance of the mandate.

The Reporter added that a virtue of asking the court of appeals to reallocate soon after its decision on the merits is that the matter will be fresh in the judges' minds. In addition, the problem of making sure that the parties know the cost of the supersedeas bond could be addressed by an amendment to Civil Rule 62.

Judge Bybee wondered whether all deadlines should be off for bonds. Ms. Dwyer stated that she didn't have a problem with proposed Rule 39(b). It isn't earthshattering; she has never seen a problem in this area in her 35 years.

Mr. Freeman reminded the Committee of the Solicitor General's question whether the costs of a supersedeas bond may be recoverable at all. He also asked how proposed Rule 39(b) interacts with the issuance of the mandate.

Professor Struve noted that the mandate issue is front and center in the *Hotels.com* case, with the curious situation of the division of labor required by that case and the resulting risk of falling between the two stools. One could move up the date of seeking reconsideration in the court of appeals. One could move back the date of the mandate. Or one could have a special rule and exception regarding the mandate.

A judge member asked why not leave it to the district court to reallocate costs, as a number of courts do. Judge Nichols responded that the Supreme Court said that the existing rule makes sense because the court of appeals best understands the nature of the victory.

Ms. Dwyer noted that there is a mandate problem; the court can't just recall the mandate.

Judge Nichols asked if there is agreement that the best solution would:

1) Provide parties with perfect information early;
2) Provide the court of appeals with authority—which it could delegate to the district court—to determine who bears the costs and in what percentage; and
3) Minimize any impact on the issuance of the mandate to the extent possible so that things get wrapped up in the court of appeals early.

Mr. Byron expressed uncertainty about number 2 and suggested that it is not always a good idea to jam up the court of appeals with what could be hard but rare issue. Perhaps the mandate could be held.

Judge Nichols stated that we don't want to create a jurisdiction stripping problem. Mr. Freeman noted that in some cases a delay of the mandate may be a real problem. A liaison member added that a party resisting payment may seek to delay the mandate.

Professor Struve added that it need not be all or nothing. While mandates are undertheorized, there could be a limited remand, so that the case goes down except for this limited purpose.

Judge Bybee asked whether there is a big enough issue to deal with. Judge Nichols responded that a survey of the clerks and other research had shown this to be a very small problem with few reported cases. Proposed 37(b) is not designed to change much, but rather to make express what is now already an option, and to provide the clarity suggested by *Hotels.com*. If the Supreme Court had not suggested that matters be clarified, it wouldn't be clear that an amendment is warranted. Judge Bybee added that a rule amendment allows useful information to be added in a committee note.

A liaison member observed that there may be more of a problem now. Professor Struve added that a court of appeals can let a district court resolve the allocation question. The Reporter emphasized that the subcommittee was looking to make a minimalist change, rather than a complete revamping of how costs on appeal are handled.

Judge Nichols asked whether the Committee wanted to do anything? A minor change along the lines under consideration? Be more aggressive in moving closer to an optimum solution? He noted that the current draft of 37(b) is not perfect, that we are not fixing a huge problem, and that the subcommittee would give it another try. Judge Bybee agreed that it made sense for the subcommittee to do so.

The Committee then took a break for lunch.

C. IFP Standards—Form 4 (19-AP-C; 20-AP-D)

Lisa Wright presented the report of the IFP subcommittee. (Agenda book page 209). She explained that the subcommittee has been looking into ways to make Form 4 simpler, useful, and less intrusive.

A survey revealed that indigency is clear in the vast majority of cases; the existing forms come back with lots of zeros. When IFP status is denied, it is typically because of the lack of a nonfrivolous legal issue.

After the last meeting, a draft revised form was circulated to senior staff attorneys for comment. The response was generally supportive. Some had concerns about the order of the questions, whether liquid assets should be separated from illiquid assets, whether more detail about expenses should be required, and whether information about spouses should be required.

In response, the subcommittee reduced the three introductory questions to one yes-or-no question. It concluded that a distinction between liquid and illiquid assets would be relevant to very few cases, and that if an applicant had significant assets but could not access them, the applicant could explain that situation. It also concluded that more detail regarding expenses was not necessary, because the funds for those expenses would have to come from either assets or income, both of which

must be reported. The subcommittee considered asking whether spousal income and assets were available to the applicant, but concluded that the intrusiveness of questions about a spouse outweighed their benefit. Given the survey responses—which were based on a form that requires disclosure of spousal resources—it seemed unlikely that they make a difference to the indigency determination.

Ms. Wright added that the IFP statute has a drafting error. It is not entirely clear whether the statutory provision calling for a "statement of all assets such prisoner possesses" applies to non-prisoners. Courts generally say it does. The draft form calls for the applicant to state the applicant's "total assets"; does that comply with the statutory provision calling for "all assets"?

Judge Bybee thanked the subcommittee and those who contributed to its work, noting that the draft form is an improvement on the current form. He asked whether the point of the first question was that if an applicant answered "yes," that there may be no need to answer the remaining questions. Ms. Wright explained that the subcommittee was initially thinking along those line, but concluded that the rest of the draft form was so simple that it made sense to simply answer all of the questions.

Judge Bybee wondered whether it would make sense to move the first question to the end; the Clerk's office could jump to the last question when processing applications. Ms. Wright responded that the first question also signaled the general nature of IFP eligibility.

The rules law clerk noted that there was some district court and unpublished court of appeals caselaw that interpreted "all assets" to include spousal assets, as well as a published court of appeals decision holding that it was an abuse of discretion to deny IFP status for failure to include spousal information without inquiring about its availability to the petitioner. Ms. Wright noted that the form could ask if spousal assets are available.

Judge Bybee asked if the subcommittee was asking the Advisory Committee to approve the draft form. Ms. Wright said not at this point. The next step would be to consult with the Supreme Court Clerk; the rules of the Supreme Court incorporate this form.

Professor Struve noted that question 2 asks for "monthly take-home pay from work," but that this amount varies for some workers. Perhaps "average" should be added. Ms. Wright suggested "typical" rather than "average." Professor Struve was content with leaving question 2 as is.

The Reporter asked if the Committee is comfortable with the form calling for "total assets" rather than "all assets." In response to a question from Judge Bybee, Ms. Wright stated that the difference could be that "all assets" might require listing assets. Ms. Dwyer stated that this draft form is great. It includes what the court takes

into account. Itemizing assets would be going backwards. She suggested that perhaps the questions should be reordered: 1, 3, 2.

In response to a question from Mr. Byron about caselaw regarding question 6, the Reporter noted the *Floyd* case. [*Floyd v. U.S. Postal Service*, 105 F.3d 274 (6th Cir. 1997).] There, the Department of Justice had argued that the requirement of stating "all assets such prisoner possesses" meant that only prisoners had to file an affidavit of assets. The Court of Appeals rejected that view, relying in part on existing Form 4. As to another issue regarding IFP practice, *Floyd* read the Prison Litigation Act to repeal part of then-existing FRAP 24. A later decision interprets a subsequent amendment to FRAP 24 to supersede *Floyd* regarding that issue. [*Callihan v. Schneider*, 178 F.3d 800, 803 (6th Cir. 1999).] In addition, there is a history in this area of the form driving practice, even without amendments to statute or rule.

Judge Bybee returned to the issue of the order of the questions, noting that some staff attorneys from some circuits had concerns about the placement of the first question. If the draft form no longer instructs applicants to skip the rest of the questions if this is answered yes, it can be moved to the end and the Ninth Circuit can simply look to the last question first. Moreover, some circuits have their own forms, so this won't be the last word.

Ms. Dwyer said that she had no objection to moving the first question to the end.

Judge Bybee synthesized various suggestions and proposed that question 6 read, "What is the total value of all your assets?"

With these changes, the draft form can be discussed informally with the Clerk of the Supreme Court.

V. Discussion of Joint Projects

A. Pro Se Electronic Filing

The Reporter introduced the joint project regarding electronic filing by pro se litigants, pointing both to his short memo about two issues that this Committee might want to focus on and Professor Struve's longer memo about the project as a whole. (Agenda book page 217).

First, based on an FJC Report, it appears that the courts of appeals are more receptive to electronic filing by unrepresented litigants than are trial courts. (Agenda book page 237). Maybe this is because of the much smaller number of filings in the courts of appeals. Maybe this is because the filing of case-initiating documents in the courts of appeals, even when filed by attorneys, do not open a case in CM/ECF, but instead a case is opened by the court staff. The Committee might think it appropriate

to flip the default and allow electronic filing in the courts of appeals unless a court order or local rule prevents such filing, perhaps with a good cause requirement. Alternatively, the Committee might think that the courts of appeals are broadly allowing electronic filing by unrepresented litigants under flexibility afforded by the current rule, so that there is no need to change anything.

Second, those who do not file electronically—unlike those who do file electronically—generally have to serve a physical copy of papers on other parties and provide proof of that service, even though the clerk's office will scan submissions and place them on ECF, thereby triggering electronic service on electronic filers. The Committee might consider lifting this burden from paper filers.

Professor Struve reported on how other Advisory Committees have reacted to this project. Bankruptcy is on board with the project, viewing it as an access to courts issue. But their support is tempered by concerns about inappropriate filings, the need to screen filings, and various technical and logistical concerns. Civil has concerns about how much this project is a matter for rule making, as opposed to other Judicial Conference committees. Service is a classic rules issue, but there are concerns about whether documents filed under seal always make it to other parties.

It is also possible to disaggregate submission of documents (whether via CM/ECF or email) from notice of submission of those documents. Technical issues like adequate software to scan for viruses could be handled by CACM.

Judge Bates stated that we are looking for the input of this Committee. There had been suggestions made to various committees; they had been stalled, in part because some committees wanted to wait for others. At his direction, the Reporters worked as a group to move the project along.

A judge member observed that, based on the FJC report, it seemed that the Sixth Circuit was out of step. Mr. Reagan responded that, since the original research was conducted months ago, the Clerk of the Sixth Circuit had stated that they are now looking into joining the majority. The judge noted that there was no real downside to crafting a rule that reflects the majority or consensus approach.

Professor Struve said that the key question here is whether this Committee want to move first and make the rule in the courts of appeals more permissive or wait until other courts are ready as well. Ms. Dwyer stated that the Ninth Circuit presumes that electronic filing is permitted unless the court says no, and that the court has arrangements with 4 or 5 prisons, too. We don't have the staff or other resources for a separate system for pro se litigants. When items are filed under seal, staff will check to see if appropriate, referring the issue to a panel if necessary.

Professor Struve added that anyone can file under seal, but needs to show that the seal should continue. Ms. Dwyer pointed out that plenty of lawyers have problems with oversize filings.

Mr. Reagan stated that in some districts where there is a relationship with a state prison, state prisoners have the best access to electronic filing among pro se litigants: they can go to the library, email the court, and the court converts the email to place on the docket. Ms. Dwyer asked why move backwards from the progress made during the pandemic; it is easier to put electronic submissions on the docket than to scan paper filings.

A judge member mentioned that an email box was a success. A different judge member stated that, from the district court perspective, moving away from paper is good, including for filing and serving court orders. Dealing with docketing of non-electronic documents takes a lot of time. Ms. Dwyer added that mailing costs a huge amount of money in postage.

Mr. Byron noted the value in taking baby steps here. A judge member suggested at least not requiring non-electronic filing to mail documents to electronic filers. Mr. Freeman urged that we not let the perfect by the enemy of the good. Should the Appellate Rules move forward alone or only if all sets of rules move forward together? Professor Struve added that they have evolved thus far in tandem and that there is value in keeping them together.

B. Direct Appeals in Bankruptcy Cases

The Reporter introduced a possible amendment to FRAP 6 in conjunction with a proposed amendment to Bankruptcy Rule 8006(g). (Agenda book page 255.) This issue was not on the Committee's agenda at the last meeting but arose during the last meeting. No action was taken at the time, but Judge Bybee encouraged the Reporter to work with the reporters for the Bankruptcy Rules Committee and its Privacy, Public Access, and Appeals Subcommittee.

Under 28 U.S.C. § 158, appeals from bankruptcy courts are usually heard by either a district court or a bankruptcy appellate panel, perhaps followed by an appeal from those courts to a court of appeals. But in certain circumstances, § 158(d)(2) permits an appeal to be taken directly to the court of appeals. The Bankruptcy Committee is proposing to amend Bankruptcy Rule 8006(g) to make clear that any party to a bankruptcy appeal can request that the appeal be heard directly by the court of appeals. That Committee views the amendment as a clarification of existing law, not a change in the law.

The problem from the perspective of the Appellate Rules is that FRAP 5, which deals with permission to appeal, doesn't fit this situation very well. That's because FRAP 5 is designed for the situation where the question before the court of appeals

is whether to allow an appeal at all. But in the context of direct bankruptcy appeals under § 158(d)(2), there is an appeal; the question is whether the court of appeals (as opposed to the district court or bankruptcy appellate court) is going to hear that appeal.

Accordingly, the draft amendments to FRAP 6, which deals generally with appeals in bankruptcy cases, would add specific provisions to deal with the procedure for seeking authorization of such a direct appeal. The reporters for the Bankruptcy Rules Committee are satisfied with this draft, and are the members of that Committee's Privacy, Public Access, and Appeals Subcommittee. But due to the way this issue can up, no subcommittee of this Committee has considered this draft.

Professor Struve added that when FRAP 6(c) was created, the possibility that an appellee might seek authorization for a direct appeal was not considered and the rule was not drafted with that possibility in mind.

Mr. Byron noted that where there is a right to appeal under § 158(a)(1) or (2), the only question is where the appeal will be heard. But there are also appeals that can only be heard by leave of court under § 158(a)(3). Is it clear enough how the draft amendment to FRAP 6 works in those situations?

The Reporter responded that this draft does not address leave to appeal under § 158(a)(3), although it does require, in cases where leave to appeal is required under § 158(a)(3), that the petition to authorize a direct appeal include a copy of any decision on a motion under Bankruptcy Rule 8004, which governs motions seeking leave to appeal under § 158(a)(3).

Professor Struve added that it would feel clearer if one were also looking at Bankruptcy Rules 8004 and 8006. Perhaps discussion of those rules should be added to the committee note.

The Reporter reiterated that no subcommittee of this Committee had yet reviewed this draft. While this Committee delayed the Bankruptcy Committee from publishing their proposed rule in August of 2022, the next time proposed rules would be published for public comment would be August of 2023, so putting this off until the spring meeting need not further delay publication.

Judge Bybee appointed Justice Kruger and Danielle Spinelli as a subcommittee to give the draft a close read.

C. Appeals in Consolidated Cases

The Reporter presented a report about appeals in consolidated actions. (Agenda book page 265.) A Joint Civil-Appellate Subcommittee has been considering for some time whether any rule amendments would be appropriate in response to the Supreme Court's decision in *Hall v. Hall*, 138 S. Ct. 1118 (2018). In that case, the Court held that consolidated cases retain their separate identity for purposes of appeal. That means that once any one of the consolidated cases is completely decided, an immediate appeal can be taken.

Extensive research by the FJC led the Joint Subcommittee to conclude that there is not a sufficient problem to warrant a rule amendment. The issue arises rarely. And lawyers tend to err on the side of filing premature notices of appeal.

Mr. Byron asked if there were any representatives from this Committee on the Joint Subcommittee. The Reporter responded that by the time the Joint Subcommittee reached its final decision, it appeared that changes to the membership of this Committee had left the Joint Subcommittee without a representative from this Committee. But he added that one member of the Joint Subcommittee was a Circuit Judge who had been on the panel reversed by the Supreme Court in *Hall*.

The Committee unanimously voted to remove this item from the agenda, with Judge Bybee noting that the issue could be raised again in the future.

VI. Discussion of Recent Suggestions

A. Striking Amicus Brief; Identifying Triggering Person (22-AP-B)

The Reporter presented a suggestion that was not on the agenda for the last meeting but briefly discussed at that meeting because it was filed after the agenda book had been compiled and related to another matter that was on the agenda. The suggestion is that, when a court strikes an amicus brief (or prohibits its filing) under FRAP 29(a)(2) because the brief would otherwise result in a judges' disqualification, that the amicus or counsel triggering the problem be identified.

The Reporter noted that the Committee might choose to refer the matter to a subcommittee, or it might conclude that the matter is too close to the standards for recusal—the suggestion that was removed from the agenda at the last meeting—and likewise remove this suggestion from the agenda.

Mr. Freeman wondered about the mechanics; would the brief be refiled with the triggering amicus or counsel removed? Judge Bybee expressed the concern that at some point it would be possible to figure out which judge was the issue and why. A judge member questioned its utility. The reasons for recusal are multifaceted. A judge might recuse from cases involving a law firm where his son worked, but only while he worked there, not after he left the firm.

A liaison member wondered, if the brief could not be refiled, what benefit there could be—other than the possibility of reverse engineering what judge would have been recused. A judge member asked if we know about the ability to refile, to which the liaison member replied that it would depend on when the brief was stricken, and at least would require a motion seeking permission to file late. The Reporter added that the suggestion is that the information could be used to avoid future briefs being stricken.

Mr. Freeman expressed concern about reverse engineering and the information being used to keep particular judges off a case. The bite is in en banc proceedings. He fears that it would be used opportunistically. The United States wouldn't do so, but there are cases where people act strategically.

A liaison member said that it would produce no really useful information for the future because the reason for a recusal issue can change, and it only matters for en banc proceedings or a very small circuit like the First.

Mr. Freeman added that the history would be public, enabling reverse engineering.

The Committee agreed, without opposition, to remove the item from its agenda.

B. Third-Party Litigation Funding (22-AP-C)

The Reporter presented a suggestion that Rule 26.1 be amended to require disclosure of a non-party that has a financial stake in the outcome of an appellate case. (Agenda book page 279). There are third-party litigation funders who make non-recourse investments in litigation and the suggested amendment would require their disclosure. The Reporter noted that the Civil Rules Committee has been considering this issue for some time, as shown by the twenty-five-page excerpt from its Fall 2021 report. This Committee might consider creating its own subcommittee or seeking to coordinate with Civil.

Further discussion revealed that while the MDL subcommittee had been considering this topic, there is currently no Civil subcommittee addressing this issue.

Judge Bybee decided to hold this item until the next meeting following consultation with the Civil Rules Committee.

VII. Review of Impact and Effectiveness of Recent Rule Changes

Judge Bybee directed the Committee's attention to a table of recent amendment to the Appellate Rules. (Agenda book page 236). He called for any comments or concerns about these recent amendments. The Committee did not raise any particular concerns.

VIII. New Business

Judge Bybee asked if anyone had anything else to raise for the Committee. No one did.

IX. Adjournment

Judge Bybee thanked everyone, noting that it had been a very productive meeting. He acknowledged that it consumed a lot of time, and that there are other demands on people's time. That time is well worth it if the Committee's efforts can prevent or help avoid misunderstandings and errors.

The next meeting will be held on March 29, 2023, in West Palm Beach, Florida.

The Committee adjourned at approximately 3:15 p.m.

TAB 4

TAB 4A

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Rules 35 and 40 Subcommittee

Re: Public Comments

Date: February 28, 2023

A package of amendments regarding rehearing has been published for public comment. Those amendments, as published, are attached to this memo. We have received five formal comments. A chart with each comment is also attached to this memo. The subcommittee has reviewed these comments and recommends final approval of the amendments as published.

Three comments broadly critique basic aspects of en banc process. They object that rehearing en banc should be widely available, should not be disfavored, and that oral argument should be allowed on the question whether to grant a petition. The subcommittee was not persuaded that these comments warrant any change in the proposed amendments as published.

Two other comments are more substantial. But after careful consideration, the subcommittee concluded that neither warranted any change in the proposed amendments as published.

First, a comment submitted by J. Krell expresses concern that the published Rule would allow a second bite at the apple after a panel decision is amended, no matter how minor the amendment. This comment suggests that a court of appeals should be allowed, without invoking Rule 2, to order that no further petitions for rehearing will be entertained, perhaps with a caution that this should only be done if the amendment is so minor that any subsequent petition would be obviously frivolous or dilatory.

This project started with a concern that courts were inappropriately foreclosing subsequent petitions. It grew over time to a larger scale re-write. But the subcommittee was reluctant to broadly endorse the very power that was the target of concern in the first place, especially when only a single comment suggested that the rule do so.

At earlier stages, the Committee struggled with the issue of drawing a line between the kinds of amendments that would permit a new petition and those that would not. Substantive? Substantial? It was never comfortable with a place to draw the line and decided instead to rely on the ability of a court to easily deny frivolous petitions, to shorten the time to file a petition or the time to issue of the mandate, and, when necessary, to invoke Rule 2. As the Committee Note explains:

> A party, however, may not agree that the panel's action has fixed the problem, or a party may think that the panel has created a new problem. If the panel amends its decision while a petition for rehearing en banc is pending, the en banc petition remains pending until its disposition by the court, and the amended Rule 40(d)(1) specifies the time during which a new rehearing petition may be filed from the amended decision. In some cases, however, there may be reasons not to allow further delay. In such cases, the court might shorten the time for filing a new petition under the amended Rule 40(d)(1), or it might shorten the time for issuance of the mandate or might order the immediate issuance of the mandate under Rule 41. In addition, in some cases, it may be clear that any additional petition for panel rehearing would be futile and would serve only to delay the proceedings. In such cases, the court might use Rule 2 to suspend the ability to file a new petition for panel rehearing. Before doing so, however, the court ought to consider the difficulty of predicting what a party filing a new petition might say.

The subcommittee decided to adhere to the prior resolution of this issue. The good sense of litigants and counsel will prevent most rehearing petitions when the amendment to the panel decision is trivial, particularly with the stringent criteria for both forms of rehearing specified together in the amended rule. Courts can readily reject frivolous rehearing petitions without calling for a response, and no vote need be taken on a petition for rehearing en banc unless a judge calls for one.

The subcommittee considered the possibility that a party might abuse the rule in order to gain additional time to seek certiorari. But it concluded that this is a remote risk. The time to seek certiorari is already 90 days and can be extended an additional 60 days by a Circuit Justice. A more substantial concern is that a party who secured an injunction in the trial court but saw that injunction vacated by the court of appeals might seek to delay issuance of the mandate in order to have the benefit of the injunction as long as possible. But the ability to shorten the time to issue the mandate takes care of this problem.

The rule as amended would not foreclose a court from ordering that no further petitions for rehearing will be entertained; it remains subject to the power to suspend the rules under Rule 2. But the subcommittee hopes that the need to suspend the rules to bar petitions for rehearing will lead courts of appeals to think twice about doing so, bearing in mind the difficulty of knowing what a party might have to say about an amended decision.

Second, a comment submitted by the National Association of Criminal Defense Lawyers (NACDL), which supports the overall proposal, suggests that the same local flexibility written into 40(d)(3) dealing with length limits and 40(d)(1) dealing with time limits should also be written into 40(d)(2) dealing with the form of

the petition. NACDL notes that some courts of appeals permit petitions for rehearing to be filed without a cover, or without paper copies.

The subcommittee does not think this change is necessary. While Rule 32(a) requires that a brief bear a cover, Rule 32(c)(2) governs other papers, "including a petition for panel rehearing and a petition for hearing or rehearing en banc," and specifically states that a "cover is not necessary if the caption and signature page of the paper together contain the information required by Rule 32(a)(2)." Rule 32(c)(2)(A). In addition, Rule 32(e) explicitly permits local variation:

> Every court of appeals must accept documents that comply with the form requirements of this rule . . . . By local rule or order in a particular case, a court of appeals may accept documents that do not meet all the form requirements of this rule . . . .

Thus while amended Rule 40(d)(2) does not itself contain a local option provision, the rule that it incorporates—Rule 32(a)—does contain one. It is a lawyer-friendly local option, so that lawyers who follow the national rule can be confident that their documents will be accepted even though local relaxation is permitted.

Apart from commentary on the published proposed rule, the subcommittee also discussed an issue it had not previously focused on: the due date for petitions for initial en banc consideration in cross appeals. It determined that any ambiguity on that score in the existing rule would be resolved by the pending amendments. That's because proposed Rule 40(g) provides, "A party's petition must be filed no later than the date when its principal brief is due." Because Rule 28.1, governing cross-appeals, describes both the appellant's and appellee's "principal brief," it seems that the due dates for a petition for initial hearing en banc in cross appeals is clear.

(It appears that the usage of "principal brief" in Rule 28.1 may vary a bit from the use of "principal brief" in proposed Rule 40(g). Rule 28.1 seems to use the term to refer a party's first brief supporting an appeal; Rule 40(g) seems to use the term to refer to a party's first brief, whether an appellant's opening brief or an appellee's responding brief. The subcommittee thinks, however, that the terms are sufficiently clear in contact not to warrant any changes.)

Finally, the subcommittee revisited the decision to shorten the time for an appellant to seek initial hearing en banc, The deadline set by the current rule is the date when the appellee's brief is due. The proposed rule shortens that deadline, for an appellant, to the date when the appellant's brief is due. The subcommittee continues to think that there is no reason why an appellant should not be able to determine, based on its own arguments, whether to seek initial hearing en banc. If one imagines a case where it is only the issues raised by the appellee that give rise to an argument by the appellant for initial hearing en banc, having until the due date for the appellee's brief is filed doesn't help—unless the appellee files far enough in

advance to give appellant time to petition before that due date. If one is sufficiently imaginative, one might imagine a case involving cross-appeals where the original appellant does not foresee that the cross-appellant might raise, in the cross-appeal, an issue warranting initial en banc hearing. But this possibility seems so remote that the subcommittee does not see a need to change the rule to deal with it. In such a rare case, the appellant could ask the court for permission to file a late petition.

TAB 4B

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE[1]

Rule 32. Form of Briefs, Appendices, and Other Papers

* * * * *

(g) Certificate of Compliance.

(1) **Briefs and Papers That Require a Certificate.** A brief submitted under Rules 28.1(e)(2), 29(b)(4), or 32(a)(7)(B)—and a paper submitted under Rules 5(c)(1), 21(d)(1), 27(d)(2)(A), 27(d)(2)(C), ~~35(b)(2)(A),~~ or ~~40(b)(1)~~ 40(d)(3)(A)—must include a certificate by the attorney, or an unrepresented party, that the document complies with the type-volume limitation. The person preparing the certificate may rely

[1] New material is underlined in red; matter to be omitted is lined through.

on the word or line count of the word-processing system used to prepare the document. The certificate must state the number of words—or the number of lines of monospaced type—in the document.

(2) **Acceptable Form.** Form 6 in the Appendix of Forms meets the requirements for a certificate of compliance.

Committee Note

Changes to subdivision (g) reflect the consolidation of Rules 35 and 40.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE[1]

Rule 35. ~~**En Banc Determination**~~
(Transferred to Rule 40)

~~**(a) When Hearing or Rehearing En Banc May Be Ordered.** A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:~~

~~(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or~~

~~(2) the proceeding involves a question of exceptional importance.~~

[1] New material is underlined in red; matter to be omitted is lined through.

~~**(b) Petition for Hearing or Rehearing En Banc.** A party may petition for a hearing or rehearing en banc.~~

~~(1) The petition must begin with a statement that either:~~

~~(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or~~

~~(B) the proceeding involves one or more questions of~~

~~exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.~~

~~(2) Except by the court's permission:~~

~~(A) a petition for an en banc hearing or rehearing produced using a computer must not exceed 3,900 words; and~~

~~(B) a handwritten or typewritten petition for an en banc hearing or rehearing must not exceed 15 pages.~~

~~(3) For purposes of the limits in Rule 35(b)(2), if a party files both a petition for panel rehearing and a petition for rehearing en banc, they are considered a single document even if they are filed separately, unless separate filing is required by local rule.~~

~~**(c) Time for Petition for Hearing or Rehearing En Banc.** A petition that an appeal be heard initially en banc must be filed by the date when the appellee's brief is due. A petition for a rehearing en banc must be~~

~~filed within the time prescribed by Rule 40 for filing a petition for rehearing.~~

~~**(d) Number of Copies.** The number of copies to be filed must be prescribed by local rule and may be altered by order in a particular case.~~

~~**(e) Response.** No response may be filed to a petition for an en banc consideration unless the court orders a response. The length limits in Rule 35(b)(2) apply to a response.~~

~~**(f) Call for a Vote.** A vote need not be taken to determine whether the case will be heard or reheard en banc unless a judge calls for a vote.~~

Committee Note

For the convenience of parties and counsel, the amendment addresses panel rehearing and rehearing en banc together in a single rule, consolidating what had been separate, overlapping, and duplicative provisions of Rule 35 (hearing and rehearing en banc) and Rule 40 (panel rehearing). The contents of Rule 35 are transferred to

Rule 40, which is expanded to address both panel rehearing and en banc determination.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE[1]

Rule 40. ~~Petition for~~ Panel Rehearing~~;~~ En Banc Determination

(a) ~~Time to File; Contents; Response; Action by the Court if Granted.~~ A Party's Options. A party may seek rehearing of a decision through a petition for panel rehearing, a petition for rehearing en banc, or both. Unless a local rule provides otherwise, a party seeking both forms of rehearing must file the petitions as a single document. Panel rehearing is the ordinary means of reconsidering a panel decision; rehearing en banc is not favored.

~~(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~~

[1] New material is underlined in red; matter to be omitted is lined through.

~~after entry of judgment. But in a civil case, 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 current or former 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 including all instances in which the United States represents that person when the court~~

~~of appeals' judgment is entered or files the petition for that person.~~

~~(2) **Contents.** The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition. Oral argument is not permitted.~~

~~(3) **Response.** Unless the court requests, no response to a petition for panel rehearing is permitted. Ordinarily, rehearing will not be granted in the absence of such a request. If a response is requested, the requirements of Rule 40(b) apply to the response.~~

~~(4) **Action by the Court.** If a petition for panel rehearing is granted, the court may do any of the following:~~

~~(A) make a final disposition of the case without reargument;~~

~~(B) restore the case to the calendar for reargument or resubmission; or~~

~~(C) issue any other appropriate order.~~

(b) ~~**Form of Petition; Length.**~~ **Content of a Petition.** ~~The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. Except by the court's permission:~~

(1) ~~a petition for panel rehearing produced using a computer must not exceed 3,900 words; and~~

Petition for Panel Rehearing. A petition for panel rehearing must:

(A) state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended; and

(B) argue in support of the petition.

(2) ~~a handwritten or typewritten petition for panel rehearing must not exceed 15 pages.~~ **Petition for Rehearing En Banc.** A petition for rehearing en banc must begin with a statement that:

(A) the panel decision conflicts with a decision of the court to which the petition is addressed (with citation to the conflicting case or cases) and the full court's consideration is therefore necessary to secure or maintain uniformity of the court's decisions;

(B) the panel decision conflicts with a decision of the United States Supreme Court (with citation to the conflicting case or cases);

(C) the panel decision conflicts with an authoritative decision of another

United States court of appeals (with citation to the conflicting case or cases); or

(D) the proceeding involves one or more questions of exceptional importance, each concisely stated.

(c) When Rehearing En Banc May Be Ordered. On their own or in response to a party's petition, a majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be reheard en banc. Unless a judge calls for a vote, a vote need not be taken to determine whether the case will be so reheard. Rehearing en banc is not favored and ordinarily will be allowed only if one of the criteria in Rule 40(b)(2)(A)-(D) is met.

(d) Time to File; Form; Length; Response; Oral Argument.

(1) **Time.** Unless the time is shortened or extended by order or local rule, any petition for panel rehearing or rehearing en banc must be filed within 14 days after judgment is entered—or, if the panel later amends its decision (on rehearing or otherwise), within 14 days after the amended decision is entered. But in a civil case, unless an order shortens or extends the time, the petition may be filed by any party within 45 days after entry of judgment or of an amended decision 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 current or former 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—including all instances in which the United States represents that person when the court of appeals' judgment is entered or files that person's petition.

(2) **Form of the Petition.** The petition must comply in form with Rule 32.

Copies must be filed and served as Rule 31 prescribes, except that the number of filed copies may be prescribed by local rule or altered by order in a particular case.

(3) **Length.** Unless the court or a local rule allows otherwise, the petition (or a single document containing a petition for panel rehearing and a petition for rehearing en banc) must not exceed:

(A) 3,900 words if produced using a computer; or

(B) 15 pages if handwritten or typewritten.

(4) **Response.** Unless the court so requests, no response to the petition is permitted. Ordinarily, the petition

will not be granted without such a request. If a response is requested, the requirements of Rule 40(d)(2)-(3) apply to the response.

(5) **Oral Argument.** Oral argument on whether to grant the petition is not permitted.

(e) If a Petition is Granted. If a petition for panel rehearing or rehearing en banc is granted, the court may:

(1) dispose of the case without further briefing or argument;

(2) order additional briefing or argument; or

(3) issue any other appropriate order.

(f) Panel's Authority After a Petition for Rehearing En Banc. The filing of a petition for rehearing en banc does not limit the

panel's authority to take action described in Rule 40(e).

(g) Initial Hearing En Banc. On its own or in response to a party's petition, a court may hear an appeal or other proceeding initially en banc. A party's petition must be filed no later than the date when its principal brief is due. The provisions of Rule 40(b)(2), (c), and (d)(2)-(5) apply to an initial hearing en banc. But initial hearing en banc is not favored and ordinarily will not be ordered.

Committee Note

For the convenience of parties and counsel, the amendment addresses panel rehearing and rehearing en banc together in a single rule, consolidating what had been separate, overlapping, and duplicative provisions of Rule 35 (hearing and rehearing en banc) and Rule 40 (panel rehearing). The contents of Rule 35 are transferred to Rule 40, which is expanded to address both panel rehearing and en banc determination.

Subdivision (a). The amendment makes clear that parties may seek panel rehearing, rehearing en banc, or both. It emphasizes that rehearing en banc is not favored and that

rehearing by the panel is the ordinary means of reconsidering a panel decision. This description of panel rehearing is by no means designed to encourage petitions for panel rehearing or to suggest that they should in any way be routine, but merely to stress the extraordinary nature of rehearing en banc. Furthermore, the amendment's discussion of rehearing petitions is not intended to diminish the court's existing power to order rehearing sua sponte, without any petition having been filed. The amendment also preserves a party's ability to seek both forms of rehearing, requiring that both petitions be filed as a single document, but preserving the court's power (previously found in Rule 35(b)(3)) to provide otherwise by local rule.

Subdivision (b). Panel rehearing and rehearing en banc are designed to deal with different circumstances. The amendment clarifies the distinction by contrasting the required content of a petition for panel rehearing (preserved from Rule 40(a)(2)) with that of a petition for rehearing en banc (preserved from Rule 35(b)(1)).

Subdivision (c). The amendment preserves the existing criteria and voting protocols for ordering rehearing en banc, including that no vote need be taken unless a judge calls for a vote (previously found in Rule 35(a) and (f)).

Subdivision (d). The amendment establishes uniform time, form, and length requirements for petitions for panel rehearing and rehearing en banc, as well as uniform provisions for responses to the petition and oral argument.

Time. The amended Rule 40(d)(1) preserves the existing time limit, after the initial entry of judgment, for filing a petition for panel rehearing (previously found in Rule 40(a)(1)) or a petition for rehearing en banc (previously found in Rule 35(c)). It adds new language extending the

same time limit to a petition filed after a panel amends its decision, on rehearing or otherwise.

Form of the Petition. The amended Rule 40(d)(2) preserves the existing form, service, and filing requirements for a petition for panel rehearing (previously found in Rule 40(b)), and it extends these same requirements to a petition for rehearing en banc. The amended rule also preserves the court's existing power (previously found in Rule 35(d)) to determine the required number of copies of a petition for rehearing en banc by local rule or by order in a particular case, and it extends this power to petitions for panel rehearing.

Length. The amended Rule 40(d)(3) preserves the existing length requirements for a petition for panel rehearing (previously found in Rule 40(b)) and for a petition for rehearing en banc (previously found in Rule 35(b)(2)). It also preserves the court's power (previously found in Rule 35(b)(3)) to provide by local rule for other length limits on combined petitions filed as a single document, and it extends this authority to petitions generally.

Response. The amended Rule 40(d)(4) preserves the existing requirements for a response to a petition for panel rehearing (previously found in Rule 40(a)(3)) or to a petition for rehearing en banc (previously found in Rule 35(e)). Unsolicited responses to rehearing petitions remain prohibited, and the length and form requirements for petitions and responses remain identical. The amended rule also extends to rehearing en banc the existing statement (previously found in Rule 40(a)(3)) that a petition for panel rehearing will ordinarily not be granted without a request for a response. The use of the word "ordinarily" recognizes that there may be circumstances where the need for rehearing is sufficiently clear to the court that no response is needed. But

before granting rehearing without requesting a response, the court should consider that a response might raise points relevant to whether rehearing is warranted or appropriate that could otherwise be overlooked. For example, a responding party may point out that an argument raised in a rehearing petition had been waived or forfeited, or it might point to other relevant aspects of the record that had not previously been brought specifically to the court's attention.

Oral argument. The amended Rule 40(d)(5) extends to rehearing en banc the existing prohibition (previously found in Rule 40(a)(2)) on oral argument on whether to grant a petition for panel rehearing.

Subdivision (e). The amendment clarifies the existing provisions empowering a court to act after granting a petition for panel rehearing (previously found in Rule 40(a)(4)), extending these provisions to rehearing en banc as well. The amended language alerts counsel that, if a petition is granted, the court might call for additional briefing or argument, or it might decide the case without additional briefing or argument. *Cf.* Supreme Court Rule 16.1 (advising counsel that an order disposing of a petition for certiorari "may be a summary disposition on the merits").

Subdivision (f). The amendment adds a new provision concerning the authority of a panel to act while a petition for rehearing en banc is pending.

Sometimes, a panel may conclude that it can fix the problem identified in a petition for rehearing en banc by, for example, amending its decision. The amendment makes clear that the panel is free to do so, and that the filing of a petition for rehearing en banc does not limit the panel's authority.

A party, however, may not agree that the panel's action has fixed the problem, or a party may think that the panel has created a new problem. If the panel amends its decision while a petition for rehearing en banc is pending, the en banc petition remains pending until its disposition by the court, and the amended Rule 40(d)(1) specifies the time during which a new rehearing petition may be filed from the amended decision. In some cases, however, there may be reasons not to allow further delay. In such cases, the court might shorten the time for filing a new petition under the amended Rule 40(d)(1), or it might shorten the time for issuance of the mandate or might order the immediate issuance of the mandate under Rule 41. In addition, in some cases, it may be clear that any additional petition for panel rehearing would be futile and would serve only to delay the proceedings. In such cases, the court might use Rule 2 to suspend the ability to file a new petition for panel rehearing. Before doing so, however, the court ought to consider the difficulty of predicting what a party filing a new petition might say.

Subdivision (g). The amended Rule 40 largely preserves the existing requirements concerning the rarely invoked initial hearing en banc (previously found in Rule 35). The time for filing a petition for initial hearing en banc (previously found in Rule 35(c)) is shortened, for an appellant, to the time for filing its principal brief. The other requirements and voting protocols, which were identical as to hearing and rehearing en banc, are incorporated by reference. The amendment adds new language to remind parties that initial hearing en banc is not favored and ordinarily will not be ordered.

Appendix:
Length Limits Stated in the
Federal Rules of Appellate Procedure

This chart summarizes the length limits stated in the Federal Rules of Appellate Procedure. Please refer to the rules for precise requirements, and bear in mind the following:

- In computing these limits, you can exclude the items listed in Rule 32(f).
- If you use a word limit or a line limit (other than the word limit in Rule 28(j)), you must file the certificate required by Rule 32(g).
- For the limits in Rules 5, 21, 27, ~~35,~~ and 40:

* * * * *

	Rule	Document type	Word limit	Page limit	Line limit

* * * * *

Rehearing and en banc filings	~~35(b)(2) & 40(b)~~ 40(d)(3)	• Petition for initial hearing en banc • Petition for panel rehearing; petition for rehearing en banc • Response if requested by the court	3,900	15	Not applicable

TAB 4C

APPELLATE RULES COMMENTS
(August 2022—February 2023)

#	Date	Name / Organization	Rule(s)	Regulations.gov Link	Comment
1	08/17/22	Claudi Barber	35	https://www.regulations.gov/comment/USC-RULES-AP-2022-0001-0003	The petition for rehearing en banc should not have a provision stating such rehearings are disfavored. That is not justice. Petitions for rehearing should be freely granted when something unjust appears in the record.
2	09/06/22	Andrew Straw	35	https://www.regulations.gov/comment/USC-RULES-AP-2022-0001-0004	FRAP RULE 35 It is too much like legislative discretion to let a court of appeals en banc to choose not to act. There should be no discretion. Every petition for en banc review should have a merits decision because only en banc courts can overturn panels and the U.S. Supreme Court is closed 99% of time to petitioners. Courts and their panels and en banc should not close themselves because this violates the First Amendment right to petition for a redress of grievances, the 5th Amendment right to fundamental fairness (which includes the right to a merits decision), and Article III, which guarantees that courts will exist, not close themselves and refuse to exist. These problems of courts closing themselves and abusing litigants appear all across the United States and the rules need to be much harder to avoid. The rules must guarantee that courts will exist and be open and fair, not act closed and abusive. I attach a draft of my petition for certiorari in 4 cases where courts closed themselves and acted abusively. These are meant to illustrate the problem. SEE LINK FOR PDF ATTACHMENTS.
3	01/30/23	J. Krell	35 & 40	https://www.regulations.gov/comment/USC-RULES-AP-2022-0001-0007	These proposed amendments are minor and largely unobjectionable. Combining Rules 35 and 40 seems appropriate given the degree to which petitions for panel rehearing and for rehearing en banc have become intertwined, and other changes (preventing oral argument on petitions for rehearing en banc, revising the deadline for petitions for initial rehearing en banc, etc.) seem reasonable. On the uniformity question, it's worth noting that the Courts of Appeal already consider conflict with a Supreme Court decision to be grounds for rehearing en banc: see Okpalobi v. Foster, 244 F.3d 405, 410 (5th Cir. 2001) (en banc) ("It is, of course, one of the purposes of taking a case en banc to clarify the law when a panel decision conflicts with a decision of the United States Supreme Court'...") and 10th Cir. R. 35 ("En banc review is an extraordinary procedure intended to focus the entire court...on a panel decision that conflicts with a decision of the United States Supreme Court or of this court."). Still, I suppose it's true that a literal interpretation of the uniformity clause wouldn't cover conflict with a Supreme Court decision, and the cost of resolving that confusion is of course very low. There is one thing in the proposed amendments that concerns me, though: the

#	Date	Name / Organization	Rule(s)	Regulations.gov Link	Comment
					idea (discussed in the Committee Note on Rule 40, subdiv. (F)) that parties should get a second bite at the apple after a panel opinion is amended. There are certainly some times when an amendment moots a pending petition for rehearing en banc (for instance, if the panel issues an entirely new opinion), but other times the procedure is used simply to deal with typographical mistakes or other minor errors. It would be absurd and wasteful to allow subsequent rehearing petitions simply because "the panel later amends its decision" to fix a typo or two. (It's true that the panel could use Rule 2 to suspend the rules and bar further petitions, but this is a common enough situation that it should be dealt with in the rules directly.) The rules should state that the current practice of the Courts of Appeal – simultaneously amending the opinion, denying rehearing en banc, and ordering that "no further petitions for panel or en banc rehearing will be entertained" – is allowed, with perhaps a caution that this should be done only if the amendment is so minor that any subsequent petition would be obviously frivolous or dilatory.
4	02/09/23	Anonymous	35 & 40	https://www.regulations.gov/comment/USC-RULES-AP-2022-0001-0008	I think it is somewhat unprofessional for an appellate court to determine that a certain type of hearing, whether it be by panel rehearing or en banc, is "unfavorable". Every criminal defendant is entitled to the appellate process and should be granted that right. Just because they may request a panel rehearing or an en banc hearing should not make their petition "unfavorable". If the attorney representing the defendant is deciding to file a petition for both hearings, there is almost certainly a reason. As this amendment points out, the documents must clearly outline the issues and explain why an en banc or panel rehearing is needed in the first place. While I understand that the language is mostly semantic and ultimately the procedural justification makes sense, I think that the way that the Courts have decided to word this amendment is somewhat whiny. Whether or not a certain hearing is favored or not shouldn't play a role in deterring people from filing petitions one way or another. Also, I think it is interesting that oral argument is not permitted on whether or not to grant a petition. Since it seems to be common knowledge that the court system is overloaded and judges cannot pour over every word in every document, wouldn't it be prudent to hear what petitioners have to say?

APPELLATE RULES COMMENTS
(August 2022—February 2023)

#	Date	Name / Organization	Rule(s)	Regulations.gov Link	Comment
5	2/14/23	National Association of Criminal Defense Lawyers	35 & 40	https://www.regulations.gov/comment/USC-RULES-AP-2022-0001-0009	SEE LINK FOR PDF FILE.

TAB 4D

National Association of Criminal Defense Lawyers
12th Floor, 1660 L Street, NW
Washington, DC 20036

February 14, 2022
Submitted online

H. Thomas Byron III, Esq., Secretary
Committee on Practice & Procedure
Judicial Conference of the United States

AMENDMENTS TO APPELLATE RULES PROPOSED FOR COMMENT, Aug. 2022

To the Committee and Staff:

The National Association of Criminal Defense Lawyers is pleased to submit our comments on the proposed amendments to Rules 35 and 40 of the Federal Rules of Appellate Procedure.

Founded in 1958, NACDL is the preeminent organization in the United States representing the views, rights and interests of the criminal defense bar and its clients. Our association has almost 10,000 direct members. Including NACDL's 95 state and local affiliates, in nearly every state, we speak for a combined membership of some 40,000 private and public defenders, along with many academics.

APPELLATE RULES 35 and 40 – PETITIONS FOR REHEARING

With one suggestion for improvement, NACDL supports the proposed amendments to Fed.R.App.P. 35 and 40, which would consolidate and clarify the procedures governing petitions for panel or *en banc* rehearing, as well as petitions for initial *en banc* consideration.

NACDL is aware that different Circuits have different preferences for the physical presentation of rehearing petitions. Those of us who practice as appellate counsel for criminal defendants in more than one Circuit have not found this to be a problem. There is no need for absolute uniformity, and minor local variations are not burdensome. For this reason, we support the express allowance of differing reasonable length limits in redesignated Rule 40(d)(3), and time limits in Rule 40(d)(1), and suggest that similar flexibility be written into Rule 40(d)(2). Absent this addition, the contrast between (d)(2) and (d)(1)&(3) would strongly suggest that local flexibility in strictly prohibited in this context.

In other words, instead of stating that "The petition must comply in form with Rule 32," the new (d)(2) provision should state that "Unless the court or a local rule allows or directs otherwise, the petition must comply …." Some Circuits now do not require a cover, for example, and instead allow the petition to begin with a full caption, like a motion. Similarly, some Circuits do not require the printing and binding of any paper copies of a petition for rehearing, being satisfied (in the ordinary case) with electronic filing only. The amended rule should not appear to prohibit such reasonable local variations.

NACDL thanks the Committee for its excellent and valuable work and for this opportunity to contribute our thoughts. We look forward to continuing our longstanding relationship with the advisory committees as a regular submitter of written comments.

Respectfully submitted,
THE NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS

By: Peter Goldberger
Ardmore, PA
Chair, Committee on Rules of Procedure

Alexander Bunin
Houston, TX

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In Memoriam:

William J. Genego
Santa Monica, CA
Late Co-Chair

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TAB 5

TAB 5A

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Subcommittee on Costs on Appeal

Re: Costs on Appeal (21-AP-D)

Date: March 2, 2023

This subcommittee was created to explore if any amendments to Federal Rule of Appellate Procedure 39 might be appropriate in light of the Supreme Court's decision in *City of San Antonio v. Hotels.com*, 141 S. Ct. 1628 (2021). There, the Court held that Rule 39 does not permit a district court to alter a court of appeals' allocation of the costs listed in subdivision (e) of that Rule. The Court also observed that "the current Rules and the relevant statutes could specify more clearly the procedure that such a party should follow to bring their arguments to the court of appeals." *Id*. at 1638.

Rule 39 provides:

> **(a) Against Whom Assessed.** The following rules apply unless the law provides or the court orders otherwise:
>
> **(1)** if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;
>
> **(2)** if a judgment is affirmed, costs are taxed against the appellant;
>
> **(3)** if a judgment is reversed, costs are taxed against the appellee;
>
> **(4)** if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders.
>
> **(b) Costs For and Against the United States.** Costs for or against the United States, its agency, or officer will be assessed under Rule 39(a) only if authorized by law.
>
> **(c) Costs of Copies.** Each court of appeals must, by local rule, fix the maximum rate for taxing the cost of producing necessary copies of a brief or appendix, or copies of records authorized by Rule 30(f). The rate must not exceed that generally charged for such work in the area where the clerk's office is located and should encourage economical methods of copying.

(d) Bill of Costs: Objections; Insertion in Mandate.

(1) A party who wants costs taxed must—within 14 days after entry of judgment—file with the circuit clerk and serve an itemized and verified bill of costs.

(2) Objections must be filed within 14 days after service of the bill of costs, unless the court extends the time.

(3) 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.

(e) Costs on Appeal Taxable in the District Court. 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 bond or other security to preserve rights pending appeal; and

(4) the fee for filing the notice of appeal.

Several issues were raised at the last meeting, including whether the problem is large enough to attempt to solve with an amendment and whether a more aggressive revision to move toward an optimal solution would be appropriate. It appeared that there was little appetite for a major revision, but that there was a desire to do something to respond to the Supreme Court's suggestion that matters be clarified. The subcommittee was charged with giving drafting another try.

The subcommittee discussed three concerns.

The first involves clarifying the distinction between (1) the court of appeals deciding which parties must bear the costs and, if appropriate, in what percentages and (2) the court of appeals, the district court (or the clerk of either) calculating and taxing the dollar amount of costs upon the proper party or parties.

The second involves the problem of the mandate: The court of appeals decides which parties must bear the costs. And any request to change that allocation is addressed in the first instance by the court of appeals. But some costs—including the

big ticket item of the premium for a supersedeas bond—are calculated and taxed in the district court. The current Rule provides that the issuance of the mandate is not delayed for the taxation of costs in the court of appeals. As a result, the mandate might well issue before the court of appeals has decided a motion to reallocate the costs. How is the court of appeals to decide such a motion after the issuance of the mandate?

The third involves how to make sure that the judgment winner in the district court is aware of the cost of the supersedeas bond early enough to ask the court of appeals to reallocate the costs. The subcommittee looked at various ways to solve the timely notice problem in the appellate rules, but none seems desirable. We could let a party move in the court of appeals after the bill of costs is filed in the district court, but that would mean that both courts are dealing with the same costs issue at the same time. We could create a long period to seek reallocation in the court of appeals, but the longer the time between entering judgment and being asked to allocate costs, the less fresh the case is in the judges' minds and the more it is like a wholly separate appeal. We could require disclosure in the bill of costs filed in the court of appeals, but it's odd to require disclosure in a bill of costs of a category of costs that is not being sought in that bill of costs. Plus, a party might forego the relatively minor costs taxable in the court of appeals and care only about costs taxable in the district court. We could have the court of appeals tax the costs itself, but that would be a major departure from the principle, endorsed by the SCOTUS in *Hotels.com*, that the court closest to the cost should tax it.

The subcommittee believes that the easiest and most obvious time for disclosure is when the bond is before the district court for approval. Professor Hartnett has informed Professor Richard Marcus, the Reporter for the Civil Rules Committee, that it would be helpful from our perspective if Civil Rule 62 required that disclosure.

Below is a draft that the subcommittee believes deals with the first two issues but not the third.

Subdivision (a) deals with the first issue by describing the rules in that subdivision as concerning the allocation of costs among the parties, leaving the taxation of costs to subsequent subdivisions. As with the current rule, the proposed amendment sets out default allocations that are subject to change by court order and other law.

The current rule also provides that the parties can agree to a different allocation of costs where the appeal is dismissed. The proposed draft would explicitly make that option available in all circumstances (i.e., when other default rules are in play).

The current rule provides that, in the case of a mixed judgment, costs are taxed only as the court orders. This means that, unless the court orders otherwise, each party bears its own cost. The proposed draft makes that explicit. It does not remove the power of a court to depart from that default: the first sentence of Rule 39(a) makes clear that all of the default rules in Rule 39(a) can be overcome by court order.

A new subdivision (b) deals with the second issue by providing that issuance of the mandate is not delayed awaiting determination of a reconsideration motion, while also providing that the mandate issues subject to the retention of jurisdiction by the court of appeals to decide the motion.

To make the provision governing costs taxable in the court of appeals parallel to the provision governing costs taxable in the district court, a new subdivision (d) is added. It provides that the costs taxable in the court of appeals are (1) the production of necessary copies of a brief or appendix, or copies of records authorized by Rule 30(f); (2) the docketing fee; and (3) a filing fee paid in the court of appeals. The latter two require some explanation.

The general cost statute, 28 U.S.C. § 1920, provides for the taxation of costs such as fees of the clerk, disbursements for printing, and costs of making copies needed for use in the case. In addition, 28 U.S.C. § 1913 empowers the Judicial Conference to prescribe the fees and costs to be charged and collected in the courts of appeals. The Judicial Conference requires a $500 fee for docketing a case in the court of appeals. Court of Appeals Miscellaneous Fee Schedule para. 1. https://www.uscourts.gov/services-forms/fees/court-appeals-miscellaneous-fee-schedule. On top of that, there is a $5 filing fee payable to the district court, imposed by 28 U.S.C. § 1917, for filing a notice of appeal in the district court. That statutory filing fee is taxable in the district court.

But there are at least some additional filing fees that are paid in the court of appeals, such as a $5 fee for filing a notice of appeal from a bankruptcy appellate panel. Fee Schedule para. 11. For this reason, subdivision (d) lists separately the docketing fee and a filing fee paid in the court of appeals.

Rule 39. Costs

(a) ~~Against Whom Assessed~~Allocation of Costs Among the Parties. The following rules apply to the allocation of costs among the parties unless the law provides, the parties agree, or the court orders otherwise:

(1) if an appeal is dismissed, costs are ~~taxed~~ allocated against the appellant;

(2) if a judgment is affirmed, costs are ~~taxed~~ allocated against the appellant;

(3) if a judgment is reversed, costs are ~~taxed~~ allocated against the appellee;

(4) if a judgment is affirmed in part, reversed in part, modified, or vacated, each party bears its own costs ~~costs are taxed only as the court orders~~.

(b) Reconsideration; Where Applicable. Once the allocation of costs under paragraph (a) is established by the entry of judgment, a party may seek reconsideration of that allocation by filing a motion in the court of appeals within 14 days after the entry of judgment. Issuance of the mandate must not be delayed awaiting determination of a motion seeking reconsideration under this paragraph. But the mandate issues subject to the retention of jurisdiction by the court of appeals to decide the motion. The allocation of costs applies both to costs taxable in the court of appeals under paragraph (d) and to costs taxable in district court under paragraph (g).

(c)~~(b)~~ Costs For and Against the United States. Costs for or against the United States, its agency, or officer will be ~~assessed~~ allocated under Rule 39(a) only if authorized by law.

(d) Costs on Appeal Taxable in the Court of Appeals.

(1) The following costs on appeal are taxable in the court of appeals for the benefit of the party entitled to costs under this rule:

(A) the production of necessary copies of a brief or appendix, or copies of records authorized by Rule 30(f);

(B) the docketing fee; and

(C) a filing fee paid in the court of appeals.

(2)~~(c)~~ Costs of Copies. Each court of appeals must, by local rule, fix the maximum rate for taxing the cost of producing necessary copies of a brief or appendix, or copies of records authorized by Rule 30(f). The rate must not exceed that generally charged for such work in the area where the clerk's office is located and should encourage economical methods of copying.

(3)~~(d)~~Bill of Costs; Objections; Insertion in Mandate.

(A~~1~~) A party who wants costs taxed in the court of appeals must—within 14 days after entry of judgment—file with the circuit clerk and serve an itemized and verified bill of costs taxable in the court of appeals.

(B~~2~~) Objections must be filed within 14 days after service of the bill of costs, unless the court extends the time.

(C~~3~~) 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.

(e) Costs on Appeal Taxable in the District Court. 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 bond or other security to preserve rights pending appeal; and

(4) the fee for filing the notice of appeal.

Committee Note

In *City of San Antonio v. Hotels.com*, 141 S. Ct. 1628 (2021), the Supreme Court held that Rule 39 does not permit a district court to alter a court of appeals' allocation of the costs listed in subdivision (e) of that Rule. The Court also observed that "the current Rules and the relevant statutes could specify more clearly the procedure that such a party should follow to bring their arguments to the court of appeals." *Id.* at 1638. The amendment does so.

Subdivision (a). Both the heading and the body of the Rule are amended to clarify that allocation of the costs among the parties is done by the court of appeals. The court may allow the default rules specified in subdivision (a) to operate based on the judgment, or it may allocate them differently based on the equities of the situation. Subdivision (a) is not concerned with calculating the amounts owed; it is

concerned with who bears those costs, and in what proportion. The amendment also specifies a default for mixed judgments: each party bears its own costs.

Subdivision (b). The amendment specifies a procedure for a party to ask the court of appeals to reconsider the allocation of costs established pursuant to subdivision (a). A party may do so by motion in the court of appeals within 14 days after the entry of judgment. The mandate is not stayed pending resolution of this motion, but the mandate issues subject to the court of appeal's retaining jurisdiction to decide the motion. Codifying the decision in *Hotels.com*, the amendment also makes clear that that the allocation of costs by the court of appeals governs the taxation of costs both in the court of appeals and in the district court.

Subdivision (c). The amendment uses the word "allocated" to match subdivision (a).

Subdivision (d). The amendment specifies which costs are taxable in the court of appeals and clarifies that the procedure in that subdivision governs the taxation of costs taxable in the court of appeals.

TAB 5B

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Direct Appeals in Bankruptcy Subcommittee

Re: FRAP 5 and 6 and Bankruptcy Direct Appeals

Date: March 3, 2023

At the fall 2022 meeting of the Advisory Committee, the Committee considered a first draft of proposed amendments to Federal Rule of Appellate Procedure 6(c), which, among other things, governs the procedure for direct appeals from bankruptcy courts to courts of appeals. While the Committee had no major concerns with the draft, it appointed a subcommittee to look more closely at the issues and proposed amendments, as well as a proposed Committee Note providing context for the amendments.

The subcommittee has given thought to and consulted regarding the draft proposed amendments and Committee Note and is now submitting revised proposed amendments that make more substantial changes to Rule 6(c), along with a revised Committee Note, for this Committee's consideration. To assist in the Committee's evaluation of the proposed amendments and Committee Note, we first provide relevant background regarding bankruptcy appeals, the governing statute, the existing rules relating to direct appeals, and those rules' potential deficiencies.

Statutory Background

Appeals in bankruptcy are governed by 28 U.S.C. § 158. The default rule for appeals from an order of the bankruptcy court is that such appeals go either to the district court for the district where the bankruptcy court is located or (in the circuits that have established a bankruptcy appellate panel (BAP)) to the BAP for that circuit. Specifically, the statute provides in relevant part:

> (a) The district courts of the United States shall have jurisdiction to hear appeals
>
> (1) from final judgments, orders, and decrees;
>
> (2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title;[1] and

[1] Section 1121(d) permits bankruptcy courts, in certain circumstances, to increase or reduce the period during which the debtor in a chapter 11 case has the exclusive right to file a plan of reorganization. *See* 11 U.S.C. § 1121(d).

> (3) with leave of the court, from other interlocutory orders and decrees;
>
> … of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. …

28 U.S.C. § 158(a); *see also id.* § 158(b) (providing that courts of appeals may establish BAPs); *id.* § 158(c) (providing that, in a circuit with a BAP, appeals under § 158(a) go to the BAP unless any party elects to have the appeal heard by the district court).

Under § 158, the losing party then has a further appeal as of right to the court of appeals from a final judgment of the district court or BAP:

> The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

28 U.S.C. § 158(d)(1). The court of appeals reviews the original bankruptcy court order de novo, without affording deference to the order of the district court or BAP.

The bankruptcy appeal process thus creates a redundancy whenever an appeal is taken to the court of appeals under § 158(d)(1), and the two-tiered procedure can be quite time-consuming. That can be problematic in the bankruptcy context, where quick resolution of the parties' disputes is sometimes critical. To give just one example, the bankruptcy court in a chapter 11 case may need to approve a sale of the estate's assets and enter related orders, or approve a plan of reorganization disposing of estate assets, on a highly expedited timeframe in order to prevent the assets from losing substantial value, thus reducing distributions to creditors.

In response to these concerns, as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Congress amended § 158(d) to provide that, in certain circumstances, appeals may be taken directly from orders of the bankruptcy court to the courts of appeals, bypassing the intervening appeal to the district court or BAP. To do so, Congress added § 158(d)(2), which provides:

> (A) The appropriate court of appeals shall have jurisdiction of appeals described in the first sentence of subsection (a) if the bankruptcy court, the district court, or the bankruptcy appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree described in such first sentence, or all the appellants and appellees (if any) acting jointly, certify that—
>
> (i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals

for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;

(ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or

(iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken;

and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.

(B) If the bankruptcy court, the district court, or the bankruptcy appellate panel—

(i) on its own motion or on the request of a party, determines that a circumstance specified in clause (i), (ii), or (iii) of subparagraph (A) exists; or

(ii) receives a request made by a majority of the appellants and a majority of appellees (if any) to make the certification described in subparagraph (A);

then the bankruptcy court, the district court, or the bankruptcy appellate panel shall make the certification described in subparagraph (A).

(C) The parties may supplement the certification with a short statement of the basis for the certification.

(D) An appeal under this paragraph does not stay any proceeding of the bankruptcy court, the district court, or the bankruptcy appellate panel from which the appeal is taken, unless the respective bankruptcy court, district court, or bankruptcy appellate panel, or the court of appeals in which the appeal is pending, issues a stay of such proceeding pending the appeal.

(E) Any request under subparagraph (B) for certification shall be made not later than 60 days after the entry of the judgment, order, or decree.

28 U.S.C. § 158(d)(2).

A few specific features of § 158(d)(2) are worth noting:

- ***Scope of jurisdiction; finality.*** Although § 158(d)(1) grants courts of appeals appellate jurisdiction only over final orders of district courts or BAPs entered under § 158(a), § 158(d)(2) grants courts of appeals jurisdiction over *all* "appeals described in the first sentence of subsection (a)." 28 U.S.C. § 158(d)(2)(A). That sentence includes (1) appeals "from final judgments, orders, and decrees" of the bankruptcy court; (2) appeals "from interlocutory orders and decrees issued [by the bankruptcy court] under section 1121(d) of

title 11"; and (3) appeals "from other interlocutory orders and decrees" of the bankruptcy court. Accordingly, any order of the bankruptcy court—final or interlocutory—can be certified for direct appeal to the court of appeals if it meets the remaining statutory requirements.

- ***Two-step process.*** Two procedural steps must be completed before a court of appeals may hear a direct appeal under § 158(d)(2). ***First, the bankruptcy court order must be certified for direct appeal*** by the bankruptcy court, district court, BAP, or the parties. ***Second,*** and most relevant to the Rules of Appellate Procedure, ***the court of appeals must authorize the direct appeal***.

- ***Standard for certification.*** The standard for certification of a direct appeal under § 158(d)(2) shares some language with 28 U.S.C. § 1292(b), which permits courts of appeals to hear appeals of interlocutory orders of the district courts in certain circumstances.[2] However, the standard for certification of a direct appeal under § 158(d)(2) is much looser than the standard under § 1292(b). Section 1292(b) requires the district court to certify *both* that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion *and* that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b) (emphasis added). By contrast, § 158(d)(2) requires only that the order involve "a question of law as to which there is no controlling decision," "a matter of public importance," *or* "a question of law requiring resolution of conflicting decisions," *or* that an immediate appeal from the order "may materially advance the progress of the case or proceeding in which the appeal is taken." Any one of those criteria suffices for a certification under § 158(d)(2).

- ***Who may certify an order for direct appeal.*** Unlike § 1292(b), which requires the district court to find and state in writing that the standard for an interlocutory appeal is met, under § 158(d)(2) either the lower court *or the parties* may certify an order for direct appeal. Specifically, the bankruptcy court, district court, or BAP may certify (on motion by a party or sua sponte) that the standard for certification is met, or "all the appellants and appellees (if any) acting jointly" may so certify without the need for any action by the

[2] Section 1292(b) provides in relevant part: "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order." 28 U.S.C. § 1292(b).

lower court. 28 U.S.C. § 158(d)(2)(A). In addition, if the standard for certification is met, or "if a majority of the appellants and a majority of appellees (if any)" so request, the bankruptcy court, district court, or BAP "*shall*" enter the certification. *Id.* § 158(d)(2)(B) (emphasis added).

- ***Standard for authorization of direct appeal.*** The statute does not set out any standard or criteria for the court of appeals in determining whether to authorize a direct appeal; the court of appeals is apparently given discretion in that regard.

Bankruptcy Rules

Federal Rule of Bankruptcy Procedure 8006 and related rules set out the procedures to be followed in the bankruptcy court, district court, or BAP to certify a direct appeal to the court of appeals. All the details are not directly relevant here, but it is helpful to understand some key aspects of the process:

- ***Notice of appeal to district court or BAP.*** A certification of a bankruptcy court order for direct appeal does not take effect until (1) "the certification has been filed" in the appropriate court;[3] (2) "a timely appeal" from the bankruptcy court order "has been taken under [Bankruptcy] Rule 8003 or 8004"; and (3) "the notice of appeal has become effective under [Bankruptcy] Rule 8002." Fed. R. Bankr. P. 8006(a).

  Bankruptcy Rule 8003 governs appeals to the district court or BAP as of right under 28 U.S.C. § 158(a)(1) and (2), while Bankruptcy Rule 8004 governs appeals of interlocutory orders to the district court or BAP with leave of the court under § 158(a)(3). In both cases, a notice of appeal must be filed within 14 days of entry of the bankruptcy court order being appealed (with some exceptions such as the pendency of certain motions seeking alteration of the order or judgment). *See* Fed. R. Bankr. P. 8002; *id.* 8003(a)(1); *id.* 8004(a)(1). A notice of appeal is typically effective when filed, but if filed prematurely becomes effective upon entry of the order being appealed or the order disposing of the last motion tolling the time to appeal. *See id.* 8002(a)(2), (b)(2).

  The upshot is that, even if a bankruptcy court order has been certified for direct appeal to the court of appeals, the appellant must still file a notice of appeal to the district court or BAP in order to render the certification effective.

[3] The rules provide that "[t]he certification must be filed with the clerk of the court where the matter is pending." Fed. R. Bankr. P. 8006(b). The matter is pending in the bankruptcy court for 30 days after the effective date of the notice of appeal, and in the district court or BAP thereafter. *See id.*

- ***Appeals under Bankruptcy Rule 8004.*** A notice of appeal of an interlocutory order pursuant to 28 U.S.C. § 158(a)(3) and Bankruptcy Rule 8004 must "be accompanied by a motion for leave to appeal" addressed to the district court or BAP, as applicable, which must include, among other things, "the reasons why leave to appeal should be granted." Fed. R. Bankr. P. 8004(a)(2), (b)(1). Failure to file such a motion is not a jurisdictional deficiency; the district court or BAP can treat the notice of appeal as a motion or order the appellant to file a motion. *Id.* 8004(d).

  Importantly, Bankruptcy Rule 8004 provides that "[i]f leave to appeal an interlocutory order or decree is required under 28 U.S.C. § 158(a)(3), an authorization of a direct appeal by the court of appeals under 28 U.S.C. § 158(d)(2) satisfies the requirement." Fed. R. Bankr. P. 8004(e). If the court of appeals authorizes a direct appeal of an interlocutory bankruptcy court order, leave to appeal from the district court or BAP is thus unnecessary.

- ***Request to court of appeals to authorize direct appeal.*** A party may request that the court of appeals authorize a direct appeal of a bankruptcy court order only after the certification has become effective pursuant to Bankruptcy Rule 8006(a). Current Bankruptcy Rule 8006(g) provides that "[w]ithin 30 days after the date the certification becomes effective under subdivision (a), a request for permission to take a direct appeal to the court of appeals must be filed with the circuit clerk in accordance with F. R. App. P. 6(c)." Fed. R. Bankr. P. 8006(g).

As discussed at the fall 2022 Committee meeting, a court of appeals' decision to authorize a direct appeal thus does not determine whether an appeal will go forward, but instead in what court the appeal will be heard. For that reason, the Bankruptcy Rules Committee believes that Bankruptcy Rule 8006(g) should be revised to clarify that any party to the appeal may file a request that the court of appeals authorize a direct appeal. The Bankruptcy Rules Committee views this as clarification of existing law, not a change in the law.

With the proposed amendment, Bankruptcy Rule 8006(g) will read as follows:

(g) Request After Certification for a Court of Appeals To Authorize a Direct Appeal.

Within 30 days after the certification has become effective under (a), any party to the appeal may ask the court of appeals to authorize a direct appeal by filing a petition with the circuit clerk in accordance with Fed. R. App. P. 6(c).

Proposed Amendments to Appellate Rules

The proposed amendment to Bankruptcy Rule 8006(g) prompted the question whether any amendments should be made to Fed. R. App. P. 6(c), which governs the procedures for direct appeals in the court of appeals. After consideration and discussion, the subcommittee believes that a full overhaul of Rule 6(c) (and not merely a tweak to correspond to the amendment to Bankruptcy Rule 8006(g)) is warranted. Our reasoning is set out below, followed by proposed amendments and a draft Committee Note for the Committee's consideration.

As discussed in the fall 2022 memo and meeting, Rule 6(c) incorporates by reference most provisions of Rule 5, which governs requests to courts of appeals for "permission to appeal when an appeal is within the court of appeals' discretion." Fed. R. App. P. 5(a). Rule 5 was originally intended to address discretionary appeals under 28 U.S.C. § 1292(b), where the question is not which court should hear an appeal, but whether an appeal from an otherwise non-appealable order should be permitted at all. *See* Fed. R. App. P. 5 committee note (1967). Rule 5 is thus in some respects a poor fit for direct appeals of bankruptcy court orders under 28 U.S.C. § 158(d)(2), where the parties cannot seek authorization of a direct appeal from the court of appeals until the appellant has already filed an appeal to the district court or BAP, and the parties will almost certainly have taken the initial procedural steps to prosecute the district court or BAP appeal before the court of appeals is able to rule on any request to authorize a direct appeal.

Anecdotally, the members of the subcommittee with experience with direct appeals have found that current Rule 6(c) is quite confusing for both practitioners and clerks' offices. That confusion is primarily due to the manner in which Rule 6(c) cross-references Rule 5 and to its failure to take into account that an appeal of the bankruptcy court order in question is already proceeding in the district court or BAP, which results in uncertainty about precisely what steps are necessary to perfect an appeal after the court of appeals authorizes a direct appeal.

The proposed amendments below would address those issues by effectively making Rule 6(c) self-contained, meaning that parties will not need to refer to Rule 5 unless expressly referred to a specific provision of Rule 5 by Rule 6(c) itself. The proposed amendments also spell out in more detail how parties should handle initial procedural steps in the court of appeals once authorization for a direct appeal is granted, taking into account that an appeal from the same order will already be pending in the district court or BAP. They are not intended to make major changes to existing procedures but to clarify those procedures.

For ease of reference, the full text of Rules 5 and 6 (with proposed amendments to Rule 6 in redline) is set out below. All edits are to Rule 6(c), except for one minor

correction to Rule 6(b)(1)(C) to restore a word apparently inadvertently omitted. Also for ease of reference, following each proposed amendment, we explain in blue text why we believe such an amendment warrants consideration. The proposed amendments are redlined against the current text of the Rules. A revised draft proposed Committee Note follows.

Rule 5. Appeal by Permission

(a) Petition for Permission to Appeal.

(1) To request permission to appeal when an appeal is within the court of appeals' discretion, a party must file a petition with the circuit clerk and serve it on all other parties to the district-court action.

(2) The petition must be filed within the time specified by the statute or rule authorizing the appeal or, if no such time is specified, within the time provided by Rule 4(a) for filing a notice of appeal.

(3) If a party cannot petition for appeal unless the district court first enters an order granting permission to do so or stating that the necessary conditions are met, the district court may amend its order, either on its own or in response to a party's motion, to include the required permission or statement. In that event, the time to petition runs from entry of the amended order.

(b) Contents of the Petition; Answer or Cross-Petition; Oral Argument.

(1) The petition must include the following:

(A) the facts necessary to understand the question presented;

(B) the question itself;

(C) the relief sought;

(D) the reasons why the appeal should be allowed and is authorized by a statute or rule; and

(E) an attached copy of:

(i) the order, decree, or judgment complained of and any related opinion or memorandum, and

(ii) any order stating the district court's permission to appeal or finding that the necessary conditions are met.

(2) A party may file an answer in opposition or a cross-petition within 10 days after the petition is served.

(3) The petition and answer will be submitted without oral argument unless the court of appeals orders otherwise.

(c) Form of Papers; Number of Copies; Length Limits. All papers must conform to Rule 32(c)(2). An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case. Except by the court's permission, and excluding the accompanying documents required by Rule 5(b)(1)(E):

(1) a paper produced using a computer must not exceed 5,200 words; and

(2) a handwritten or typewritten paper must not exceed 20 pages.

(d) Grant of Permission; Fees; Cost Bond; Filing the Record.

(1) Within 14 days after the entry of the order granting permission to appeal, the appellant must:

(A) pay the district clerk all required fees; and

(B) file a cost bond if required under Rule 7.

(2) A notice of appeal need not be filed. The date when the order granting permission to appeal is entered serves as the date of the notice of appeal for calculating time under these rules.

(3) The district clerk must notify the circuit clerk once the petitioner has paid the fees. Upon receiving this notice, the circuit clerk must enter the appeal on the docket. The record must be forwarded and filed in accordance with Rules 11 and 12(c).

Rule 6. Appeal in a Bankruptcy Case

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

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

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

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

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

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

The word "bankruptcy" appears to have been inadvertently omitted from the phrase "bankruptcy appellate panel"; this amendment would correct that.

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

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

(A) **Motion for Rehearing.**

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

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

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

(B) **The record on appeal.**

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

(ii) An appellee who believes that other parts of the record are necessary must, within 14 days after being served with the appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included.

(iii) The record on appeal consists of:

- the redesignated record as provided above;
- the proceedings in the district court or bankruptcy appellate panel; and
- a certified copy of the docket entries prepared by the clerk under Rule 3(d).

(C) **Making the Record Available.**

(i) When the record is complete, the district clerk or bankruptcy-appellate-panel clerk must number the documents constituting the record and promptly make it available to the circuit clerk. If the clerk makes the record available in paper form, the clerk will not send documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals, unless directed to do so by a party or the circuit clerk. If unusually bulky or heavy exhibits are to be made available in paper form, a party must arrange with the clerks in advance for their transportation and receipt.

(ii) All parties must do whatever else is necessary to enable the clerk to assemble the record and make it available. When the record is made available in paper form, the court of appeals may provide by rule or order that a certified copy of the docket entries be made available in place of the redesignated record.

But any party may request at any time during the pendency of the appeal that the redesignated record be made available.

(D) **Filing the record**

When the district clerk or bankruptcy-appellate-panel clerk has made the record available, the circuit clerk must note that fact on the docket. The date noted on the docket serves as the filing date of the record. The circuit clerk must immediately notify all parties of the filing date.

(c) Direct Appeal ~~Review~~ from a Judgment, Order, or Decree of a Bankruptcy Court by ~~Permission~~ Authorization Under 28 U.S.C. § 158(d)(2).

We propose changing "Review" to "Appeal" and "Permission" to "Authorization" to be consistent with the language used in § 158(d)(2). In addition, we propose adding "from a Judgment, Order, or Decree of a Bankruptcy Court" for clarity and to be consistent with other subsections of Rule 6.

(1) **Applicability of Other Rules.** These rules apply to a direct appeal from a judgment, order, or decree of a bankruptcy court by ~~permission~~ authorization under 28 U.S.C. § 158(d)(2), but with these qualifications:

(A) Rules 3–4, 5~~(a)(3)~~ (except as provided in this subdivision), 6(a), 6(b), 8(a), 8(c), 9–12, 13–20, 22–23, and 24(b) do not apply; and

(B) as used in any applicable rule, "district court" or "district clerk" includes—to the extent appropriate—a bankruptcy court or bankruptcy appellate panel or its clerk.~~; and~~

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

We propose changing the language of the first sentence to be consistent with the title of Rule 6(c). In addition, we propose changing the list of rules that are not applicable to include Rule 5, except as provided in Rule 6(c). Much of Rule 5 does not apply cleanly to direct appeals of bankruptcy court orders, so we believe it is clearer to expressly incorporate those portions that do apply and otherwise include an appropriately modified provision in Rule 6(c) itself, so that parties need

only look at Rule 6(c) to understand the relevant procedures. This also has the benefit of eliminating current Rule 6(c)(1)(C), which is quite confusing.

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

We propose adding the language above to be consistent with other subsections of Rule 6.

(A) Petition to Authorize a Direct Appeal. Within 30 days after a certification of a bankruptcy court order for direct appeal to the court of appeals under 28 U.S.C. § 158(d)(2) has become effective under Bankruptcy Rule 8006(a), any party to the appeal may ask the court of appeals to authorize a direct appeal by filing a petition with the circuit clerk as provided in Bankruptcy Rule 8006(g).

Proposed new Rule 6(c)(2)(A) is substantively identical to Bankruptcy Rule 8006(g) (with the proposed amendments mentioned above). While including this is probably not strictly necessary, it seems helpful to have the entire process for seeking authorization for a direct appeal contained in the FRAP (which is probably where most people would look for it).

(B) **Contents of the Petition**. The petition must include the material required by Rule 5(b)(1) and must also attach:

(i) a copy of the certification of the bankruptcy court's judgment, order, or decree for direct appeal filed under 28 U.S.C. § 158(d)(2) and Bankruptcy Rule 8006; and

(ii) a copy of the notice of appeal of the bankruptcy court's judgment, order, or decree filed under Bankruptcy Rule 8003 or 8004.

Proposed new Rule 6(c)(2)(B) provides that, in addition to the contents required by Rule 5, a petition for direct appeal must include a copy of the certification and the notice of appeal.

(C) **Answer or Cross-Petition; Oral Argument.** Any answer or cross-petition is governed by Rule 5(b)(2), and oral argument is governed by Rule 5(b)(3).

Proposed new Rule 6(c)(2)(C) provides that responses to petitions and oral argument are governed by Rule 5(b).

(D) **Form of Papers; Number of Copies; Length Limits.** The required form, number of copies to be filed, and length limits applicable to the petition and any answer or cross-petition are governed by Rule 5(c).

Proposed new Rule 6(c)(2)(D) is added on the same theory as 6(c)(2)(C), to make clear that the form of papers is governed by Rule 5(c).

(E) Notice of Appeal; Calculating Time. A notice of appeal to the court of appeals need not be filed. The date of entry of the order authorizing the direct appeal serves as the date of the notice of appeal for calculating time under these rules.

Proposed new Rule 6(c)(2)(E) contains the substance of Rule 5(d)(2), modified to take into account that the appellant will already have filed a notice of appeal to the district court/BAP and that the court of appeals' order granting a direct appeal is elsewhere referred to as an "authorization."

(F) Notification of Order Authorizing Direct Appeal; Fees; Docketing of Appeal.

(i) When the court of appeals enters the order authorizing the direct appeal, the circuit clerk must notify the bankruptcy clerk and the clerk of the district court or bankruptcy appellate panel of the entry of the order.

(ii) Within 14 days of entry of the order authorizing the direct appeal, the appellant must pay the bankruptcy clerk any required fee that has not yet been paid, including:

(I) if it has not yet been paid, the fee required for the appeal to the district court or bankruptcy appellate panel; and

(II) the difference between the fee for the appeal to the district court or bankruptcy appellate panel and the fee required for an appeal to the court of appeals.

(iii) The bankruptcy clerk must notify the circuit clerk once the appellant has paid all required fees. Upon receiving this notice, the circuit clerk must enter the direct appeal on the docket.

Proposed new Rule 6(c)(2)(F) contains the substance of Rule 5(d)(1)(a) and 5(d)(3), with some modifications to take account of the direct appeal context. Rule 6(c)(2)(F)(i) provides that the circuit clerk must notify the bankruptcy court clerk and the district court/BAP clerk when the order authorizing the direct appeal is entered. Rule 6(c)(2)(F)(ii) provides that within 14 days of entry of the order authorizing the direct appeal, the appellant must pay all required filing fees that have not yet been paid. For clarity, it spells out that those fees include the initial filing fee for the district court/BAP appeal (if not already paid) and the difference between the fee for a district court/BAP appeal and the higher filing fee for a COA appeal. Rule 6(c)(2)(F)(iii) then provides that, once all fees are paid, the bankruptcy clerk must notify the circuit clerk, who then dockets the appeal.

(G) **Bond for Costs on Appeal**. The bankruptcy court may require an appellant to file a bond or provide other security to ensure payment of costs on appeal under Rule 7.

Proposed new Rule 6(c)(2)(G) contains the substance of Rule 5(d)(1)(B), modified to provide that the bankruptcy court (rather than the district court) may order security for costs on appeal.

(H) Stay Pending Appeal. Bankruptcy Rule 8007 governs any stay pending appeal.

Rule 6(c)(2)(H) was formerly Rule 6(c)(2)(C) and appeared between two subparagraphs relating to the record on appeal. Because it will need to be renumbered in any event, we propose moving this subparagraph here, following the provision regarding cost bonds, which seems to be a more logical placement. The only alterations made to the text are changing "stays" to "any stay" and changing "applies to" to "governs" for consistency with other subparagraphs of Rule 6(c)(2).

~~(A)~~(I) **The Record on Appeal**. Bankruptcy Rule 8009 governs the record on appeal. To the extent that, when the order authorizing the direct appeal is entered, a party has already filed any document or completed any step to assemble the record required by Bankruptcy Rule 8009 in connection with the appeal to the district court or

bankruptcy appellate panel, the party need not repeat that filing or step.

We propose modifying Rule 6(c)(2)(I) (formerly 6(c)(2)(A)) to make clear that if, for example, the appellant has already filed a designation of the record on appeal in connection with the initial appeal to the district court/BAP (which will likely be the case), it is not necessary to repeat the step. The reference to Bankruptcy Rule 8009, by itself, does not make that perfectly clear.

~~**(B)**~~**(J) Sending ~~Making~~ the Record ~~Available~~.** Bankruptcy Rule 8010 governs ~~completing~~ sending the record ~~and making it available~~. If, when the circuit clerk notifies the bankruptcy clerk that the order authorizing the direct appeal has been entered, the bankruptcy clerk has already sent the record to the clerk of the district court or bankruptcy appellate panel, the bankruptcy clerk must resend the record to the circuit clerk.

We propose modifying Rule 6(c)(2)(J) (formerly 6(c)(2)(B)) to conform to the language employed by restyled Bankruptcy Rule 8010 (which refers to "sending the record"). Because Bankruptcy Rule 8010 does not itself make this clear (it merely requires the bankruptcy clerk to send the record to the clerk of the court where the appeal is pending when the record is complete), we also propose adding a sentence making clear that if the bankruptcy clerk has already sent the record to the district court or BAP when the court of appeals authorizes the direct appeal, the record should be resent to the court of appeals.

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

As noted above, we propose moving former Rule 6(c)(2)(C) so that it follows the subparagraph regarding bonds for costs on appeal, rather than coming awkwardly between subparagraphs relating to the record on appeal.

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

~~(E)~~(L) **Filing a Representation Statement**. Unless the court of appeals designates another time, within 14 days after entry of the order ~~granting permission to appeal~~ authorizing the direct appeal, counsel for each party to the appeal ~~the attorney who sought permission~~ must file a statement with the circuit clerk naming the parties that ~~the attorney~~ counsel represents on appeal.

Since the proposed amendments to the rules clarify that any party may file a petition to authorize a direct appeal, we suggest modifying Rule 6(c)(2)(L) (formerly Rule 6(c)(2)(E)) to provide that counsel for each party must file a representation statement. We also suggest changing "granting permission to appeal" to "authorizing the direct appeal" to conform to the language used throughout the rest of Rule 6(c).

Committee Note

Subdivision (b). Subdivision (b)(1)(C) is amended to correct the omission of the word "bankruptcy" from the phrase "bankruptcy appellate panel."

Subdivision (c). Subdivision (c) was added to Rule 6 in 2014 to set out procedures governing discretionary direct appeals from orders, judgments, or decrees of the bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2).

Typically, an appeal from an order, judgment, or decree of a bankruptcy court may be taken either to the district court for the relevant district or, in circuits that have established bankruptcy appellate panels, to the bankruptcy appellate panel for that circuit. 28 U.S.C. § 158(a). Final orders of the district court or bankruptcy appellate panel resolving appeals under § 158(a) are then appealable as of right to the court of appeals under § 158(d)(1).

That two-step appeals process can be redundant and time-consuming and could in some circumstances potentially jeopardize the value of a bankruptcy estate by impeding quick resolution of disputes over disposition of estate assets. In the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Congress enacted 28 U.S.C. § 158(d)(2) to provide that, in certain circumstances, appeals may be taken directly from orders of the bankruptcy court to the courts of appeals, bypassing the intervening appeal to the district court or bankruptcy appellate panel.

Specifically, § 158(d)(2) grants the court of appeals jurisdiction of appeals from any order, judgment, or decree of the bankruptcy court if (a) the bankruptcy court, the district court, the bankruptcy appellate panel, or all parties to the appeal certify that (1) "the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance"; (2) "the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions"; or (3) "an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken" *and* (b) "the court of appeals authorizes the direct appeal of the judgment, order, or decree." 28 U.S.C. § 158(d)(2).

Bankruptcy Rule 8006 governs the procedures for certification of a bankruptcy court order for direct appeal to the court of appeals. Among other things, Rule 8006 provides that, to become effective, the certification must be filed in the appropriate court, the appellant must file a notice of appeal of the bankruptcy court order to the district court or bankruptcy appellate panel, and the notice of appeal must become effective. Fed. R. Bankr. P. 8006(a). Once the certification becomes effective under Rule 8006(a), a petition seeking authorization of the direct appeal must be filed with the court of appeals within 30 days. *Id.* 8006(g).

Rule 6(c) governs the procedures applicable to a petition for authorization of a direct appeal and, if the court of appeals grants the petition, the initial procedural steps required to prosecute the direct appeal in the court of appeals.

As promulgated in 2014, Rule 6(c) incorporated by reference most of Rule 5, which governs petitions for permission to appeal to the court of appeals from otherwise non-appealable district court orders. It has become evident over time, however, that Rule 5 is not a perfect fit for direct appeals of bankruptcy court orders to the courts of appeals. The primary difference is that Rule 5 governs discretionary appeals from district court orders that are otherwise non-appealable, and an order granting a petition for permission to appeal under Rule 5 thus initiates an appeal that otherwise would not occur. By contrast, an order granting a petition to authorize a direct appeal under Rule 6(c) means that an appeal that has already been filed and is pending in the district court or bankruptcy appellate panel will instead be heard in the court of appeals. As a result, it is not always clear precisely how to apply the provisions of Rule 5 to a Rule 6(c) direct appeal.

The new amendments to Rule 6(c) are intended to address that problem by making Rule 6(c) self-contained. Thus, Rule 6(c)(1) is amended to provide that Rule 5 is not applicable to Rule 6(c) direct appeals except as specified in Rule 6(c) itself. Rule 6(c)(2) is also amended to include the substance of applicable provisions of Rule 5, modified to apply more clearly to Rule 6(c) direct appeals. In addition, stylistic and clarifying amendments are made to conform to other provisions of the Appellate Rules and Bankruptcy Rules and to ensure that all the procedures governing direct appeals of bankruptcy court orders are as clear as possible to both courts and practitioners.

Subdivision (c)—Title. The title of subdivision (c) is amended to change "Direct Review" to "Direct Appeal" and "Permission" to "Authorization," to be consistent with the language of 28 U.S.C. § 158(d)(2). In addition, the language "from a Judgment, Order, or Decree of a Bankruptcy Court" is added for clarity and to be consistent with other subdivisions of Rule 6.

Subdivision (c)(1). The language of the first sentence is amended to be consistent with the title of subdivision (c). In addition, the list of rules in subdivision (c)(1)(A) that are inapplicable to direct appeals is modified to include Rule 5, except as provided in subdivision (c) itself. Subdivision (c)(1)(C), which modified certain language in Rule 5 in the context of direct appeals, is therefore deleted. As set out in more detail below, the provisions of Rule 5 that are applicable to direct appeals have been added, with appropriate modifications to take account of the direct appeal context, as new provisions in subdivision (c)(2).

Subdivision (c)(2). The language "to the rules made applicable by Rule 6(c)(1)" is added to the first sentence for consistency with other subdivisions of Rule 6.

Subdivision (c)(2)(A). Subdivision (c)(2)(A) is a new provision that sets out the basic procedure and timeline for filing a petition to authorize a direct appeal in the court of appeals. It is intended to be substantively identical to Bankruptcy Rule 8006(g), with minor stylistic changes made in light of the context of the Appellate Rules.

Subdivision (c)(2)(B). Subdivision (c)(2)(B) is a new provision that specifies the contents of a petition to authorize a direct appeal. It provides that, in addition to the material required by Rule 5, the petition must attach

a copy of the certification under § 158(d)(2) and a copy of the notice of appeal to the district court or bankruptcy appellate panel.

Subdivision (c)(2)(C). Subdivision (c)(2)(C) is a new provision. For clarity, it specifies that answers or cross-petitions are governed by Rule 5(b)(2) and oral argument is governed by Rule 5(b)(3).

Subdivision (c)(2)(D). Subdivision (c)(2)(D) is a new provision. For clarity, it specifies that the required form, number of copies to be filed, and length limits applicable to the petition and any answer or cross-petition are governed by Rule 5(c).

Subdivision (c)(2)(E). Subdivision (c)(2)(E) is a new provision that incorporates the substance of Rule 5(d)(2), modified to take into account that the appellant will already have filed a notice of appeal to the district court or bankruptcy appellate panel. It makes clear that a second notice of appeal to the court of appeals need not be filed, and that the date of entry of the order authorizing the direct appeal serves as the date of the notice of appeal for the purpose of calculating time under the Appellate Rules.

Subdivision (c)(2)(F). Subdivision (c)(2)(F) is a new provision. It largely incorporates the substance of Rules 5(d)(1)(A) and 5(d)(3), with some modifications.

Subdivision (c)(2)(F)(1) now requires that when the court of appeals enters an order authorizing a direct appeal, the circuit clerk must notify the bankruptcy clerk and the clerk of the district court or bankruptcy appellate panel of the order.

Subdivision (c)(2)(F)(2) requires that, within 14 days of entry of the order authorizing the direct appeal, the appellant must pay the bankruptcy clerk any required filing or docketing fees that have not yet been paid. Thus, if the appellant has not yet paid the required fee for the initial appeal to the district court or bankruptcy appellate panel, the appellant must do so. In addition, the appellant must pay the bankruptcy clerk the difference between the fee for the appeal to the district court or bankruptcy appellate panel and the fee for an appeal to the court of appeals, so that the appellant has paid the full fee required for an appeal to the court of appeals.

Subdivision (c)(2)(F)(3) then requires the bankruptcy clerk to notify the circuit clerk that all fees have been paid, which triggers the circuit clerk's duty to docket the direct appeal.

Subdivision (c)(2)(G). Subdivision (c)(2)(G) is a new provision that largely incorporates the substance of Rule 5(d)(1)(B) by providing that the bankruptcy court may require the appellant to post a bond to secure potential costs on appeal under Rule 7.

Subdivision (c)(2)(H). Subdivision (c)(2)(H) was formerly subdivision (c)(2)(C). It is substantively unchanged, continuing to provide that Bankruptcy Rule 8007 governs stays pending appeal, but reflects minor stylistic revisions.

Subdivision (c)(2)(I). Subdivision (c)(2)(I) was formerly subdivision (c)(2)(A). It continues to provide that Bankruptcy Rule 8009 governs the record on appeal, but adds a sentence clarifying that steps taken to assemble the record under Bankruptcy Rule 8009 before the court of appeals authorizes the direct appeal need not be repeated after the direct appeal is authorized.

Subdivision (c)(2)(J). Subdivision (c)(2)(J) was formerly subdivision (c)(2)(B). It continues to provide that Bankruptcy Rule 8010 governs provision of the record to the court of appeals, but changes the language "making the record available" to "sending the record" to be consistent with Bankruptcy Rule 8010. It also adds a sentence clarifying that if the bankruptcy clerk has already sent the record to the district court or bankruptcy appellate panel when the court of appeals authorizes the direct appeal, the record must be resent to the circuit clerk.

Subdivision (c)(2)(K). Subdivision (c)(2)(K) was formerly subdivision (c)(2)(D). It is unchanged other than being renumbered.

Subdivision (c)(2)(L). Subdivision (c)(2)(L) was formerly subdivision (c)(2)(E). Because any party may file a petition to authorize a direct appeal, it is modified to provide that counsel for each party—rather than only counsel for the party filing the petition—must file a representation statement. In addition, the phrase "granting permission to appeal" is changed to "authorizing the direct appeal" to conform to the language used throughout the rest of subdivision (c).

TAB 5C

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Amicus Disclosure Subcommittee

Re: Amicus briefs (21-AP-C; 21-AP-G; 21-AP-H; 22-AP-A)

Date: March 3, 2023

This subcommittee has been considering for some time whether to recommend that Rule 29 be amended to require additional disclosures by amici curiae. Prior subcommittee memos from the spring 2021, fall 2021, and spring 2022 meetings of the Advisory Committee discussed the relevant considerations in greater detail.

There have been two significant developments since the last meeting of the Advisory Committee. First, we have gotten some feedback from the Standing Committee about these issues. Second, the Supreme Court removed from its own rules the requirement that an amicus obtain either the agreement of the parties or the permission of the Court to file a brief.[1]

The subcommittee has taken these developments into account, along with input from the style consultants. The resulting working discussion draft follows.

Once again, the subcommittee emphasizes that it is not yet proposing that any amendment be published for public comment, much less adopted. As before, this is simply a working draft to help guide the full Advisory Committee's consideration.

It remains an open question—one that both the subcommittee and the full Advisory Committee need to address—whether any changes are appropriate, whether more or less robust changes are appropriate, and whether any possible changes would do enough to address the underlying concerns to be worth making.

The subcommittee does not see much reason to insist on party agreement or court permission to file an amicus brief. Amicus briefs are far more common at the Supreme Court. If it no longer finds such gatekeeping necessary, it seems unlikely that the courts of appeals have greater need.

Following the Supreme Court's lead, the working draft removes that requirement. In place of this formal gatekeeping, the draft draws on the Supreme Court's rule to explain when an amicus brief is helpful: When it "brings to the court's attention relevant matter not already brought to its attention by the parties." Working Draft Rule 29(a)(2). And it discourages amicus briefs that do not serve this

[1] Certain governmental parties had already been exempt from this requirement.

purpose. *Id*. The ability to strike an amicus brief that would result in a judge's disqualification is retained. Working Draft Rule 29(a)(3).

Some have commented throughout this process that the identity of an amicus is irrelevant and that the only thing that matter is the argument presented. Others, however, think that the identity of an amicus can be important. At least on occasion, the Supreme Court takes note of the identity of an amicus. Recently, for example, it held that a high-earning employee is not compensated on a "salary basis"—and therefore is entitled to overtime pay—when his paycheck is based solely on a daily rate. *Helix Energy Sols. Grp., Inc. v. Hewitt*, 21-984, 2023 WL 2144441, at *3 (U.S. Feb. 22, 2023). At the end of its explanation for rejecting the employer's contrary position, the Court stated:

> It is in fact Helix's position that would create disturbing consequences, by depriving even workers at the heartland of the FLSA's protection—those paid less than $100,000 annually—of overtime pay. . . . So on Helix's view, any daily-rate employee who meets the general rule's three-part duties test; gets a paycheck no more frequently than every week; and receives at least $455 per week (about $24,000 per year) is excluded from the FLSA's overtime protections. It is unclear how many, and what kinds of, employees are in that group, given the relative strictness of the general rule's duties test. But, for example, two organizations representing nurses have filed amicus briefs here, and it is easy to see why. See Brief for National Nurses United as Amicus Curiae; Brief for Massachusetts Nurses Association as Amicus Curiae. Some nurses working on a per-day or per-shift basis are likely to meet the general rule's duties test; and their employers would assure them $455 per week in a heartbeat if doing so eliminated the need to pay overtime. And nurses, in the Government's view, are not alone: "are just one of the many examples" of workers paid less than $100,000 a year who would, if Helix prevailed, lose their entitlement to overtime compensation. That consequence, unlike the ones Helix raises, is difficult, if not impossible, to reconcile with the FLSA's design.

Hewitt, 2023 WL 2144441, at *11 (some citations omitted).

Some amici are well known to judges and their arguments can be evaluated accordingly. Others, however, are largely if not completely unknown. They might even have been created solely for a particular case, but with a misleading or anodyne name. What appears to be a longstanding grassroots organization might be astroturf instead.

Current Rule 29(a)(4)(D) requires most amici to state their "identity," their "interest in the case" and their "source of . . . authority to file." If the requirement of party agreement or court permission is eliminated, there is no need to state the source

of authority to file. The remaining requirements can be expanded so that a court—and the public—has a fuller basis for evaluating an amicus brief. And if the gatekeeping procedure is replaced with a provision that focuses on when amicus briefs are and are not helpful to the court, an amicus can also be required to explain how the brief will be helpful.

The working draft shows a sketch of such a provision: Requiring an amicus to provide "a concise description of the identity, history, experience, and interests of the amicus curiae, together with an explanation of how the brief and the perspective of the amicus will be helpful to the court." Working Draft Rule 29(a)(4)(D).

Disclosing a Relationship Between the Amicus and a Party

Threshold. There was considerable discussion at the Standing Committee meeting of the appropriate threshold that would trigger the obligation to disclose a party's contributions to an amicus. While some members questioned the need to change the disclosure requirements at all, one member suggested a lower threshold to normalize such disclosures, and one member was attracted to the idea of setting several bands (e.g., 15%-25% 25%-35%, 35%-455, etc.), none of these approaches gained any traction. Instead, it appeared that the Standing Committee would be content with a 25% threshold. One fixed level would be simpler and easy to administer. Contributions at the 25% level would raise eyebrows; an amicus receiving that level of support from a party would not be a broad-based amicus. The 25% threshold was described as reasonable and "not wrong."

Based on this feedback, the working draft continues to use a 25% threshold.

Look-back period. There was less discussion at the Standing Committee meeting of the appropriate look-back period for determining whether the level of contributions by a party was sufficiently high to require disclosure. Several members found a prior calendar or fiscal year much more administrable than a 12 month period prior to the filing of the brief.

The subcommittee, however, remains concerned that using a prior calendar or fiscal year could miss the most egregious cases: a party pouring funds into an amicus shortly before the brief is filed. In addition, the subcommittee does not view a 12 month period prior to the filing of the brief as terribly burdensome. An amicus does not need to figure out whether any of its contributors meets the 25% threshold. It only needs to determine if a party to the case meets that threshold.

For this reason, the working draft continues to use a 12 month look-back period.

Disclosing a Relationship Between the Amicus and a Nonparty.

There was little if any support in the Standing Committee for expanding disclosure of contributions by nonparties that are not earmarked for an amicus brief. Indeed, one member suggested holding this idea until it could be coordinated with disclosure of third-party litigation funding. From this perspective, there shouldn't be greater disclosure requirements for amici than for parties.

For this reason, the working draft does not have a provision requiring disclosure of non-earmarked contributions by nonparties to an amicus.

Current Rule 29(a)(4)(E)(iii) requires the disclosure of earmarked contributions by anyone other than the amicus, its members, or its counsel. Prior working drafts have made two notable changes to this provision.

First, a threshold of $1000 would be established, so that earmarked contributions below that threshold would not have to be disclosed. This would enable crowd-sourcing and other grassroots funding of an amicus brief to take place without requiring disclosure of contributors to the effort.

Second, the exclusion for members would be eliminated, so that earmarked contributions over the $1000 threshold by members of the amicus would have to be disclosed.

The subcommittee views the two aspects as linked. The threshold of $1000, standing alone, would reduce the current disclosure requirements and there seems to be little call for that. Eliminating the exclusion for members, standing alone, would increase disclosure requirements but could impose a burden that exceeds its benefits.

But joined together, they close a method of easy evasion of the current rule: simply become a member of the amicus and provide as much earmarked funding for an amicus brief as you please. And joined together, they avoid imposing a burden on low-dollar contributors whether or not members of the amicus.

In this regard, the working draft provides two alternatives for the Advisory Committee's consideration. One includes both of these possible changes; the other includes neither. See Working Draft Rule 29(d).

Other Issues.

The style consultants thought that there was no need to add the word "drafting" to the provisions dealing with earmarked contributions because "preparing" was broad enough to cover drafting. The subcommittee does not doubt that this is the better interpretation of the current rule. But the sponsors of the Amicus Act fear that "preparing or submitting" the brief could be read by some quite

narrowly. The word "drafting" has been added in earlier working drafts to meet this concern. On further consideration, the subcommittee fears that the phrase "drafting, preparing, or submitting" might suggest a narrow meaning of preparing by suggesting that these are chronological steps. To deal with that risk, while accommodating the concerns of the sponsors of the Amicus Act, the current working draft changes the order to "preparing, drafting, or submitting," suggesting that "preparing" covers activity preparatory not just to submission but also to drafting.

Judge Bates also raised a concern that the phrase "a party or its counsel . . . (or two or more parties or their counsel collectively . . .)" might not capture all of the permutations we would want to capture. For that reason, the working draft uses the phrase "a party, counsel, or any combination of parties and counsel . . . ".

TAB 5D

Rule 29 Brief of an Amicus Curiae

a) During Initial Consideration of a Case on the Merits

(1) Applicability. This Rule 29(a) governs amicus filings during a court's initial consideration of a case on the merits.

(2) When ~~Permitted~~Helpful. An amicus curiae brief that brings to the court's attention relevant matter not already brought to its attention by the parties may be of considerable help to the court. An amicus curiae brief that does not serve this purpose burdens the court, and its filing is not favored. ~~The United States or its officer or agency or a state may file an amicus 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, but a court of appeals may prohibit the filing of or may strike an amicus brief that would result in a judge's disqualification.~~

(3) ~~Motion for Leave to File~~Striking a Brief. A court of appeals may strike an amicus brief that would result in a judge's disqualification.~~The motion must be accompanied by the proposed brief and state:~~

~~(A) the movant's interest; and~~

~~(B) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.~~

(4) Contents and Form. An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. An amicus brief need not comply with Rule 28, but must include the following:

(A) if the amicus curiae is a corporation, a disclosure statement like that required of parties by Rule 26.1;

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

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

(D) ~~a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;~~a concise description of the identity, history, experience, and interests of the amicus curiae,

together with an explanation of how the brief and the perspective of the amicus will be helpful to the court;

(E) the disclosures required by Rule 29(b)-(d)~~unless the amicus curiae is one listed in the first sentence of Rule 29(a)(2), a statement that indicates whether:~~

~~(i) a party's counsel authored the brief in whole or in part;~~

~~(ii) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and~~

~~(iii) a person — other than the amicus curiae, its members, or its counsel — contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person~~;

(F) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; and

(G) a certificate of compliance under Rule 32(g)(1), if length is computed using a word or line limit.

(5) Length. Except by the court's permission, an amicus brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

(6) Time for Filing. An amicus curiae must file its brief~~, accompanied by a motion for filing when necessary,~~ no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed. A court may grant leave for later filing, specifying the time within which an opposing party may answer.

(7) Reply Brief. Except by the court's permission, an amicus curiae may not file a reply brief.

(8) Oral Argument. An amicus curiae may participate in oral argument only with the court's permission.

(b) Disclosing a Relationship Between the Amicus and a Party. An amicus brief must disclose:

(1) whether a party or its counsel authored the brief in whole or in part;

(2) whether a party or its counsel contributed or pledged to contribute money intended to fund—or intended as compensation for—preparing, drafting, or submitting the brief;

(3) whether a party, counsel, or any combination of parties and counsel has a majority ownership interest in or majority control of a legal entity submitting the brief; and

(4) whether a party, counsel, or any combination of parties and counsel has contributed 25% or more of the gross annual revenue of an amicus curiae during the 12 month period before the brief was filed—disregarding amounts unrelated to the amicus curiae's amicus activities that were received in the form of investments or in commercial transactions in the ordinary course of business.

(c) **Identifying the Party or Counsel; Disclosure by a Party or Counsel.** Any disclosure required by paragraph (b) must name the party or counsel. If a party or counsel knows that an amicus has failed to make the disclosure, the party or counsel must do so.

(d) [alternative α] **Disclosing a Relationship Between the Amicus and a Nonparty**. An amicus brief must name any person—other than the amicus or its counsel—who contributed or pledged to contribute more than $1000 intended to fund (or intended as compensation for) preparing, drafting, or submitting the brief.

(d) [alternative β] **Disclosing a Relationship Between the Amicus and a Nonparty**. An amicus brief must name any person—other than the amicus, its members, or its counsel—who contributed or pledged to contribute money intended to fund (or intended as compensation for) preparing, drafting, or submitting the brief.

(e~~b~~) During Consideration of Whether to Grant Rehearing.

(1) Applicability. ~~This Rule 29(b)~~ Rule 29(a) through (d) governs amicus filings during a court's consideration of whether to grant panel rehearing or rehearing en banc, except as provided in 29(e)(2) and (3), and unless a local rule or order in a case provides otherwise.

(2) ~~When Permitted.~~ ~~The United States or its officer or agency or a state may file an amicus brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court.~~

~~(3) Motion for Leave to File.~~ ~~Rule 29(a)(3) applies to a motion for leave.~~

~~(4) Contents, Form, and~~ Length. ~~Rule 29(a)(4) applies to the amicus brief.~~ The brief must not exceed 2,600 words.

(3~~5~~) Time for Filing. An amicus curiae supporting the petition for rehearing or supporting neither party must file its brief~~, accompanied by a motion for filing when necessary,~~ no later than 7 days after the petition is filed. An amicus curiae opposing the petition must file its brief~~, accompanied by a motion for filing when necessary,~~ no later than the date set by the court for the response~~.~~

TAB 6

TAB 6A

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett

Re: Disclosure of Third-Party Litigation Funding (22-AP-C, 22-AP-D)

Date: March 2, 2023

Lawyers for Civil Justice (LCJ) has submitted a suggestion to amend Rule 26.1. Rule 26.1 requires non-governmental corporations to identify any parent corporation and any publicly held corporation that owns 10% or more of its stock. LCJ suggests that this disclosure should be expanded to require disclosure of a non-party that has a financial stake in the outcome of an appellate case. It observes that non-parties fund appellate litigation and obtain the right to a portion of any financial recovery. The investments are non-recourse, so the recipient of the funding owes nothing if there is no recovery. LCJ contends that circuit judges should know who has this kind of interest in the cases before them in order to comply with their recusal obligations. The suggestion follows this memo.

The International Legal Finance Association has submitted a response. It argues that federal judges already have ample authority to determine whether a conflict of interest exists, including requiring disclosure of any relationship with a litigation finance company. It notes that judges are well advised to avoid investing in legal finance entities. And it contends that there is no reason to treat litigation finance companies differently than other entities that may have a financial stake on legal outcomes. Because there is no pending proposal published for public comment, the comment has been docketed as a suggestion. It, too, follows this memo.

The Advisory Committee on Civil Rules has been considering the issue of disclosure of third-party litigation funding for years. Its agenda book from the Fall of 2021 recaps that history; the relevant pages were included in the fall agenda book of this Committee.

It is not clear how commonly judges have investments in entities that engage in litigation finance. Nor is it clear that there is anything distinctive about appeals that would call for disclosure of third-party litigation funding on appeal that was not required in the district court. (One of the rationales for required disclosure in the district court—so that a judge trying to facilitate a settlement has people with settlement authority at the table—is much weaker on appeal.)

The December 2021 report of the Advisory Committee on Civil Rules to the Standing Committee states:

> The Advisory Committee [on Civil Rules] has determined that it remains premature to begin work toward possible rules related to third

> party litigation financing. Third-party funding continues to grow and to take on new forms. The agreements that establish funding relationships vary widely, and may not express the full reality of the actual relationships. It would be difficult even to define what sorts of funding might be brought within the scope of a rule. And many of the questions raised about third-party funding address issues of possible regulation that are beyond the reach of Enabling Act rules. The Advisory Committee continues to gather information.

Agenda Book for the January 2022 Meeting of the Standing Committee, pg. 185.

At the last meeting, I was under the impression that the Civil Rules Committee had an existing subcommittee that was part of this information gathering process. But that impression was in error. For that reason, the Appellate Rules Committee decided to defer further consideration of the issue of third-party litigation funding until the spring meeting.

Professor Richard Marcus, the Reporter for the Civil Rules Committee, has informed me that the Civil Rules Committee continues to study the matter. Successive Rules Law Clerks have compiled a substantial collection of published pieces about TPLF. He is involved with two academic conferences on the topic in coming months.

The GAO has also published a report on the topic, available at https://www.gao.gov/products/gao-23-105210

The Committee may want to establish a subcommittee to explore this issue, or it might decide to await further developments from the Civil Rules Committee.

My fall memo also noted two other disclosure suggestions for the Committee's information. I repeat them here: Magistrate Judge Patty Barksdale has suggested that Civil Rule 7.1 be amended to require a party to check a judge's publicly available financial disclosures for possible conflicts. Circuit Judge Ralph Erickson has suggested that Civil Rule 7.1 be amended to require the disclosure of "grandparent" corporations, that is, parent corporations of parent corporations of parties. Appellate Rule 26.1 is similar to Civil Rule 7.1. So are Bankruptcy Rules 7007.1 and 8012, and Criminal Rule 12.4. After consulting with the Chairs and Reporters of these Committees, Judge Bates, the chair of the Standing Committee, decided to have the Civil Rules Committee take the lead on these two suggestions, perhaps with a Bankruptcy Rules Committee representative on the Civil Rules Committee subcommittee.

TAB 6B

RULES SUGGESTION
to the
ADVISORY COMMITTEE ON APPELLATE RULES

PERVASIVE, YET UNKNOWN: THE PREVALENCE OF DIRECT, UNDISCLOSED NON-PARTY FINANCIAL STAKES IN APPELLATE OUTCOMES, AND WHY THE COMMITTEE SHOULD AMEND RULE 26.1

September 1, 2022

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Rule Suggestion to the Advisory Committee on Appellate Rules ("Committee").

Introduction

Direct, yet undisclosed non-party financial stakes in appellate outcomes are pervasive in federal circuit courts. These concrete rights—typically, a right to receive a percentage of proceeds contingent on the court's decision to uphold a judgment—arise from litigation funding contracts and popular "crowdfunding" web sites. Such rights can be held by individuals, investment funds (including family offices), and institutions, both domestic and non-US. Unfortunately, circuit judges are largely unaware that such non-party interests are present in the cases they decide. Rule 26.1 of the Federal Rule of Appellate Procedure does not require disclosure of these financial arrangements and therefore does not assist judges in determining whether they pose potential conflicts of interest or create the appearance of impropriety. Local rules do not do so either; although six of the twelve circuit local disclosure rules are broad enough to include such rights, none of them specifically mentions non-party rights created by funding contracts—an oversight that litigation funders rely upon to conclude that those rules do not apply to their financial stakes. Closing this disclosure gap would be consistent with the Chief Justice's recent call for "greater attention to promoting a culture of compliance" in the federal judiciary,[2] which

[1] LCJ is a national coalition of corporations, law firms, and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. For over 35 years, LCJ has been closely engaged in reforming federal procedural rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

[2] John G. Roberts, Jr., Chief Justice of the United States, *2021 Year-End Report on the Federal Judiciary*, at 3-4, https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf.

was inspired by the *Wall Street Journal*'s reporting of 685 instances of conflicts of interest.[3] Amending Rule 26.1 to cover non-party outcome-contingent rights to share in the proceeds of litigation matters is necessary to provide judges adequate, uniform disclosures.[4]

I. Undisclosed Non-Party Financial Rights Are Commonplace in Appellate Cases

There are $11 billion worth of non-party financial rights in litigation outcomes in the United States today, according to a recent survey.[5] Such rights exist for litigation at all stages[6]—including appeals[7]—in all federal courts and in cases of a wide variety of subject matters. Appellate cases "seem[] to be a significant sub-category of litigation funding,"[8] according to the Advisory Committee on Civil Rules, which has been studying the matter since 2014. These financial rights are held by individuals, asset managers (including family offices), hedge funds, and institutions,[9] including both non-US individuals[10] and sovereign wealth funds.[11]

II. The Financial Rights Held by Non-Party Investors Are Directly Contingent on the Outcome of Appeals

The financial rights that non-party litigation investors receive in exchange for their investments are directly contingent upon the outcome of cases. Litigation finance "is the practice where a third party unrelated to the lawsuit provides capital to a plaintiff involved in litigation in return for a portion of any financial recovery from the lawsuit."[12] These are not loans. Litigation finance provider LexShares explains:

> Solutions are instead structured as non-recourse investments, which means that the funding recipient owes nothing if the lawsuit does not result in a recovery. If the case reaches a

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[3] *Id*. at 3.
[4] The Committee is separately devoting attention to considering whether to require more disclosures from amici curiae. The need for disclosure about non-party financial rights contingent on the outcome of an appeal is far more compelling. Non-parties with financial rights that are directly contingent in the outcome of an appeal are akin to real parties in interest, and are far different from ordinary members of an advocacy organization or trade association that publicly files an amicus brief, thus identifying their group as interested in the appeal. Litigation funds are completely unknown to the court.
[5] Bloomberg Law, *Willkie, Longford Reach $50 Million Litigation Funding Pact* (June 23, 2021), https://news.bloomberglaw.com/business-and-practice/willkie-longford-partner-in-50-million-litigation-funding-pact ("[L]itigation funding . . . has attracted more than $11 billion in capital, according to a survey this year."). In 2021, a single company, Burford, committed over a billion dollars to fund litigation. Burford Capital 2021 Annual Report, at iv, https://www.burfordcapital.com/media/2679/fy-2021-report.pdf ("Burford 2021 Annual Report"); *see also* Christopher Bogart, *Common sense vs. false narratives about litigation finance disclosure*, Burford Capital (July 12, 2018), https://www.burfordcapital.com/insights/insights-container/common-sense-vs-false-narratives-about-litigation-finance-disclosure/ ("Burford Article") ("[L]itigation finance continues to grow as an increasingly essential tool to law firms and litigants.").
[6] LexShares, Frequently asked questions, https://www.lexshares.com/faqs ("LexShares FAQs").
[7] *See* Appeal Funding Partners, https://appealfundingpartners.com/.
[8] Advisory Committee on Civil Rules, Agenda Book, at 381 (Oct. 5, 2021).
[9] LexShares FAQs ("LexShares investors include high net worth individuals and institutional investors, including select family offices, hedge funds and asset managers.").
[10] *Id.* ("LexShares supports funding by non U.S. based investors through our online platform").
[11] Burford 2021 Annual Report at 12.
[12] LexShares, Litigation Finance 101, https://www.lexshares.com/litigation-finance-101.

positive outcome, then the funding recipient would owe a predetermined portion of any damages recovered.[13]

Another large litigation financing firm, Burford, similarly explains:

> In return [for our investment], we receive our contractually agreed entitlement from the ultimate settlement or judgment on the claim and, if the claim does not produce any cash proceeds, we generally lose our capital.[14]

The nature of investors' financial rights is the same in appellate cases, as a firm specializing in appellate investments, Appeal Funding Partners, explains:

> An Appeal Funding cash advance is not a loan. It is an investment in a portion of a judgment on appeal. . . . In this regard, our goals and yours are perfectly aligned. *If you win, we win*. And you have the added security of knowing that if the case is eventually lost, you keep every dollar we advanced to you and you owe us nothing. If the case is ultimately won, we all win.[15]

Because the non-party financial entitlements that we are describing are directly dependent on the outcome of cases, and because there are no countervailing interests in nondisclosure of this information,[16] judges should know when they are present.

III. Circuit Judges Should Be Able to Determine Whether Financial Rights Contingent on the Outcome of Appeals Pose a Conflict of Interest

Circuit judges are required by statute,[17] the Code of Conduct for Federal Judges,[18] and the Judicial Conference Mandatory Conflict Screening Policy[19] to recuse themselves when they know that they have a financial interest that would be substantially affected by the outcome of the proceeding. This responsibility applies to financial interests "however small"[20] and extends to include any "appearance of impropriety."[21] Compliance with these provisions requires judges

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[13] *Id.*
[14] Burford 2021 Annual Report at 13.
[15] Appeal Funding Partners, Our Solutions, https://appealfundingpartners.com/our-solutions/ (emphasis added).
[16] By contrast to the funding at issue here, the U.S. Supreme Court has recognized the First Amendment prohibits "compelled disclosure of affiliation with groups engaged in advocacy" where the government has "no offsetting interest 'sufficient to justify the deterrent effect' of [such] disclosure." *See Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2382 (2021) (citation omitted). It has counseled, "Protected association furthers 'a wide variety of political, social, economic, educational, religious, and cultural ends,' and 'is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority. . . . [I]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action." *Id.* (citations omitted).
[17] 28 U.S.C. § 455.
[18] Code of Conduct for Federal Judges, Canon 3(C)(1)(c).
[19] U.S. Courts, Guide to Judiciary Policy, Mandatory Conflict Screening Policy, https://www.uscourts.gov/sites/default/files/guide-vol02c-ch04.pdf (last revised Mar. 15, 2022).
[20] Code of Conduct for Federal Judges, Canon 3(C)(3)(c).
[21] Code of Conduct for Federal Judges, Canon 2.

to be able to discover when non-party individuals, asset managers, and funds have contingent rights in proceeds triggered by the outcomes of appeals that they are handling.

IV. Rule 26.1 Should Be Amended to Provide Circuit Judges the Disclosures Necessary to Determine Whether Outcome-Contingent Non-Party Financial Entitlements Pose Conflicts of Interest

The purpose of Rule 26.1 is to "assist[] a judge in ascertaining whether or not the judge has an interest that should cause the judge to recuse himself or herself from the case," according to the 1998 Committee Notes.[22] But the Rule says nothing about potential non-party financial rights, even where those interests are directly affected by the outcome of the case. It merely requires that "[a]ny nongovernmental corporation that is a party to a proceeding in a court of appeals must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation."[23] To assist circuit judges in obtaining the information required to ascertain whether any potential non-party financial rights exist in the case, the Rule should be amended to require disclosure of non-party financial rights that are directly contingent upon the outcome of the appeal. Such an amendment would be consistent with the current Rule's focus on interests that are concretely affected by the outcome of an appeal; as the 1998 Committee Notes explain, "disclosure of entities that would *not* be adversely affected by a decision in the case is unnecessary."[24]

V. Circuit Local Rules are Inconsistent, Unclear, and Not Specific Enough to Encompass the Commonplace Non-Party Financial Entitlements Held by Litigation Investors

The variation in circuits' local rules on this subject further highlights the case for amending Rule 26.1 to create a uniform rule requiring disclosure of non-party financial rights contingent on the outcome of appeals.[25] Six circuits generally require disclosure of "all persons" or "other legal entities" that "are financially interested in the outcome of the litigation."[26] But because those rules do not specifically mention rights created by litigation financing contracts, some holders of these entitlements interpret the rules not to apply. Burford explains:

> Six out of 12 federal circuit courts of appeal have local variations on Rule 26.1 that additionally require outside parties with a financial interest in the outcome to be disclosed. None of these rules, however, singles out litigation finance providers for disclosure . . . .[27]

The result is today's lack of disclosure of such arrangements. In Burford's words: "[T]hese broad disclosure provisions in local rules do not appear to be much-followed or enforced."[28]

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[22] Fed. R. App. P. 26.1 committee notes to 1998 amendment.
[23] Fed. R. App. P. 26.1(a).
[24] Fed. R. App. P. 26.1 committee notes to 1998 amendment.
[25] Memorandum from Patrick A. Tighe, Rules Law Clerk, to Ed Cooper, Dan Coquillette, Rick Marcus, and Cathie Struve, *Survey of Federal and State Disclosure Rules Regarding Litigation Funding* (Feb. 7, 2018), *in* Advisory Committee on Civil Rules, Agenda Book, at 209 (Apr. 10, 2018).
[26] *See, e.g.*, 5th Cir. R. 28.2.1.
[27] Burford Article.
[28] *Id.*

Accordingly, amending Rule 26.1 to provide an explicit, uniform[29] disclosure standard for non-party outcome-contingent financial entitlements—and specifically mentioning rights to settlement or judgment proceeds that stem from litigation investment arrangements—is necessary for judges to determine whether such rights pose a conflict of interest in their cases.

Conclusion

Rule 26.1 is failing to provide circuit judges any information about the non-party, outcome-contingent financial rights that are commonplace in appellate cases today. Because circuit judges are responsible for determining whether such interests pose a conflict of interest, Rule 26.1's omission hampers the Judicial Conference's goal of promoting a greater "culture of compliance" in the judiciary. The various local disclosure rules have not proven an adequate substitute. The Committee should thus amend Rule 26.1 to require disclosure of non-party outcome-contingent rights to settlement or judgment proceeds tied to the outcome of cases, specifically including such interests arising from litigation investment contracts.

[29] The 1989 Committee Notes to Rule 26.1 invited circuits to develop local disclosure rules, but stated: "However, the committee requests the courts to consider the desirability of uniformity and the burden that varying circuit rules creates on attorneys who practice in many circuits." Fed. R. App. P. 26.1 advisory committee notes (1989 addition).

TAB 6C

ILFA | INTERNATIONAL LEGAL FINANCE ASSOCIATION

22-AP-D

October 3, 2022

Advisory Committee on Appellate Rules
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-300
Washington, D.C. 20544

RE: Response to September 1, 2022 Rules Suggestion from Lawyers for Civil Justice (22-AP-C) Concerning Rule 26.1

The International Legal Finance Association ("ILFA")[1] respectfully submits this response to the September 1, 2022, submission to the Advisory Committee on Appellate Rules (the "Committee") from Lawyers for Civil Justice ("LCJ") concerning Fed. R. App. P. 26.1 ("Rule 26.1"). We refer the Advisory Committee to the previous submissions by ILFA's members[2] to the Advisory Committee on Civil Rules and only briefly address the substance of LCJ's submission, as it repeats many of the previous arguments—by LCJ and others—presented to and rejected by the Advisory Committee on Civil Rules.

In 2014, 2015, 2017, 2018, 2019, 2020, and 2021, the LCJ and other aligned organizations such as the U.S. Chamber of Commerce Institute for Legal Reform, urged the Advisory Committee on Civil Rules to adopt an unprecedented proposal to force disclosure of certain funding arrangements in every civil case under Fed. R. Civ. P. 26(a)(1)(A). Having failed to advance that proposal, the LCJ now urges this Committee to adopt essentially the same proposal via amendment of a different rule, Rule 26.1. The stated rationale is that Rule 26.1 does not require disclosure of certain financing arrangements and "therefore does not assist judges in determining whether they

[1] Founded in September 2020, the International Legal Finance Association is the only global association of commercial legal finance companies. ILFA is a non-profit trade association that promotes the highest standards of operation and service for the commercial legal finance sector. Its founding members include Burford Capital, Omni Bridgeway (formerly known as Bentham IMF), and Therium Capital Management, which previously participated in the Committee's deliberations regarding legal finance.

[2] *See., e.g.,* Letter from Shannon Campagna, Executive Director, International Legal Finance Association, to Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure, Administrative Office of the U.S. Courts (April 6, 2021); Letter from Eric H. Blinderman, Chief Executive Officer (U.S.), Therium Capital Management, Allison K. Chock, Chief Investment Officer, Bentham IMF, and Danielle Cutrona, Director, Global Public Policy, Burford Capital, to Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure, Administrative Office of the U.S. Courts (Feb. 20, 2019); Letter from Christopher P. Bogart, Chief Executive Officer, Burford Capital, to Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure, Administrative Office of the U.S. Courts (Feb. 20, 2019); Letter from Allison K. Chock, Chief Investment Officer, Bentham IMF, to Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure, Administrative Office of the U.S. Courts (Sept. 6, 2017); Letter from Christopher P. Bogart, Chief Executive Officer, Burford Capital, to Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure, Administrative Office of the U.S. Courts (Sept. 1, 2017); Letter from Adam R. Gerchen, Chief Executive Officer, Gerchen Keller Capital, LLC, Christopher P. Bogart, Chief Executive Officer, Burford Capital, and Ralph J. Sutton, Chief Investment Officer, Bentham IMF, to Jonathan C. Rose, Secretary, Advisory Committee on the Rules of Practice and Procedure, Administrative Office of the U.S. Courts (Oct. 21, 2014).

pose potential conflicts of interest or create the appearance of impropriety."[3] However, as discussed below, this rule suggestion is a solution in search of a problem. There is insufficient justification to impose a rule like the one proposed by LCJ where judges already possess the authority to provide federal courts with the ability to obtain information when deemed necessary, the presence of legal finance is the exception rather than the rule, and where there are multiple forms of financing available to private litigants to which it would not apply.

In short, and for the reasons set forth below, LCJ's proposal does not merit submission for public comment or any further attention by the Committee.

Federal judges already have ample authority to determine whether a conflict of interest exists. The LCJ proposal overlooks the essential point that federal judges have ample authority to determine whether a conflict of interest exists. That is because conflict of interest is simply the cited rationale for new disclosure rules specific to legal finance. The true motivation here is to enact a mechanism by which an opposing party can obtain the financial information of its adversaries and use it to its advantage in litigation. Anyone who has spent any time in courtrooms litigating high-stakes commercial matters has encountered demands for disclosure of irrelevant information as a mechanism of delay—as "frolic and detour" that adds to the extraordinary cost of litigation and slows down an already overburdened justice system. Disclosure of legal finance implicates further concerns, the most significant of which is the potential for prejudice to financed parties.

The submission offers no explanation why the federal courts' current ability to obtain information about legal finance arrangements is insufficient to address potential concerns that may arise every so often in a particular case. Fundamentally, the proposal is a push for forced disclosure of irrelevant information that one party is simply curious to know. That is not the standard for discovery under Fed. R. Civ. P. 26, and it is not an adequate justification to amend Rule 26.1. Nor would any litigant support such a standard that would be more evenly applicable across financial interests.

As the Advisory Committee on Civil Rules appropriately observed in rejecting earlier calls for an amendment to Fed. R. Civ. P. 26 backed by a similar rationale, "judges currently have the power to obtain information about third-party funding when it is relevant in a particular case."[4] Judge Polster's order in the pending Opioids MDL in the U.S. District Court for the Northern District of Ohio is a perfect example.[5] Other federal courts have adopted this sensible approach, which balances the court's need to inquire into financing arrangements for a specific, narrow purpose with the fact that funding issues are rarely relevant to the parties' claims and defenses.[6] And still other courts have taken a broader approach that demonstrates that the federal courts already have broad discretion to order disclosure of litigation finance when they deem it appropriate.[7]

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[3] *See* Lawyers for Civil Justice, Rule Suggestion to the Advisory Committee on Appellate Rules at 1 (Sept. 1, 2022), https://www.uscourts.gov/sites/default/files/22-ap-c_suggestion_from_lcj_-_rule_26.1_0.pdf.

[4] Hon. David G. Campbell, Report of Advisory Committee on Civil Rules, at 4 (Dec. 2, 2014), https://www.uscourts.gov/sites/default/files/fr_import/CV12-2014.pdf.

[5] *See In re Nat'l Prescription Opiate Litig.*, 2018 WL 2127807, at *1 (N.D. Ohio May 7, 2018).

[6] *See, e.g.*, *MLC Intellectual Property LLC v. Micron*, 2019 WL 118595, at *2 (N.D. Cal. Jan. 7, 2019) (noting the court's ability to "question potential jurors *in camera* regarding relationships to third party funders and potential conflicts of interest" if necessary at trial).

[7] ILFA does not endorse any particular approach but the ability to issue sufficient orders is clear.

Importantly, there have never been any real-world examples of judicial conflicts of interest in this regard; judges are acutely aware of their ethical responsibilities and would be well advised to avoid investing in legal finance entities (whether public or private). Even the LCJ concedes in a September 8, 2022, submission to the Advisory Committee on Civil Rules that "judges are (presumably) not personally investing with entities explicitly advertising themselves as 'litigation funders.'"[8] And even if a judge were to have a relationship that rose to the level of warranting disqualification, he or she would be fully equipped to issue an individual practice rule or standing order requiring disclosure of any relationship with that company—as has been done in the Northern District of California, the District of New Jersey, and by Chief Judge Connolly of the District of Delaware. In short, any concern about judicial conflict of interest is so attenuated that it cannot support the unwarranted disclosure rule targeted at a specific sector of financial institutions of the kind suggested by the LCJ proposal.[9]

The Proposed Rule is not warranted as an extension of Rule 26.1. LCJ argues that the proposed rule is an appropriate extension of Rule 26.1, which requires that a "nongovernmental corporation that is a party to a proceeding in a court of appeals" file a statement identifying "any parent corporation and any publicly held corporation that owns 10% or more of its stock."[10] But the original purpose of corporate disclosure statements stands in stark contrast to the situation here. The LCJ has not offered any evidence of a risk of judicial conflicts of interest associated with the involvement of legal finance providers. As previously stated, that is because federal judges are well aware of their ethical responsibilities, would be well advised to avoid investing in legal finance entities (whether public or private), and are fully equipped to issue an individual practice rule or standing order requiring disclosure of any relationship with that company. The current rules applied at the discretion of judges are fully capable of handling any concern about judicial conflict of interest.

The proposal inappropriately targets one subset of financial institutions for differential treatment under the Federal Rules. In the U.S. justice system, there are numerous types of entities that may have financial interests that are contingent on legal outcomes. These include: (1) law firms that work on contingency or conditional fee arrangements; (2) banks, private funds, or other

[8] *See* Lawyers for Civil Justice and U.S. Chamber of Commerce Institute for Legal Reform, Submission to the Advisory Committee on Civil Rules (Sept. 8, 2022), https://www.uscourts.gov/sites/default/files/22-cv-m_suggestion_from_lcj_and_ilr_-_rule_16c2_0.pdf.

[9] It is important to note that, contrary to the flawed arguments presented by the LCJ proposal, there is well-developed jurisprudence in this area demonstrating that federal courts have routinely rejected discovery regarding the sources of financing in litigation unless the party seeking it makes a specific showing of relevance. *See Colibri Heart Valve LLC v. Medtronic CoreValve LLC, et al*, Case No. 8:20-cv-00847 (C.D. Cal. Mar. 26, 2021) (finding legal finance documents not discoverable; defendant's "skepticism" that plaintiff's discovery responses were not accurate or complete did not demonstrate the requisite relevance of the funding documents to the claims and defenses in the matter); *MLC Intellectual Prop. LLC v. Micron Tech., Inc.*, No. 14-cv-03657, 2019 WL 118595, at *2 (N.D. Cal. Jan. 7, 2019) (finding that defendant's attempts to establish relevance based on potential bias and conflicts of interest concerns were speculative); *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 724 (N.D. Ill. 2014) (rejecting discovery into legal finance arrangements; noting defendant's assertion of relevance lacked "any cogency"); *VHT, Inc. v. Zillow Group, Inc.*, No. C15-1096JLR, 2016 WL 7077235, at *1 (W.D. Wash. Sept. 8, 2016) (rejecting discovery into legal finance arrangements absent "some objective evidence that any of Zillow's theories of relevance apply in this case"). Indeed, no federal court has required mandatory disclosure of financing in litigation on a scale equivalent to the Chamber's proposal. Federal courts have permitted discovery only in exceedingly rare and unique circumstances where it is, in fact, germane to the claims and defenses of the parties. The call for blanket forced disclosure flies in the face of this settled judicial consensus and the principles of relevance and proportionality.

[10] Fed. R. App. P. 26.1(a).

financial institutions which provide loans, recourse debt, or equity instruments; (3) risk-avoidance instruments from insurance companies; and (4) specialist providers of legal finance. All of these sources of outside financing could be considered "non-parties" with "financial stakes in appellate outcomes" and there is no basis for choosing among them for differential treatment.

However, that is not LCJ's intent. Rather, LCJ is focused on legal finance providers, not because of some inherent concern for the integrity of the courts or to root out conflicts of interest, but because some of LCJ's members believe that disclosure of certain legal financing arrangements will inure to the benefit of one party by prejudicing their adversary. That LCJ has sought for many years an amendment to Fed. R. Civ P. 26(a)(1)(A), a discovery provision, to force disclosure of these arrangements before proposing an amendment to Rule 26.1 demonstrates LCJ's true motivation—an unfair, forced disclosure rule that provides a strategic advantage to one party in litigation over another.

Legal finance is far less prevalent than many other types of financial interests that by policy choice have never been deemed relevant to the ultimate disposition of claims and are not required to be disclosed. As a practical matter, adding a special "legal finance disclosure rule" therefore seems both oddly specific and broadly unnecessary, given that courts have operated for decades without inquiring into the (usually irrelevant) financial health of the litigation parties and their counsel.

It is not unreasonable to assume that, if the rule suggested by LCJ were put into practice, at least some regular litigants would forgo financing for fear of triggering disclosure rules and revealing private financial information to their adversary in litigation. As the Supreme Court has recognized, requiring parties to produce potentially sensitive information can have a chilling effect on meritorious litigation,[11] an effect that would extend to litigants financing litigation. To the extent that such forced disclosure resulted in litigants declining to pursue meritorious claims, the result would be less justice. Our system of justice requires that the rules be applied evenhandedly to all participants in litigation. The Committee should reject LCJ's proposal discriminating between "non-parties with financial rights" and all others with financial interests in litigation with respect to the imposition of disclosure rules.

Legal finance is not "commonplace." Finally, it is worth noting that the LCJ overstates the prevalence of legal finance, generally and with respect to appellate cases. Last year, there were 461,478 new civil filings in U.S. district courts.[12] In comparison, the most robust public study of legal finance data study found that in 2021, the number of legal finance investments with a nexus to the U.S. was less than one-tenth of one percent of the number of federal cases.[13] The LCJ cites no data to support its assertion that legal finance is present in a material number of appeals. To the contrary, it cites a public survey estimating the claim values in financed litigation. Putting aside the questionable accuracy of that survey, the *value* of financed claims is not an indicator of the *number* of financed cases. This is particularly true given that commercial legal finance providers are highly selective and predominantly invest in matters where tens to hundreds of millions of

[11] *See* Lawyers for Civil Justice, Submission to the Advisory Committee on Civil at 16, (Mar. 24, 2021), http://www.lfcj.com/uploads/1/1/2/0/112061707/lcj_comment_on_sealing_of_court_records_march_24_2021.pdf.

[12] *See* Federal Judicial Caseload Statistics 2021, available at https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2021.

[13] *See* The Westfleet Insider: 2021 Litigation Finance Market Report, https://www.westfleetadvisors.com/publications/2021-litigation-finance-report/.

dollars are in dispute. Such matters are obviously exceptional. The LCJ proposal's disproportionate focus on legal finance can only be explained by the fact that its existence levels the playing field in matters where their constituents traditionally held the upper hand in terms of resources and expertise. That is certainly not a reason to change Rule 26.1—or any other federal rule—particularly given that legal finance affects such a marked minority of federal litigation and where no identifiable problem exists.

* * *

The Committee should hew to the basic framework and practice that has historically worked in federal court and decline to adopt the overbroad disclosure requirements proposed by LCJ. The current disclosure regime in the Rules strikes an appropriate and time-tested balance between the interest in avoiding conflicts of interest and protecting litigants' ability to freely obtain all types of financing, especially without any evidence of a problem. The LCJ proposal rests on a basic misconception of the role of legal finance in litigation, as compared to other more widely used forms of financing, and contravenes the principle that federal rules of procedure be applied evenhandedly to all participants in litigation.

For the foregoing reasons, and for all the reasons we have stated in previous submissions to the Advisory Committee on Civil Rules, we respectfully submit that LCJ's renewed request, albeit in a new venue, does not merit this Committee's consideration.

Respectfully submitted,

/s/

Gary Barnett
Executive Director & General Counsel

TAB 6D

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett

Re: Decisions Based on Unbriefed Grounds (19-AP-B)

Date: February 28, 2023

In 2019, the American Academy of Appellate Lawyers (AAAL) submitted a suggestion to add a Rule 32.2 that would require a court to provide notice and an opportunity to submit supplemental briefing before deciding a case on a ground not briefed or argued by any party. That suggestion accompanies this memo.

At the spring 2020 meeting, the Committee decided that this issue would be best handled by the Chair of the Committee sending a letter to Chief Circuit Judges alerting them to the legitimate concern raised by the AAAL. Judge Chagares did so in May of 2020.

The Committee did not remove the item from its agenda. Instead it determined to revisit the matter in three years.

It is now three years later. The Committee might want to create a subcommittee to look into the issue. Or it might want the Chair or the Reporter to reach out to the AAAL to see if it thinks that the concern has been alleviated.

TAB 6E

American Academy of Appellate Lawyers

19-AP-B

TO: THE HONORABLE MICHAEL CHAGARES, CHAIR
FEDERAL ADVISORY COMMITTEE ON APPELLATE RULES

FROM: AMERICAN ACADEMY OF APPELLATE LAWYERS

DATE: APRIL 26, 2019

RE: PROPOSED RULE REGARDING DECISIONS BASED ON UNBRIEFED GROUNDS

The American Academy of Appellate Lawyers proposes that the Federal Rules of Appellate Procedure be amended to address appeals that are decided on legal issues or theories not raised by the parties.[1] The proposed rule provides that, before a court decides an appeal on a ground not raised by parties, the court shall give notice that it is considering a previously unaddressed ground and provide an opportunity to brief it.

The proposed amendment addresses a practice that harms the integrity of the appellate process. To avoid limiting what appellate courts may consider in deciding cases, the proposed amendment merely requires that, before an appeal is decided on a ground the parties framing the appeal have not raised or addressed, the court must give parties notice and an opportunity to be heard on the unbriefed issue or theory.

Proposed Rule 32.2

Rule 32.2
Decisions on Unbriefed Grounds

Before a decision is issued based on a ground not briefed or argued by any party, the court shall provide a notice to the parties that describes the ground, and the court shall give the parties the opportunity to submit supplemental briefing on that ground.

[1] Positions taken in this recommendation state views determined by the Academy's internal process and should not be attributed to individual Fellows, their places of work, or their clients.

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The problem addressed by the proposed rule

An appellate decision based on a ground not raised by the parties may not be a common occurrence, but it happens.[2] The vast majority of members attending the Academy's Fall 2017 meeting indicated they have received decisions based on issues not presented in the briefs.

Many appellate courts invite supplemental briefs when a court's own research indicates potential grounds for decision other than those raised by the parties.3 But the consequences are severe when courts decide appeals based upon grounds the parties did not have an opportunity to brief. Issues and theories considered without notice and briefing may deprive the appellate court of the reasons those matters were not developed at trial or on appeal.

In addition to being necessary for integrity and quality in appellate decision-making, the opportunity to be heard before decisions are made is fundamental to the American adversary system of justice and due process of law. Notice and opportunity to be heard are also critical to the public perception of justice under law.

Established procedure is necessary

Rule-making provides the procedural mechanism to ensure that litigants can be heard before the court renders decisions in their cases based upon grounds the parties did not have an opportunity to develop or contest. Court rules set forth explicit procedures for providing notice to parties before courts determine facts relevant to the legal issues that determine the outcome of their cases. For example, the Federal Rules of Civil Procedure explicitly require notice and a reasonable time to respond before the court may grant summary judgment either *sua sponte* or on grounds not raised by a party.[4] A court is required to give notice to the parties before appointment of a special master,[5] and also must give notice and an opportunity to respond before

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[2] *See* E. King Poor & James E. Goldschmidt, Sua Sponte *Decisions on Appeal*, FOR THE DEFENSE, Oct. 2015, at 62.

[3] *See, e.g. In re Woolsey*, 696 F.3d 1266, 1279 (10th Cir. 2012) (Gorsuch, J.) (discussing supplemental briefing by the parties in response to the court's request in light of authority discussing a different statutory basis for the relief sought by the appellant).

[4] Fed. R. Civ. P. 56(f): *Judgment Independent of the Motion.* After giving notice and a reasonable time to respond, the court may:
(1) grant summary judgment for a nonmovant;
(2) grant the motion on grounds not raised by a party; or

[5] Fed. R. Civ. P. 53(b)(1): *Notice.* Before appointing a master, the court must give the parties notice and an opportunity to be heard. Any party may suggest candidates for appointment.

imposing sanctions for a violation of Federal Rule of Civil Procedure 11.[6]

The Academy's proposed Rule of Appellate Procedure is thus consistent with other rules designed to ensure due process.

[6] Fed. R. Civ. P. 11(c)(1): *In General.* If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on recommendation.

TAB 7

TAB 7A

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett

Re: Social Security Numbers in Court Filings (22-AP-E)

Date: March 2, 2023

Senator Ron Wyden has expressed concern that the judiciary is not doing enough to protect Social Security numbers from appearing in court filings. The excerpt from his letter to the Chief Justice that has been posted as a rules suggestion accompanies this memo.

This is primarily a matter for the Advisory Committee on the Federal Rules of Bankruptcy Procedure, and that Committee is giving the question close attention.

From the perspective of this Committee, the Federal Rules of Appellate Procedure piggy-back on other rules governing privacy protections. Rule 25(a)(5) provides:

> **Privacy Protection.** An appeal in a case whose privacy protection was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. In all other proceedings, privacy protection is governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case. The provisions on remote electronic access in Federal Rule of Civil Procedure 5.2(c)(1) and (2) apply in a petition for review of a benefits decision of the Railroad Retirement Board under the Railroad Retirement Act.

The last sentence, which extends to Railroad Retirement Act cases the same limitations on remote electronic access designed to protect privacy in Social Security cases, was just added. It became effective December 1, 2022.

While protecting the privacy interests in Social Security numbers remains important, I do not believe that there is anything that this Committee needs to do at this time and recommend that the Committee remove the matter from its agenda.

TAB 7B

RON WYDEN
OREGON

CHAIRMAN OF COMMITTEE ON FINANCE

221 DIRKSEN SENATE OFFICE BUILDING
WASHINGTON, DC 20510
(202) 224–5244

United States Senate
WASHINGTON, DC 20510–3703

COMMITTEES:
COMMITTEE ON FINANCE
COMMITTEE ON THE BUDGET
COMMITTEE ON ENERGY AND NATURAL RESOURCES
SELECT COMMITTEE ON INTELLIGENCE
JOINT COMMITTEE ON TAXATION

August 4, 2022

The Honorable John G. Roberts, Jr
Chief Justice
Supreme Court of the United States
1 First Street, NE
Washington, DC 20543

Dear Chief Justice Roberts:

* * *

Twenty years ago, when Congress required federal courts to publish court records online, it required the Supreme Court to establish rules to protect the privacy and security of Americans whose information was contained in public court records. Congress also required the courts to report back every two years to describe whether the rules were in fact protecting Americans' privacy and security. * * *

* * *

The most recent report, which was provided to my office in draft form, * * * describes how in 2015-2016, the Judicial Conference considered a proposal to redact the entire SSN from court filings, as federal court rules currently permit, and in some cases require, records to include the last four digits. * * *

* * *

Sincerely,

Ron Wyden
United States Senator

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TAB 7C

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett

Re: Bar Admission (22-AP-F)

Date: March 1, 2023

Rule 46 governs admission to the bar of a court of appeals. It provides, in relevant part:

> **(a) Admission to the Bar.**
>
> **(1) Eligibility.** 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).

Erwin Rosenberg suggests that the Rule be amended to provide that all persons have a right to practice law, absent a compelling reason for restriction.

Mr. Rosenberg relies on two cases, one involving the licensing of professional fundraisers and one involving regulation of the speech of pregnancy crisis centers. *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781 (1988); *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018).

I recommend that the Committee remove the matter from its agenda.

TAB 7D

From: Erwin Rosenberg
To: RulesCommittee Secretary
Date: Thursday, December 15, 2022 4:03:58 PM

22-AP-F

Dear Secretary of the Rules Committee,

I respectfully propose replacing current Federal Appellate Rule 46 to say the following:

"The Federal Government acknowledges that pursuant to the First Amendment of the U.S. Constitution all persons have the right to practice law and may not be prevented from practicing law unless a government officer seeking a restriction acts in a content-neutral manner and proves to a neutral judge that the intended practice of law needs to be restricted for a compelling reason and that there is no less restrictive alternative means of achieving the compelling purpose. See Riley v. National Federation of Blind of NC, Inc., 487 US 781, 802 (1988),("The history to which the State refers relates to the period before the 1985 amendments, at which time professional fundraisers were permitted to solicit as soon as their applications were filed. Then, delay permitted the speaker's speech; now, delay compels the speaker's silence. Under these circumstances, the licensing provision cannot stand")(footnote omitted). See also Nifla v. Becerra, 138 S. Ct. 2361, 2374 (2018)("And the Court emphasized that the lawyer's statements in *Zauderer* would have been "fully protected" if they were made in a context other than advertising. 471 U.S., at 637, n. 7, 105 S.Ct. 2265.")."

Thank you,

Erwin Rosenberg

TAB 7E

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett

Re: Intervention on Appeal (22-AP-G and 23-AP-C)

Date: March 1, 2023

In the spring of 2022, Professor Stephen Sachs noted that the Supreme Court had recently observed that there is no Appellate Rule dealing with intervention on appeal. *Cameron v. EMW Women's Surgical Ctr.*, 142 S. Ct. 1002, 1010 (2022) ("No statute or rule provides a general standard to apply in deciding whether intervention on appeal should be allowed. The Federal Rules of Appellate Procedure make only one passing reference to intervention, and that reference concerns the review of agency action.")

At the spring 2022 meeting, Professor Struve noted that the Committee had looked into this issue in 2010 but did not move forward. She added that it may be time to think about it again and other members agreed.

In addition, Professor Judith Resnik informed us about an amicus brief that she had submitted to the Supreme Court in *Arizona v. Mayorkas*, 22-592, arguing that the Court should not use that case to fashion a comprehensive standard for appellate intervention but instead should encourage rulemaking. That case was set for argument on March 1, 2023, but on February 16, 2023, the Court removed the case from its February argument calendar. The case may become moot on May 11 when the Biden administration intends to end the covid-19 emergency declaration. On February 21, 2023, the Court granted the Solicitor General's motion for divided argument and enlargement of time, but it has not rescheduled the argument.

The Committee may want to wait until the Supreme Court decides *Mayorkas* before deciding how to proceed. But since the Court will take some action on the case before the next time the Committee meets, I suggest that a subcommittee be appointed to explore the issue. Perhaps it will conclude that it is more appropriate now than it was in 2010 to propose a rule change.

TAB 7F

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett

Re: Permission to File an Amicus Brief (23-AP-A; 23-AP-B)

Date: March 1, 2023

Both the Atlantic Legal Foundation and the DRI Center for Law and Public Policy have suggested that the Federal Rules of Appellate Procedure be amended to follow the Supreme Court's lead in removing the requirement that an amicus curiae obtain either the agreement of the parties or the permission of the court to submit a brief. The suggestions accompany this memo.

The amicus disclosure subcommittee has already incorporated this idea into its working draft for discussion. I suggest that these suggestions be formally referred to that subcommittee.

TAB 7G

January 6, 2023

By Email

H. Thomas Byron III, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE, Room 7-300
Washington, D.C. 20544

Re: Recommendation to Amend Fed. R. App. P. 29(a)

Dear Mr. Byron:

I am writing on behalf of the DRI Center for Law and Public Policy to recommend that Federal Rule of Appellate Procedure 29(a) be amended to eliminate the requirement for obtaining the parties' consent, or the court's permission, for the filing of non-governmental *amicus curiae* briefs. Under our recommended amendment, a court of appeals still would be able to prohibit or strike the filing of an amicus brief that would result in a judge's disqualification. Further, our recommended amendment would apply only to the filing of amicus briefs during a court's initial consideration of a case on the merits; it would not affect Rule 29(b). Please see the proposed markup to Rule 29(a) appended to this letter.

DRI Center for Law and Public Policy

DRI is the largest international membership organization of attorneys defending the interests of business and individuals in civil litigation. Many of DRI's 14,000 members include attorneys who regularly practice in the federal courts of appeals. The Center for Law and Public Policy is DRI's think tank and advocacy voice. The Center's Amicus Committee files amicus briefs in carefully selected Supreme Court, federal court of appeals, and state appellate court cases that present issues that are important to the civil justice system and to civil litigation defense attorneys and their clients.

Recommended Amendment to Fed. R. App. P. 29(a)

The Center's recommended amendment to Federal Rule of Appellate Procedure 29(a) follows the Supreme Court's lead in revising Supreme Court Rule 37 by eliminating the need for a non-governmental *amicus curiae* to obtain all parties' consent, or the Court's permission, for the filing of either a petition-stage or merits-stage amicus brief. In announcing the rules change, which became effective on January 1, 2023, the Supreme Court Clerk explained that "[w]hile the consent

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requirement may have served a useful gatekeeping function in the past, it no longer does so, and compliance with the rule imposes unnecessary burdens upon litigants and the Court."

The DRI Center for Law and Public Policy believes that the same is true for the corresponding requirement in Fed. R. App. P. 29(a). Although timely consent usually can be obtained, that not always is the case, especially if the non-supported party's counsel does not regularly practice in the federal courts of appeals or is unfamiliar with the important role that well-crafted amicus briefs play in enhancing an appellate court's understanding of the legal issues involved in an appeal. Such counsel sometimes delay, withhold, or refuse consent, or even file oppositions to motions for leave, simply because they do not want the opposing party to benefit from amicus support, or are displeased with the organization or individuals intending to provide amicus support (e.g., a national voluntary bar organization such as DRI; the national trade association to which the supported party belongs; an ad hoc group of law professors). This type of hardball tactic is incompatible with appellate litigation. The fact that Fed. R. App. P. 29(a)(6) requires amicus briefs to be filed no later than 7 days after the supported party's principal brief is filed can exacerbate the logistical problems encountered by amicus counsel who are confronted with an uncooperative non-supported party's counsel who chooses to delay or withhold consent.

Facilitating the filing of amicus briefs in federal courts of appeals by eliminating the consent/permission requirement in Fed. R. App. P. 29(a) also would benefit the civil justice system. Timely, rules-compliant amicus briefs that do not replicate the supported party's legal arguments, but instead, provide a court of appeals with additional argument or broader perspective on the legal issues involved in an appeal, enhance appellate decision-making and the judicial process. Equally important, amicus briefs give organizations such as DRI a direct voice in appeals that present legal questions important to their members. Federal courthouse doors should open automatically to true friends of the court such as DRI.

We urge the Standing Committee and its Advisory Committee on Appellate Rules to follow the Supreme Court's lead and recommend that amicus counsel, party counsel, and federal courts of appeals be relieved of the unnecessary burdens imposed by the requirement of obtaining the parties' consent, or the court's permission, for filing amicus briefs. Thank you for your consideration.

Sincerely,

Lawrence S. Ebner

Lawrence S. Ebner
Chair, DRI Center for Law and Public Policy

Rule 29. Brief of an Amicus Curiae

(a) DURING INITIAL CONSIDERATION OF A CASE ON THE MERITS.

(1) Applicability. This Rule 29(a) governs amicus filings during a court's initial consideration of a case on the merits.

(2) When Prohibited ~~Permitted~~. ~~The United States or its officer or agency or a state may file an amicus 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, but a~~ A court of appeals may prohibit the filing of or may strike an amicus brief that would result in a judge's disqualification.

~~**(3) Motion for Leave to File.** The motion must be accompanied by the proposed brief and state:~~

~~(A) the movant's interest; and~~

~~(B) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.~~

(3) Contents and Form. An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. An amicus brief need not comply with Rule 28, but must include the following:

(A) if the amicus curiae is a corporation, a disclosure statement like that required of parties by Rule 26.1;

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

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

(D) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;

(E) unless the amicus curiae is the United States or its officer or agency or state ~~one listed in the first sentence of Rule 29(a)(2)~~, a statement that indicates whether:

(i) a party's counsel authored the brief in whole or in part;

(ii) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and

(iii) a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person;

(F) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; and

(G) a certificate of compliance under Rule 32(g)(1), if length is computed using a word or line limit.

(4) Length. Except by the court's permission, an amicus brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

(5) Time for Filing. An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed. A court may grant leave for later filing, specifying the time within which an opposing party may answer.

(6) Reply Brief. Except by the court's permission, an amicus curiae may not file a reply brief.

(7) Oral Argument. An amicus curiae may participate in oral argument only with the court's permission.

TAB 7H

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(310) 471-5595 or 5623

January 17, 2023

<u>VIA</u> Email: RulesCommittee_Secretary@ao.uscourts.gov

H. Thomas Byron III, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE, Room 7-300
Washington, D.C. 20544

Re: 23-AP-A — Proposal to Amend Fed. R. App. P. 29(a)

Dear Mr. Byron:

On behalf of the Atlantic Legal Foundation (ALF), I am writing in support of the suggestion submitted by the DRI Center for Law and Public Policy on January 6, 2023 to amend Federal Rule of Appellate Procedure 29(a) by eliminating the requirement to obtain the parties' consent, or to file a motion for leave, in order to submit an amicus brief in a federal court of appeals.

Established in 1977, ALF is a national, nonprofit, nonpartisan, public interest law firm that advocates for individual liberty, free enterprise, property rights, limited and efficient government, sound science in judicial & regulatory proceedings, and effective education, including parental rights and school choice. *See* atlanticlegal.org. Over the years, we have filed numerous amicus briefs in federal courts of appeals throughout the United States, as well as in the Supreme Court and some state appellate courts.

As you are aware, the Supreme Court, as of January 1, 2023, has eliminated the requirement for an *amicus curiae* to obtain consent or leave to submit an amicus brief. In response to the Clerk's request for comments when this rules change was proposed by the Court, ALF submitted a letter enthusiastically supporting the proposal. We agreed with the Clerk's observation that the consent requirement imposes unnecessary burdens on litigants and the Court and no longer serves a useful purpose. We also

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expressed our view that requiring the parties to consent to the filing of an amicus brief is inconsistent with an *amicus curiae* not only supporting a party, but also serving as a friend of the court. Equally important, the opportunity to file an amicus brief helps to open the federal appellate process to all interested parties, and affords them a voice on legal issues that are important to them and their members or supporters.

The same is true in the federal courts of appeals. As long as an amicus brief complies with the federal and local rules, neither consent nor leave should be required for its filing.

Thank you for your consideration.

Sincerely,

Hayward D. Fisk
Chairman & President

cc: Lawrence S. Ebner

TAB 7I

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett

Re: Resetting the Time to Appeal in a Bankruptcy Case

Date: March 1, 2023

In the spring of 2022, the Advisory Committee on Bankruptcy Rules considered an issue involving the resetting of time to appeal in bankruptcy cases.

Federal Rule of Appellate Procedure 4(a)(4)(A) resets the time to appeal if various post-judgment motions are timely made in the district court. To be timely in an ordinary civil case, the motion must be made within 28 days of the judgment. Fed. R. Civ. P. 50(b), 52(b), 59. But in a bankruptcy case, the equivalent motions must be made within 14 days of the judgment. Fed. R. Bankr. P. 7052, 9015(c), 9023.

So what happens if a district court itself—rather than a bankruptcy court—decides a bankruptcy proceeding in the first instance and a post-judgment motion is made on 20th day after judgment? Does the motion have resetting effect or not?

The Court of Appeals for the First Circuit has said no. *In re Lac-Mégantic Train Derailment Litigation*, 999 F.3d 72, 84 (2021). The Bankruptcy Rules and their times limits apply to a bankruptcy case heard in the district court.

This result, while sensible, is not obvious from the text of the Federal Rules of Appellate Procedure. That's because Rule 6 provides:

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

And Rule 4(a)(4)(A) gives resetting effect to motions that are filed "within the time allowed" by "the Federal Rules of Civil Procedure"—which is 28 days, not 14 days.

The Bankruptcy Rules Committee considered amending Bankruptcy Rules 7052, 9015(c), and 9023 to provide 28 days for the motions if the proceeding is heard by the district court, but that would undermine the goal of expedition and disrupt the uniformity of bankruptcy rules. It considered asking this Committee to consider amending Appellate Rule 4(a)(4)(A) to acknowledge the different timing rules, but that would complicate an already quite complicated rule with material that doesn't apply to non-bankruptcy cases. It settled on asking this Committee to consider

amending Appellate Rule 6(a)—the rule that deals with bankruptcy appeals—to acknowledge the different timing rules.

An excerpt from Bankruptcy Rules Committee's Report to the Standing Committee providing more detail accompanies this memo. The suggested amendment is as follows:

> **Rule 6. Appeal in a Bankruptcy Case**
>
> **(a) Appeal From a Judgment, Order, or Decree of a District Court Exercising Original Jurisdiction in a Bankruptcy Case.** An appeal to a court of appeals from a final judgment, order, or decree of a district court exercising jurisdiction under 28 U.S.C. § 1334 is taken as any other civil appeal under these rules. The reference in Rule 4(a)(4)(A) to the time allowed by the Federal Rules of Civil Procedure must be read as a reference to the time allowed by the Federal Rules of Civil Procedure as shortened, for some types of motions, by the Federal Rules of Bankruptcy Procedure.

If the Committee decides that the proposed amendments to Rule 6 dealing with direct appeals in bankruptcy are ready for publication, this sentence can be folded into that proposal.

If the Committee decides that the proposed amendments to Rule 6 dealing with direct appeals in bankruptcy are not yet ready for publication, this suggestion can be referred to the subcommittee handling direct appeals in bankruptcy.

TAB 7J

Information Item 2. Timing of Post-Judgment Motions in Bankruptcy Proceedings Initially Heard in District Court. In response to a recent First Circuit decision, Professor Cathie Struve raised with the reporters an issue that involves the overlap of the bankruptcy, civil, and appellate rules. The issue is whether, in a bankruptcy proceeding heard and decided initially by a district court, the time for filing post-judgment motions of the type that toll the period for filing a notice of appeal should be 14 days, as in the bankruptcy court, or should be 28 days because of the longer time allowed for taking an appeal from the district court.

The situation in question is the following: A district court hears a bankruptcy adversary proceeding and enters a judgment. Twenty-eight days later, the losing party files a motion for reconsideration (or new trial or judgment as a matter of law). The court denies the motion. Thirty days after denial, the losing party files a notice of appeal. The question is whether the appeal is timely.

The First Circuit held no in *In re* Lac-Mégantic Train Derailment Litigation, 999 F.3d 72, 84 (2021). The court concluded that the Bankruptcy Rules applied in the district court and that under Rule 9023, the motion for reconsideration had to be filed within 14 days of the entry of judgment. Since the motion was untimely, it did not toll the time for filing the notice of appeal. Thus the appeal taken more than 30 days after entry of judgment was untimely, and the court of appeals lacked jurisdiction to hear it.

As Prof. Struve pointed out, this result raises questions about the wording of FRAP 4(a)(4)(A). It says that the listed post-judgment motions toll the time for filing a notice of appeal if "a party files in the district court any of [those] motions under the Federal Rules of Civil Procedure—and does so within the time allowed by those rules." The Civil Rules allow 28 days for those motions. But if the rule is applied literally, it would allow motions that are untimely according to the applicable Bankruptcy Rules to toll the time for taking an appeal.

Until 2009 the time for filing post-judgment motions under the Civil and Bankruptcy Rules was the same—within 10 days after entry of judgment. Then in 2009, the time limit for such motions was changed to 14 days in Bankruptcy Rules 7052, 9015(c), and 9023 as a result of the time computation project that changed rules deadlines of less than 30 days to multiples of 7. The deadlines in Civil Rules 50, 52, and 59, however, were changed to 28 days at that time because, as explained by the committee notes, "Experience has proved that in many cases it is not possible to prepare a satisfactory post-judgment motion in 10 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays." The reason for not similarly extending the parallel Bankruptcy Rules was explained as follows: The new Civil Rule "deadline corresponds to the 30-day deadline for filing a notice of appeal in a civil case under Rule 4(a)(1)(A) F. R. App. P. In a bankruptcy case, the deadline for filing a notice of appeal is 14 days. Therefore, the 28-day deadline for filing a motion for amended or additional findings would effectively override the notice of appeal deadline under Rule 8002(a) but for this amendment." 2009 Committee Notes to Rules 7052, 9015, and 9023.

In choosing not to propose the 28-day deadline for post-judgment motions under the Bankruptcy Rules, the Advisory Committee focused on the deadline for filing notices of appeal under Rule 8002(a). That deadline applies to appeals from the bankruptcy court to the district court or bankruptcy appellate panel, but not to appeals from a district court's exercise of jurisdiction under 28 U.S.C. § 1334. Appellate Rule 6(a) provides that the 30-day deadline of

FRAP 4(a) applies in that situation, just as it does in appeals of civil cases from the district court to the court of appeals.

The Appeals Subcommittee considered several possible responses to the issue, including amending Bankruptcy Rules 7052, 9015(c), and 9023 to provide 28 days for the motions if the proceeding is heard by the district court; asking the Appellate Rules Committee to consider amending Rule 4(a)(4)(A) to acknowledge the different timing rules; and asking the Appellate Rules Committee to consider amending Rule 6(a) to do the same. The Subcommittee recommended doing the latter, and the Advisory Committee agreed.

An amendment to Rule 6(a) might read as follows:

> **Rule 6. Appeal in a Bankruptcy Case**
>
> **(a) Appeal From a Judgment, Order, or Decree of a District Court Exercising Original Jurisdiction in a Bankruptcy Case.** An appeal to a court of appeals from a final judgment, order, or decree of a district court exercising jurisdiction under 28 U.S.C. § 1334 is taken as any other civil appeal under these rules. The reference in Rule 4(a)(4)(A) to the time allowed by the Federal Rules of Civil Procedure must be read as a reference to the time allowed by the Federal Rules of Civil Procedure as shortened, for some types of motions, by the Federal Rules of Bankruptcy Procedure.
>
> * * * * *

This solution has the advantage of requiring the amendment of only one rule—an appellate rule that is bankruptcy specific—and it does not introduce a new distinction in the Bankruptcy Rules between district court and bankruptcy court exercises of jurisdiction. This approach would also be consistent with the general desire for expedition in bankruptcy cases. Whether to propose an amendment to FRAP 6(a) and the wording of any such amendment would, of course, be left in the first instance to the Appellate Rules Advisory Committee.

TAB 8

TAB 8A

MEMORANDUM

DATE: March 3, 2023

TO: Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules

FROM: Catherine T. Struve

RE: Project on self-represented litigants' filing and service

Thank you for the illuminating discussions of this project during the fall 2022 advisory committee meetings. Those discussions generated further topics for investigation. By the time of the spring 2023 advisory committee meetings, I hope to have conducted further interviews that may shed light on some of the factual questions that came up during the fall meetings. Part I of this memo briefly summarizes a number of those questions, which concern increases to electronic access to court by self-represented litigants (whether via CM/ECF or alternative means) and service by self-represented litigants on CM/ECF participants. The latter topic – namely, whether it may be desirable to eliminate the rules' requirement for paper service on CM/ECF participants by litigants who lack CM/ECF access – also generated a technical question about how such a change might affect the operation of the "three-day rule" in the rules' time-computation provisions. That query is a facet of a more general question: whether such a change would affect the operation of time periods that are measured after service of a paper. Part II of this memo addresses that question.

A fuller discussion of the self-represented litigants' filing and service project can be found in my August 2022 memo, which was included in the fall 2022 advisory committee agenda books. Under the national electronic-filing rules that took effect in 2018, self-represented litigants presumptively must file non-electronically, but they can file electronically if authorized to do so by court order or local rule.[1] In late 2021, in response to a number of proposals

1 *See* Civil Rule 5(d)(3); Appellate Rule 25(a)(2)(B); Bankruptcy Rules 5005(a)(2) and 8011(a)(2)(B); and Criminal Rule 49(b)(3). The Civil, Bankruptcy, and Appellate Rules permit courts – by order or "by a local rule that includes reasonable exceptions" to *require* self-represented litigants to file electronically. By contrast, the Criminal Rule does not authorize a court to *require* electronic filing by a self-represented litigant. *See* Part I.A.1 of my August 2022 memo.

submitted to the advisory committees,[2] a cross-committee working group was formed to study whether developments since 2018 provide a reason to alter the rules' approach to e-filing by self-represented litigants. This working group includes the reporters for the Appellate, Bankruptcy, Civil, and Criminal Rules advisory committees as well as attorneys from the Rules Committee Support Office and researchers from the Federal Judicial Center (FJC). The working group's efforts have been informed by a study conducted by Tim Reagan, Carly Giffin, and Roy Germano of the FJC. The final version of the FJC report became available in May 2022.[3]

I. Topics currently under investigation

Through inquiries between now and the time of the spring meetings, I hope to gather some answers to questions that surfaced during the fall 2022 discussions. Those questions concern three principal topics: access to CM/ECF for self-represented litigants; exempting self-represented litigants from the requirement of separate service on CM/ECF participants; and alternative (non-CM/ECF) modes of electronic access and notice for self-represented litigants.

A. Access to CM/ECF for self-represented litigants

The advisory committees have had varying discussions, so far, concerning the possibility of amending one or more of the national sets of rules to broaden self-represented litigants' access to CM/ECF. The types of potential amendments under discussion would not require the use of CM/ECF by self-represented litigants, but could switch the default rule (that is, provide a presumption of voluntary access to CM/ECF – for non-incarcerated litigants[4] – unless a court acted to deny such access) or could set a standard for a court's consideration of whether to grant such access.[5] Participants in the discussions raised a number of concerns that could usefully be investigated by inquiries with selected courts that currently provide broader access to CM/ECF for self-represented litigants.

The inquiries in this regard will focus on how self-represented litigants' access to

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2 *See, e.g.*, Suggestion No. 21-CV-J (Sai) (proposing adoption of nationwide presumptive permission for self-represented litigants to file electronically); Suggestion No. 20-CV-EE (John Hawkinson) (proposing that if the requirement of permission by court order or local rule is retained, then the national rules could be amended to address the standard for granting permission).

3 See Tim Reagan et al., Federal Courts' Electronic Filing by Pro Se Litigants (FJC 2022), available at https://www.fjc.gov/content/368499/federal-courts-electronic-filing-pro-se-litigants ("FJC Study").

4 I will inquire about the courts' approach to incarcerated self-represented filers as well. Based on our study so far, I expect to hear that the courts that grant CM/ECF access to non-incarcerated self-represented litigants typically do not extend that access to incarcerated self-represented litigants.

5 As to the latter question, it is worth noting that in a minority of district courts CM/ECF access appears to be flatly unavailable to self-represented litigants – an approach that seems out of step with a majority of the district courts around the country. See FJC Study, supra note 3, at 7.

CM/ECF works in the districts that offer it, and perhaps also how it could work in future. For example, how are self-represented litigants identified for CM/ECF purposes, given that they lack attorney ID numbers? How do courts handle CM/ECF docketing errors (e.g., wrong event or wrong case) by self-represented litigants? Does the court require training on use of CM/ECF, and how is that training provided?[6] Has the clerk's office experienced burdens and/or benefits as a result of CM/ECF access by self-represented litigants? Are inappropriate filings more troublesome when made by a CM/ECF user, especially as compared to paper filings by similarly situated users? Have self-represented litigants inappropriately shared their CM/ECF credentials? Does the version of CM/ECF matter? Is there a possibility for CM/ECF to be set so that a filing could be "gated," that is held for clerk's office review after it is uploaded into CM/ECF and before it is placed into the electronic docket?[7] What are the options and approaches for handling case-initiating filings (as distinct from filings in a case that has already been opened)? What resources would a court find necessary or useful if it were to permit or expand CM/ECF access for self-represented litigants?

B. Exempting litigants from separate service on CM/ECF participants

As discussed in Part II, a separate question concerns whether to repeal the current rules' requirement that non-CM/ECF users serve CM/ECF users separately from the notice of electronic filing generated after a filing is scanned and uploaded into CM/ECF. Inquiries relating to that topic will focus on the logistics in districts[8] that have exempted self-represented litigants[9] from serving CM/ECF participants.

Relevant questions include: How do the self-represented litigants know who is in CM/ECF (and need not be separately served) and who is not in CM/ECF (such that separate service is still required)?[10] Does the exemption only concern service on CM/ECF participants, or

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6 It would be useful to inquire about training both for self-represented litigants and for attorneys. See, e.g., http://www.cod.uscourts.gov/Portals/0/Documents/CMECF/Required_Reading_for_Electronic_Filing.pdf.

7 The FJC Study reports a practice that is somewhat analogous, albeit with respect to case-initiating filings. A number of courts permit attorneys to file complaints via CM/ECF without opening a new case file; the filing goes into a shell case, and the clerk's office then (if appropriate) opens the new case file and transfers the filing into it. See FJC Study, supra note 3, at 6.

8 Local provisions indicate that these districts include the District of Arizona and the Southern District of New York.

9 On this set of issues, the inquiry should focus on both incarcerated and non-incarcerated litigants. Indeed, relief from the burden of making paper service may be particularly important for a litigant who must pay for postage out of a prison account.

10 Litigants who file via CM/ECF receive a system-generated notice of electronic filing that

does it also extend to service on non-CM/ECF participants who have opted into an electronic-noticing program? Have the courts experienced any downsides to exempting litigants from the separate service requirement? (For example, has the clerk's office experienced any new or additional burden as a result of the change?) Does the fact that a filing is sealed make any difference? Are there any paper filings that do *not* get scanned and uploaded into CM/ECF? (Also, for purposes of comparison, how are filing and service handled when a CM/ECF user files a document under seal?)

A discrete set of questions, for these districts, concerns how they treat time periods measured from service when the service is effected through CM/ECF but the filing was filed other than through CM/ECF. (This, of course, is the topic discussed in Part II of this memo.) Questions include: What is the typical time interval between the time the clerk's office receives a paper filing and the time that the clerk's office (having scanned it) uploads it into CM/ECF? For time periods measured after service, what date is treated as the date of service – the date a paper filing is received by the clerk's office, or the date that the filing is later uploaded into CM/ECF by the clerk's office? If the date of receipt by the clerk's office is used, then (1) how does the recipient know the date of receipt and (2) are an extra three days added to the relevant time period?

C. Alternative (non-CM/ECF) modes of electronic access

This inquiry will seek further data on alternative methods of access for self-represented litigants – both for filing their own papers and for receiving others' filings in the case. Alternative modes of filing include email or portal submissions. A court could also provide a non-CM/ECF user with an alternative means of access to electronic noticing of other litigants' filings.

Inquiries on these topics will include: How have courts used portals or email submissions, and how have they handled virus scanning, file size, and other technical problems? What are the benefits and burdens to the clerk's office of an email or portal submission option for self-represented litigants? Does a litigant who files by email or by uploading to a portal qualify for the timing treatment accorded to electronic filing?[11] If the court provides access to

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says who is being automatically served and who is not. Paper filers will not receive the notice of electronic filing (unless, perhaps, they are registered for electronic noticing). We have speculated that such filers might instead draw inferences from a party's status as counseled or self-represented, or from the contact information listed on the docket sheet; or they might ask the clerk's office.

11 Under the time-computation rules, those using "electronic filing" presumptively may file up to midnight in the court's time zone, whereas those using "other means" of filing must file before the scheduled closing of the clerk's office. See Bankruptcy Rule 9006(a)(4); Civil Rule 6(a)(4); Criminal Rule 45(a)(4). Appellate Rule 26(a)(4) includes a few more tailored approaches for

electronic noticing, what benefits and challenges has the court encountered with that program?[12]

II. The application of time periods measured from service, when a paper is filed by a non-CM/ECF participant

The Appellate, Bankruptcy, Civil, and Criminal Rules require that litigants serve their filings[13] on all other parties to the litigation. But because notice through CM/ECF constitutes a method of service, the rules effectively exempt CM/ECF filers from separately serving their papers on persons that are registered users of CM/ECF. By contrast, the rules can be read to require non-CM/ECF filers to serve their papers on all other parties, even those that are CM/ECF users.

A review of Civil Rule 5 illustrates the general approach.[14] Civil Rule 5(a)(1) sets the general requirement that litigation papers "must be served on every party."[15] Civil Rule 5(b)(2)(E) provides that one way to serve a paper is by "sending it to a registered user by filing it with the court's electronic-filing system."[16] Civil Rule 5(d)(1)(B) requires a certificate of service for every filing, except that "[n]o certificate of service is required when a paper is served by filing it with the court's electronic-filing system."[17]

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particular filing scenarios, but adopts the same basic idea that electronic filers get the latest deadline – midnight in the relevant time zone.

This feature of the time-computation rules is currently under study. See generally Tim Reagan et al., Electronic Filing Times in Federal Courts (FJC 2022), available at https://www.fjc.gov/content/365889/electronic-filing-times-federal-courts .

12 Questions could include whether the electronic noticing also provides a means of electronic access to the document that is the subject of the notice, and whether the electronic noticing encompasses both other parties' filings and also court orders.

13 The rules provide separately for the service of case-initiating filings. See, e.g., Civil Rule 4 (addressing service of summons and complaint). The discussion here focuses on filings subsequent to the initiation of a case.

14 Bankruptcy Rule 7005 expressly applies Civil Rule 5 to adversary proceedings in a bankruptcy. The footnotes that follow cite provisions in Appellate Rule 25, Bankruptcy Rule 8011 (concerning appeals in bankruptcy cases), and Criminal Rule 49 that are similar to those in Civil Rule 5.

15 See also Appellate Rule 25(b) ("Unless a rule requires service by the clerk, a party must, at or before the time of filing a paper, serve a copy on the other parties to the appeal or review."); Bankruptcy Rule 8011(b) ("Unless a rule requires service by the clerk, a party must, at or before the time of the filing of a document, serve it on the other parties to the appeal."); Criminal Rule 49(a)(1) ("Each of the following must be served on every party: any written motion (other than one to be heard ex parte), written notice, designation of the record on appeal, or similar paper.").

16 See also Appellate Rule 25(c)(2)(A); Criminal Rule 49(a)(3)(A).

17 See also Appellate Rule 25(d)(1); Criminal Rule 49(b)(1).

In a case where all parties are represented by counsel,[18] these provisions combine to exempt the litigants from any requirement that they separately serve other litigants; their filings via CM/ECF automatically effect service on all parties. In a case that involves one or more self-represented litigants, however, the situation is more complicated. Service on a self-represented litigant can only be made via CM/ECF if the self-represented litigant is a registered user of CM/ECF – which occurs only if the litigant receives permission (to use CM/ECF) by court order or local rule.[19]

As for service by a self-represented, non-CM/ECF-using, litigant on a registered user of CM/ECF, one might argue – as a policy matter – that separate service is just as unnecessary as it is when the filer is a registered user of CM/ECF. Because clerk's offices routinely scan paper filings and upload them into CM/ECF, registered users will receive a CM/ECF-generated notice of electronic filing each time a paper filing (or a filing submitted by email or via a portal) is uploaded into CM/ECF in one of their cases. However, a number of courts appear to interpret the current rules to require that a person filing by means other than CM/ECF must separately serve the filing, even when the recipient of the filing is a registered user of CM/ECF.[20]

Accordingly, if the policy judgment is made that non-CM/ECF users should not be required to serve CM/ECF users, it may be desirable to amend the national rules to clarify that they impose no such requirement. My August 2022 memo sketched one possible amendment, using Civil Rule 5 as the illustration.

But during the fall 2022 discussions, we realized that it is necessary to consider how such an amendment would interact with the "three-day rule" in the rules' time-computation provisions. The "three-day rule" provides a cushion of extra time for deadlines measured after

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18 Civil Rule 5(b)(1) presumptively requires that service on a represented party "must be made on the attorney." See also Appellate Rule 25(b); Criminal Rule 49(a)(2). And Civil Rule 5(d)(3)(A)'s presumptive requirement that "[a] person represented by an attorney must file electronically" guarantees, in practice, that any attorney appearing as counsel of record will be a registered user of CM/ECF. See also Appellate Rule 25(a)(2)(B)(i); Criminal Rule 49(b)(3)(A).

19 See footnote 1 and accompanying text.

20 See, e.g., Pro Se Handbook for Civil Suits, U.S. District Court, Northern District of Texas, § 6 ("If you and the opposing side are both ECF users, the ECF system will complete the service for you, and a Certificate of Service is not required. If either of you is not an ECF user, or if you learn that service sent through ECF did not reach the person, you must serve the document by other means …."), available at https://www.txnd.uscourts.gov/sites/default/files/documents/handbook.pdf; Electronic Submission For Pro Se Filers, U.S. District Court, Western District of Texas ("Service of pleadings filed in the drop box must be performed by the filing party."), available at https://www.txwd.uscourts.gov/filing-without-an-attorney/electronic-filing-for-pro-se/ .

service,[21] where the service is accomplished through a means that the rulemakers expected to include a time delay. Civil Rule 6(d) illustrates the mechanism:

> **Rule 6. Computing and Extending Time; Time for Motion Papers**
>
> * * *
>
> **(d) Additional Time After Certain Kinds of Service.** When a party may or must act within a specified time after being served and service is made under Rule 5(b)(2)(C) (mail), (D) (leaving with the clerk), or (F) (other means consented to), 3 days are added after the period would otherwise expire under Rule 6(a).

The Rule 5 sketch in the fall 2022 agenda books would not have worked properly with the three-day rule, due to the interaction of two features in that sketch: First, proposed Rule 5(b)(3) would have defined service on a CM/ECF user as "filing" without accounting for the possibility of delay between the paper's filing[22] and its uploading into CM/ECF. And second, Rule 6(d)'s three-day rule would not have applied to service under proposed Rule 5(b)(3), because by Rule 6(d)'s terms the extra three days apply only when service is made under Rules 5(b)(2)(C), (D), or (F). A different way of putting the problem is that, when adjusting what is considered "service," we need to be aware of how that adjustment affects the operation of time periods measured from the date of service.

Fortunately, there are ways to ensure that a proposed amendment accounts for the timing concerns reflected in the three-day rule. One simple way to do so is to adjust proposed Rule 5(b)(3) so that service via CM/ECF is not complete until the paper is actually in CM/ECF. The sketch that follows takes that approach.

In the course of preparing this memo, I became aware of one other consideration. The fall 2022 Rule 5(b) sketch sought to streamline the rule by redefining service on a CM/ECF user as filing. That still strikes me as the cleanest and simplest approach. But that approach needs to be

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21 For such deadlines in the Civil Rules, see, e.g., Rule 11(c)(2) (time for correcting a litigation paper after service of Rule 11 motion); Rule 15(a)(1)(B) (time to amend pleading as of right); Rule 15(a)(3) (time to respond to amended pleading); Rule 33(b)(2) (time to respond to interrogatories); Rule 34(b)(2)(A) (time to respond to request for documents or ESI); Rule 36(a)(3) (time to respond to requests for admission); Rules 38(b)(1) & (c) (time for making jury demand); Rule 59(c) (time to file affidavits in opposition to new trial motion); Rule 68(a) (time to respond to offer of judgment). (This is an illustrative, not exhaustive, list.)

22 Civil Rule 5(d)(2) provides that "[a] paper not filed electronically is filed by *delivering* it: (A) *to the clerk*; or (B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk" (emphasis added). Thus, the clerk's receipt of the filing, not the clerk's later upload of the document into CM/ECF, would seem to be defined as the time of "filing" under the current rule.

nuanced to account for the fact that certain papers (such as disclosures and discovery requests and responses) are served without being filed.[23] The sketch that follows accounts for this possibility by providing that, where a paper is not filed, service is governed by Rule 5(b)(2).

Rule 5. Serving and Filing Pleadings and Other Papers

* * *

(b) Service: How Made.

(1) Serving an Attorney. If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party.

(2) Service <u>on non-users of electronic-filing [and electronic-noticing] system[s]</u> ~~in General~~. A paper is served under this rule <u>on [one who has not registered for the court's electronic-filing system] [one who has not registered for either the court's electronic-filing system or a court-provided electronic-noticing system]</u> by:

(A) handing it to the person;

(B) leaving it:

(i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or

(ii) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(C) mailing it to the person's last known address--in which event service is complete upon mailing;

(D) leaving it with the court clerk if the person has no known address;

(E) ~~sending it to a registered user by filing it with the court's electronic-filing system or~~ sending it by ~~other~~ electronic means that the person consented to in writing--in ~~either of~~ which

23 See Civil Rule 5(d)(1)(A).

events service is complete upon ~~filing or~~ sending, but is not effective if the filer or sender learns that it did not reach the person to be served; or

(F) delivering it by any other means that the person consented to in writing--in which event service is complete when the person making service delivers it to the agency designated to make delivery.

(3) ~~Using Court Facilities. [Abrogated (Apr. 26, 2018, eff. Dec. 1, 2018.)]~~ **Service on users of the court's electronic-filing [or electronic-noticing] system**.

(A) A paper that must be filed is served under this rule on a registered user of [either] the court's electronic-filing system [or a court-provided electronic-noticing system] by filing it.
(B) If the paper is filed via the court's electronic-filing system, service under Rule 5(b)(3)(A) is complete upon filing.
(C) If the paper is filed other than via the court's electronic-filing system, service under Rule 5(b)(3)(A) is complete when the paper is uploaded into[24] the court's electronic-filing system.[25]
(D) Service under Rule 5(b)(3)(A) is not effective if the filer learns that it did not reach the person to be served.
(E) Rule 5(b)(2) governs service of a paper that is not filed.

* * *

(d) Filing.

(1) Required Filings; Certificate of Service.

* * *

(B) Certificate of Service. No certificate of service is required when a paper is served ~~by filing it with the court's electronic-filing system~~ under subdivision (b)(3)(A). When a paper

24 "Uploaded into" is used here as a placeholder for the concept, which is that the relevant demarcation should be the point in time when the CM/ECF system generates the notice of electronic filing. It may be useful to consider other possible formulations; "entered in" has been suggested as an alternative.
25 This new provision would remove any need to include this type of service within Rule 6(d)'s three-day rule.

that is required to be served is served by other means:

> (i) if the paper is filed, a certificate of service must be filed with it or within a reasonable time after service; and
>
> (ii) if the paper is not filed, a certificate of service need not be filed unless filing is required by court order or by local rule.

* * *

The sketch above presents one way to lift the requirement of service on CM/ECF users. Other ways doubtless exist, but I present this sketch to illustrate that it is feasible to account for the timing concern that arose during the committees' fall 2022 discussions.

III. Conclusion

This memo presents an interim report. I hope to have further information to share with the advisory committees by the spring meetings. If Part I's list of questions strikes you as incomplete, I welcome suggestions concerning additional questions that we should be asking.

TAB 9

Effective Date	Rule	Summary
December 2018	8, 11, 39	Conforms the Appellate Rules to a proposed change to Civil Rule 62(b) that eliminates the antiquated term "supersedeas bond" and makes plain an appellant may provide either "a bond or other security."
	25	Amendments to Rule 25 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service.
December 2019	3, 13	Changes the word "mail" to "send" or "sends" in both rules, although not in the second sentence of Rule 13.
	26.1, 28, 32	Rule 26.1 amended to change the disclosure requirements, and Rules 28 and 32 amended to change the term "corporate disclosure statement" to "disclosure statement" to match the wording used in amended Rule 26.1.
	25(d)(1)	Eliminated unnecessary proofs of service in light of electronic filing.
	5.21, 26, 32, 39	Technical amendment that removed the term "proof of service."
December 2020	35, 40	Amendment clarifies that length limits apply to responses to petitions for rehearing plus minor wording changes.
December 2021	3	Amendment addresses the relationship between the contents of the notice of appeal and the scope of the appeal. The structure of the rule is changed to provide greater clarity, expressly rejecting the expressio unius approach, and adds a reference to the merger rule.
	6	Amendment conforms the rule to amended Rule 3.
	Forms 1 and 2	Amendments conform the forms to amended Rule 3, creating Form 1A and Form 1B to provide separate forms for appeals from final judgments and appeals from other orders.
December 2022	25	Treats remote electronic access to Railroad Retirement Act cases like Social Security cases.
	42	Requires dismissal of appeal if parties agree.

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Subcommittee on Costs on Appeal

Re: Costs on Appeal (21-AP-D)

Date: March 20, 2023

The style consultants have reviewed the proposed amendments to Federal Rule of Appellate Procedure 39. Here is a revised draft, taking into account their comments.

Rule 39. Costs

(a) ~~Against Whom Assessed~~Allocating Costs Among the Parties. The following rules apply to allocating costs among the parties unless the law provides,~~-~~ the parties agree, or the court orders otherwise:

(1) if an appeal is dismissed, costs are ~~taxed~~ allocated against the appellant;

(2) if a judgment is affirmed, costs are ~~taxed~~ allocated against the appellant;

(3) if a judgment is reversed, costs are ~~taxed~~ allocated against the appellee;

(4) if a judgment is affirmed in part, reversed in part, modified, or vacated, each party bears its own costs ~~costs are taxed only as the court orders~~.

(b) Reconsideration. Once the allocation of costs is established by the entry of judgment, a party may seek reconsideration of that allocation by filing a motion in the court of appeals within 14 days after the entry of judgment. But issuance of the mandate under Rule 41 must not be delayed awaiting a determination of a motion seeking reconsideration under this paragraph. The court of appeals retains jurisdiction to decide the motion after the mandate issues.

(c) Where Applicable. The allocation of costs applies both to costs taxable in the court of appeals under paragraph (e) and to costs taxable in district court under paragraph (f).

(d)~~(b)~~ Costs For and Against the United States. Costs for or against the United States, its agency, or officer will be ~~assessed~~ allocated under Rule 39(a) only if authorized by law.

(e) Costs on Appeal Taxable in the Court of Appeals.

(1) The following costs on appeal are taxable in the court of appeals for the benefit of the party entitled to costs:

(A) the production of necessary copies of a brief or appendix, or copies of records authorized by Rule 30(f);

(B) the docketing fee; and

(C) a filing fee paid in the court of appeals.

(2)~~(c)~~ Costs of Copies. Each court of appeals must, by local rule, set~~fix~~ the maximum rate for taxing the cost of producing necessary copies of a brief or appendix, or copies of records authorized by Rule 30(f). The rate must not exceed that generally charged for such work in the area where the clerk's office is located and should encourage economical methods of copying.

(3)~~(d)~~ Bill of Costs; Objections; Insertion in Mandate.

(A~~1~~) A party who wants costs taxed in the court of appeals must—within 14 days after ~~entry of~~ judgment is entered—file with the circuit clerk and serve an itemized and verified bill of those costs.

(B~~2~~) Objections must be filed within 14 days after ~~service of~~ the bill of costs is served, unless the court extends the time.

(C~~3~~) 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.

(f)~~(e)~~ Costs on Appeal Taxable in the District Court. 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 bond or other security to preserve rights pending appeal; and

(4) the fee for filing the notice of appeal.

Committee Note

In *City of San Antonio v. Hotels.com*, 141 S. Ct. 1628 (2021), the Supreme Court held that Rule 39 does not permit a district court to alter a court of appeals' allocation of the costs listed in subdivision (e) of that Rule. The Court also observed that "the current Rules and the relevant statutes could specify more clearly the procedure that such a party should follow to bring their arguments to the court of appeals." *Id*. at 1638. The amendment does so. Stylistic changes are also made.

Subdivision (a). Both the heading and the body of the Rule are amended to clarify that allocation of the costs among the parties is done by the court of appeals. The court may allow the default rules specified in subdivision (a) to operate based on the judgment, or it may allocate them differently based on the equities of the situation. Subdivision (a) is not concerned with calculating the amounts owed; it is concerned with who bears those costs, and in what proportion. The amendment also specifies a default for mixed judgments: each party bears its own costs.

Subdivision (b). The amendment specifies a procedure for a party to ask the court of appeals to reconsider the allocation of costs established pursuant to subdivision (a). A party may do so by motion in the court of appeals within 14 days after the entry of judgment. The mandate is not stayed pending resolution of this motion, but the court of appeals retains jurisdiction to decide the motion after the mandate issues.

Subdivision (c). Codifying the decision in *Hotels.com*, the amendment also makes clear that that the allocation of costs by the court of appeals governs the taxation of costs both in the court of appeals and in the district court.

Subdivision (d). The amendment uses the word "allocated" to match subdivision (a).

Subdivision (e). The amendment specifies which costs are taxable in the court of appeals and clarifies that the procedure in that subdivision governs the taxation of costs taxable in the court of appeals.

Subdivision (f). The provisions governing costs taxable in the district court are lettered (f) rather than (e).

Here is a clean version of the Rule text.

Rule 39. Costs

(a)Allocating Costs Among the Parties. The following rules apply to allocating costs among the parties unless the law provides, the parties agree, or the court orders otherwise:

(1) if an appeal is dismissed, costs are allocated against the appellant;

(2) if a judgment is affirmed, costs are allocated against the appellant;

(3) if a judgment is reversed, costs are allocated against the appellee;

(4) if a judgment is affirmed in part, reversed in part, modified, or vacated, each party bears its own costs.

(b) Reconsideration. Once the allocation of costs is established by the entry of judgment, a party may seek reconsideration of that allocation by filing a motion in the court of appeals within 14 days after the entry of judgment. But issuance of the mandate under Rule 41 must not be delayed awaiting a determination of a motion seeking reconsideration under this paragraph. The court of appeals retains jurisdiction to decide the motion after the mandate issues.

(c) Where Applicable. The allocation of costs applies both to costs taxable in the court of appeals under paragraph (e) and to costs taxable in district court under paragraph (f).

(d) Costs For and Against the United States. Costs for or against the United States, its agency, or officer will be allocated under Rule 39(a) only if authorized by law.

(e) Costs on Appeal Taxable in the Court of Appeals.

(1) The following costs on appeal are taxable in the court of appeals for the benefit of the party entitled to costs:

(A) the production of necessary copies of a brief or appendix, or copies of records authorized by Rule 30(f);

(B) the docketing fee; and

(C) a filing fee paid in the court of appeals.

(2) Costs of Copies. Each court of appeals must, by local rule, set the maximum rate for taxing the cost of producing necessary copies of a brief or appendix, or copies of records authorized by Rule 30(f). The rate must not exceed that generally charged for such work in the area where the clerk's office is located and should encourage economical methods of copying.

(3) Bill of Costs; Objections; Insertion in Mandate.

(A) A party who wants costs taxed in the court of appeals must—within 14 days after judgment is entered—file with the circuit clerk and serve an itemized and verified bill of those costs.

(B) Objections must be filed within 14 days after the bill of costs is served, unless the court extends the time.

(C) 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.

(f) Costs on Appeal Taxable in the District Court. 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 bond or other security to preserve rights pending appeal; and

(4) the fee for filing the notice of appeal.

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Direct Appeals in Bankruptcy Subcommittee

Re: FRAP 5 and 6 and Bankruptcy Direct Appeals

Date: March 20, 2023

Here is an updated draft of FRAP 6 after receiving comments from the style consultants.

Rule 6. Appeal in a Bankruptcy Case

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

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

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

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

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

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

The word "bankruptcy" appears to have been inadvertently omitted from the phrase "bankruptcy appellate panel"; this amendment would correct that.

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

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

(A) **Motion for Rehearing.**

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

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

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

(B) **The record on appeal.**

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

(ii) An appellee who believes that other parts of the record are necessary must, within 14 days after being served with the appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included.

(iii) The record on appeal consists of:

- the redesignated record as provided above;

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

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

(C) **Making the Record Available.**

(i) When the record is complete, the district clerk or bankruptcy-appellate-panel clerk must number the documents constituting the record and promptly make it available to the circuit clerk. If the clerk makes the record available in paper form, the clerk will not send documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals, unless directed to do so by a party or the circuit clerk. If unusually bulky or heavy exhibits are to be made available in paper form, a party must arrange with the clerks in advance for their transportation and receipt.

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

(D) **Filing the record**

When the district clerk or bankruptcy-appellate-panel clerk has made the record available, the circuit clerk must note that fact on the docket. The date noted on the docket serves as the filing date of the record. The circuit clerk must immediately notify all parties of the filing date.

(c) Direct Appeal ~~Review~~ from a Judgment, Order, or Decree of a Bankruptcy Court by ~~Permission~~ Authorization Under 28 U.S.C. § 158(d)(2).

We propose changing "Review" to "Appeal" and "Permission" to "Authorization" to be consistent with the language used in § 158(d)(2). In addition, we propose adding "from a Judgment, Order, or Decree of a

Bankruptcy Court" for clarity and to be consistent with other subsections of Rule 6.

(1) **Applicability of Other Rules.** These rules apply to a direct appeal from a judgment, order, or decree of a bankruptcy court by ~~permission~~ authorization under 28 U.S.C. § 158(d)(2), but with these qualifications:

(A) Rules 3–4, 5~~(a)(3)~~ (except as provided in this subdivision (c)), 6(a), 6(b), 8(a), 8(c), 9–12, 13–20, 22–23, and 24(b) do not apply; and

(B) as used in any applicable rule, "district court" or "district clerk" includes—to the extent appropriate—a bankruptcy court or bankruptcy appellate panel or its clerk~~; and~~

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

We propose changing the language of the first sentence to be consistent with the title of Rule 6(c). In addition, we propose changing the list of rules that are not applicable to include Rule 5, except as provided in Rule 6(c). Much of Rule 5 does not apply cleanly to direct appeals of bankruptcy court orders, so we believe it is clearer to incorporate the portions that do expressly and otherwise include an appropriately modified provision in Rule 6(c) itself, so that parties need only look at Rule 6(c) to understand the relevant procedures. This also has the benefit of eliminating current Rule 6(c)(1)(C), which is quite confusing.

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

We propose adding the language above to be consistent with other subsections of Rule 6.

(A) Petition to Authorize a Direct Appeal. Within 30 days after a certification of a bankruptcy court's order for direct appeal to the court of appeals under 28 U.S.C. § 158(d)(2) becomes effective under Bankruptcy Rule 8006(a), any party to the appeal may ask the court of appeals to authorize a direct appeal by filing a petition with the circuit clerk under Bankruptcy Rule 8006(g).

Proposed new Rule 6(c)(2)(A) is substantively identical to Bankruptcy Rule 8006(g) (with the proposed amendments mentioned above). While including this is probably not strictly necessary, it seems helpful to have

the entire process for seeking authorization for a direct appeal contained in the FRAP (which is probably where most people would look for it).

(B) **Contents of the Petition**. The petition must include the material required by Rule 5(b)(1) and an attached copy of:

(i) the certification; and

(ii) the notice of appeal of the bankruptcy court's judgment, order, or decree filed under Bankruptcy Rule 8003 or 8004.

Proposed new Rule 6(c)(2)(B) provides that, in addition to the contents required by Rule 5, a petition for direct appeal must include a copy of the certification and the notice of appeal.

(C) **Answer or Cross-Petition; Oral Argument.** Rule 5(b)(2) governs an answer or cross-petition. Rule 5(b)(3) governs oral argument.

Proposed new Rule 6(c)(2)(C) provides that responses to petitions and oral argument are governed by Rule 5(b).

(D) **Form of Papers; Number of Copies; Length Limits.** Rule 5(c) governs the required form, number of copies to be filed, and length limits applicable to the petition and any answer or cross-petition.

Proposed new Rule 6(c)(2)(D) is added on the same theory as 6(c)(2)(C), to make clear that the form of papers is governed by Rule 5(c).

(E) Notice of Appeal; Calculating Time. A notice of appeal to the court of appeals need not be filed. The date when the order authorizing the direct appeal is entered serves as the date of the notice of appeal for calculating time under these rules.

Proposed new Rule 6(c)(2)(E) contains the substance of Rule 5(d)(2), modified to take into account that the appellant will already have filed a notice of appeal to the district court/BAP and that the court of appeals' order granting a direct appeal is elsewhere referred to as an "authorization."

(F) Notification of the Order Authorizing Direct Appeal; Fees; Docketing of the Appeal.

(i) When the court of appeals enters the order authorizing the direct appeal, the circuit clerk must notify the bankruptcy clerk and the district court clerk or bankruptcy appellate panel clerk of the entry.

(ii) Within 14 days after the order authorizing the direct appeal is entered, the appellant must pay the bankruptcy clerk any unpaid required fee, including:

(I) the fee required for the appeal to the district court or bankruptcy appellate panel; and

(II) the difference between the fee for an appeal to the district court or bankruptcy appellate panel and the fee required for an appeal to the court of appeals.

(iii) The bankruptcy clerk must notify the circuit clerk once the appellant has paid all required fees. Upon receiving the notice, the circuit clerk must enter the direct appeal on the docket.

Proposed new Rule 6(c)(2)(F) contains the substance of Rule 5(d)(1)(a) and 5(d)(3), with some modifications to take account of the direct appeal context. Rule 6(c)(2)(F)(i) provides that the circuit clerk must notify the bankruptcy court clerk and the district court/BAP clerk when the order authorizing the direct appeal is entered. Rule 6(c)(2)(F)(ii) provides that within 14 days of entry of the order authorizing the direct appeal, the appellant must pay all required filing fees that have not yet been paid. For clarity, it spells out that those fees include the initial filing fee for the district court/BAP appeal (if not already paid) and the difference between the fee for a district court/BAP appeal and the higher filing fee for a COA appeal. Rule 6(c)(2)(F)(iii) then provides that, once all fees are paid, the bankruptcy clerk must notify the circuit clerk, who then dockets the appeal.

(G) Bond for Costs on Appeal. The bankruptcy court may require an appellant to file a bond or provide other security to ensure payment of costs on appeal under Rule 7.

Proposed new Rule 6(c)(2)(G) contains the substance of Rule 5(d)(1)(B), modified to provide that the bankruptcy court (rather than the district court) may order security for costs on appeal.

(H) Stay Pending Appeal. Bankruptcy Rule 8007 governs any stay pending appeal.

Rule 6(c)(2)(H) was formerly Rule 6(c)(2)(C) and appeared between two subparagraphs relating to the record on appeal. Because it will need to be renumbered in any event, we propose moving this subparagraph here, following the provision regarding cost bonds, which seems to be a more logical placement. The only alterations made to the text are changing "stays" to "any stay" and changing "applies to" to "governs" for consistency with other subparagraphs of Rule 6(c)(2).

~~(A)~~**(I) The Record on Appeal**. Bankruptcy Rule 8009 governs the record on appeal. If a party has already filed a document or completed a step required to assemble the record for the appeal to the district court or bankruptcy appellate panel, the party need not repeat that filing or step.

We propose modifying Rule 6(c)(2)(I) (formerly 6(c)(2)(A)) to make clear that if, for example, the appellant has already filed a designation of the record on appeal in connection with the initial appeal to the district court/BAP (which will likely be the case), it is not necessary to repeat the step. The reference to Bankruptcy Rule 8009, by itself, does not make that perfectly clear.

~~(B)~~(J) **Sending** ~~**Making**~~ **the Record** ~~**Available**~~**.** Bankruptcy Rule 8010 governs ~~completing~~ sending the record ~~and making it available~~. If, when the order authorizing the direct appeal has been entered, the bankruptcy clerk has already sent the record to the clerk of the district court or bankruptcy appellate panel, the bankruptcy clerk must resend the record to the circuit clerk.

We propose modifying Rule 6(c)(2)(J) (formerly 6(c)(2)(B)) to conform to the language employed by restyled Bankruptcy Rule 8010 (which refers to "sending the record"). Because Bankruptcy Rule 8010 does not itself make this clear (it merely requires the bankruptcy clerk to send the record to the clerk of the court where the appeal is pending when the record is complete), we also propose adding a sentence making clear that if the bankruptcy clerk has already sent the record to the district court or BAP when the court of appeals authorizes the direct appeal, the record should be resent to the court of appeals.

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

As noted above, we propose moving former Rule 6(c)(2)(C) so that it follows the subparagraph regarding bonds for costs on appeal, rather than coming awkwardly between subparagraphs relating to the record on appeal.

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

~~**(E)**~~**(L) Filing a Representation Statement**. Unless the court of appeals designates another time, within 14 days ~~after entry of~~ the order ~~granting permission to appeal~~ authorizing the direct appeal is entered, the attorney for each party to the appeal ~~the attorney who sought permission~~ must file a statement with the circuit clerk naming the parties that the attorney represents on appeal.

Since the proposed amendments to the rules clarify that any party may file a petition to authorize a direct appeal, we suggest modifying Rule 6(c)(2)(L) (formerly Rule 6(c)(2)(E)) to provide that counsel for each party must file a representation statement. We also suggest changing "granting permission to appeal" to "authorizing the direct appeal" to conform to the language used throughout the rest of Rule 6(c).

Committee Note

Subdivision (b). Subdivision (b)(1)(C) is amended to correct the omission of the word "bankruptcy" from the phrase "bankruptcy appellate panel."

Subdivision (c). Subdivision (c) was added to Rule 6 in 2014 to set out procedures governing discretionary direct appeals from orders, judgments, or decrees of the bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2).

Typically, an appeal from an order, judgment, or decree of a bankruptcy court may be taken either to the district court for the relevant

district or, in circuits that have established bankruptcy appellate panels, to the bankruptcy appellate panel for that circuit. 28 U.S.C. § 158(a). Final orders of the district court or bankruptcy appellate panel resolving appeals under § 158(a) are then appealable as of right to the court of appeals under § 158(d)(1).

That two-step appeals process can be redundant and time-consuming and could in some circumstances potentially jeopardize the value of a bankruptcy estate by impeding quick resolution of disputes over disposition of estate assets. In the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Congress enacted 28 U.S.C. § 158(d)(2) to provide that, in certain circumstances, appeals may be taken directly from orders of the bankruptcy court to the courts of appeals, bypassing the intervening appeal to the district court or bankruptcy appellate panel.

Specifically, § 158(d)(2) grants the court of appeals jurisdiction of appeals from any order, judgment, or decree of the bankruptcy court if (a) the bankruptcy court, the district court, the bankruptcy appellate panel, or all parties to the appeal certify that (1) "the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance"; (2) "the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions"; or (3) "an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken" *and* (b) "the court of appeals authorizes the direct appeal of the judgment, order, or decree." 28 U.S.C. § 158(d)(2).

Bankruptcy Rule 8006 governs the procedures for certification of a bankruptcy court order for direct appeal to the court of appeals. Among other things, Rule 8006 provides that, to become effective, the certification must be filed in the appropriate court, the appellant must file a notice of appeal of the bankruptcy court order to the district court or bankruptcy appellate panel, and the notice of appeal must become effective. Fed. R. Bankr. P. 8006(a). Once the certification becomes effective under Rule 8006(a), a petition seeking authorization of the direct appeal must be filed with the court of appeals within 30 days. *Id.* 8006(g).

Rule 6(c) governs the procedures applicable to a petition for authorization of a direct appeal and, if the court of appeals grants the petition, the initial procedural steps required to prosecute the direct appeal in the court of appeals.

As promulgated in 2014, Rule 6(c) incorporated by reference most of Rule 5, which governs petitions for permission to appeal to the court of appeals from otherwise non-appealable district court orders. It has become evident over time, however, that Rule 5 is not a perfect fit for direct appeals of bankruptcy court orders to the courts of appeals. The primary difference is that Rule 5 governs discretionary appeals from district court orders that are otherwise non-appealable, and an order granting a petition for permission to appeal under Rule 5 thus initiates an appeal that otherwise would not occur. By contrast, an order granting a petition to authorize a direct appeal under Rule 6(c) means that an appeal that has already been filed and is pending in the district court or bankruptcy appellate panel will instead be heard in the court of appeals. As a result, it is not always clear precisely how to apply the provisions of Rule 5 to a Rule 6(c) direct appeal.

The new amendments to Rule 6(c) are intended to address that problem by making Rule 6(c) self-contained. Thus, Rule 6(c)(1) is amended to provide that Rule 5 is not applicable to Rule 6(c) direct appeals except as specified in Rule 6(c) itself. Rule 6(c)(2) is also amended to include the substance of applicable provisions of Rule 5, modified to apply more clearly to Rule 6(c) direct appeals. In addition, stylistic and clarifying amendments are made to conform to other provisions of the Appellate Rules and Bankruptcy Rules and to ensure that all the procedures governing direct appeals of bankruptcy court orders are as clear as possible to both courts and practitioners.

Subdivision (c)—Title. The title of subdivision (c) is amended to change "Direct Review" to "Direct Appeal" and "Permission" to "Authorization," to be consistent with the language of 28 U.S.C. § 158(d)(2). In addition, the language "from a Judgment, Order, or Decree of a Bankruptcy Court" is added for clarity and to be consistent with other subdivisions of Rule 6.

Subdivision (c)(1). The language of the first sentence is amended to be consistent with the title of subdivision (c). In addition, the list of rules in subdivision (c)(1)(A) that are inapplicable to direct appeals is modified to include Rule 5, except as provided in subdivision (c) itself. Subdivision (c)(1)(C), which modified certain language in Rule 5 in the context of direct appeals, is therefore deleted. As set out in more detail below, the provisions of Rule 5 that are applicable to direct appeals have been added, with appropriate modifications to take account of the direct appeal context, as new provisions in subdivision (c)(2).

Subdivision (c)(2). The language "to the rules made applicable by Rule 6(c)(1)" is added to the first sentence for consistency with other subdivisions of Rule 6.

Subdivision (c)(2)(A). Subdivision (c)(2)(A) is a new provision that sets out the basic procedure and timeline for filing a petition to authorize a direct appeal in the court of appeals. It is intended to be substantively identical to Bankruptcy Rule 8006(g), with minor stylistic changes made in light of the context of the Appellate Rules.

Subdivision (c)(2)(B). Subdivision (c)(2)(B) is a new provision that specifies the contents of a petition to authorize a direct appeal. It provides that, in addition to the material required by Rule 5, the petition must include an attached copy of the certification under § 158(d)(2) and a copy of the notice of appeal to the district court or bankruptcy appellate panel.

Subdivision (c)(2)(C). Subdivision (c)(2)(C) is a new provision. For clarity, it specifies that answers or cross-petitions are governed by Rule 5(b)(2) and oral argument is governed by Rule 5(b)(3).

Subdivision (c)(2)(D). Subdivision (c)(2)(D) is a new provision. For clarity, it specifies that the required form, number of copies to be filed, and length limits applicable to the petition and any answer or cross-petition are governed by Rule 5(c).

Subdivision (c)(2)(E). Subdivision (c)(2)(E) is a new provision that incorporates the substance of Rule 5(d)(2), modified to take into account that the appellant will already have filed a notice of appeal to the district court or bankruptcy appellate panel. It makes clear that a second notice of appeal to the court of appeals need not be filed, and that the date of entry of the order authorizing the direct appeal serves as the date of the notice of appeal for the purpose of calculating time under the Appellate Rules.

Subdivision (c)(2)(F). Subdivision (c)(2)(F) is a new provision. It largely incorporates the substance of Rules 5(d)(1)(A) and 5(d)(3), with some modifications.

Subdivision (c)(2)(F)(i) now requires that when the court of appeals enters an order authorizing a direct appeal, the circuit clerk must notify the bankruptcy clerk and the clerk of the district court or the clerk of the bankruptcy appellate panel of the order.

Subdivision (c)(2)(F)(ii) requires that, within 14 days of entry of the order authorizing the direct appeal, the appellant must pay the bankruptcy

clerk any required filing or docketing fees that have not yet been paid. Thus, if the appellant has not yet paid the required fee for the initial appeal to the district court or bankruptcy appellate panel, the appellant must do so. In addition, the appellant must pay the bankruptcy clerk the difference between the fee for the appeal to the district court or bankruptcy appellate panel and the fee for an appeal to the court of appeals, so that the appellant has paid the full fee required for an appeal to the court of appeals.

Subdivision (c)(2)(F)(iii) then requires the bankruptcy clerk to notify the circuit clerk that all fees have been paid, which triggers the circuit clerk's duty to docket the direct appeal.

Subdivision (c)(2)(G). Subdivision (c)(2)(G) is a new provision that largely incorporates the substance of Rule 5(d)(1)(B) by providing that the bankruptcy court may require the appellant to post a bond to secure potential costs on appeal under Rule 7.

Subdivision (c)(2)(H). Subdivision (c)(2)(H) was formerly subdivision (c)(2)(C). It is substantively unchanged, continuing to provide that Bankruptcy Rule 8007 governs stays pending appeal, but reflects minor stylistic revisions.

Subdivision (c)(2)(I). Subdivision (c)(2)(I) was formerly subdivision (c)(2)(A). It continues to provide that Bankruptcy Rule 8009 governs the record on appeal, but adds a sentence clarifying that steps taken to assemble the record under Bankruptcy Rule 8009 before the court of appeals authorizes the direct appeal need not be repeated after the direct appeal is authorized.

Subdivision (c)(2)(J). Subdivision (c)(2)(J) was formerly subdivision (c)(2)(B). It continues to provide that Bankruptcy Rule 8010 governs provision of the record to the court of appeals, but changes the language "making the record available" to "sending the record" to be consistent with Bankruptcy Rule 8010. It also adds a sentence clarifying that if the bankruptcy clerk has already sent the record to the district court or bankruptcy appellate panel when the court of appeals authorizes the direct appeal, the record must be resent to the circuit clerk.

Subdivision (c)(2)(K). Subdivision (c)(2)(K) was formerly subdivision (c)(2)(D). It is unchanged other than a stylistic change and being renumbered.

Subdivision (c)(2)(L). Subdivision (c)(2)(L) was formerly subdivision (c)(2)(E). Because any party may file a petition to authorize a direct appeal, it is modified to provide that the attorney for each party—rather than only the attorney for the party filing the petition—must file a representation statement. In addition, the phrase "granting permission to appeal" is changed to "authorizing the direct appeal" to conform to the language used throughout the rest of subdivision (c), and a stylistic change is made.