ADVISORY COMMITTEE
ON
APPELLATE RULES

April 10, 2024

ADVISORY COMMITTEE ON APPELLATE RULES
Meeting of April 10, 2024
Denver, CO

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Next meeting: October 9, 2024, in Washington, DC

TAB 1

TAB 1A

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

H. Thomas Byron III, Esq.
Administrative Office of the U.S. Courts
Washington, DC

Advisory Committee on Appellate Rules

Chair	Reporter
Honorable Jay S. Bybee United States Court of Appeals Las Vegas, NV	Professor Edward Hartnett Seton Hall University School of Law Newark, NJ

Advisory Committee on Bankruptcy Rules

Chair	Reporter
Honorable Rebecca B. Connelly United States Bankruptcy Court Harrisonburg, VA	Professor S. Elizabeth Gibson University of North Carolina at Chapel Hill Chapel Hill, NC

Associate Reporter

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

Advisory Committee on Civil Rules

Chair	Reporter
Honorable Robin L. Rosenberg United States District Court West Palm Beach, FL	Professor Richard L. Marcus University of California Hastings College of the Law San Francisco, CA
	Associate Reporter
	Professor Andrew Bradt University of California, Berkeley Berkeley, CA

Advisory Committee on Criminal Rules

Chair	Reporter
Honorable James C. Dever III United States District Court Raleigh, NC	Professor Sara Sun Beale Duke University School of Law Durham, NC
	Associate Reporter
	Professor Nancy J. King Vanderbilt University Law School Nashville, TN

Advisory Committee on Evidence Rules

Chair	Reporter
Honorable Patrick J. Schiltz United States District Court Minneapolis, MN	Professor Daniel J. Capra Fordham University School of Law New York, NY

ADVISORY COMMITTEE ON APPELLATE RULES

Chair	Reporter
Honorable Jay S. Bybee United States Court of Appeals Las Vegas, NV	Professor Edward Hartnett Seton Hall University School of Law Newark, NJ

Members

Linda Coberly, Esq. Winston & Strawn LLP Chicago, IL	George W. Hicks, Jr., Esq. Kirkland & Ellis LLP Washington, DC
Professor Bert Huang Columbia Law School New York, NY	Honorable Leondra R. Kruger Supreme Court of California San Francisco, CA
Honorable Carl J. Nichols United States District Court Washington, DC	Honorable Elizabeth B. Prelogar Solicitor General (ex officio) United States Department of Justice Washington, DC
Honorable Sidney R. Thomas United States Court of Appeals Billings, MT	Honorable Richard C. Wesley United States Court of Appeals Geneseo, NY
Lisa B. Wright, Esq. Office of the Federal Public Defender Washington, DC	

Liaisons

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

Molly Dwyer, Esq.
Clerk
United States Court of Appeals
San Francisco, CA

ADVISORY COMMITTEE ON APPELLATE RULES

Members	Position	District/Circuit	Start Date	End Date
Jay S. Bybee Chair	C	Ninth Circuit	Member: 2017 Chair: 2020	---- 2024
Linda Coberly	ESQ	Illinois	2023	2026
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
Sidney R. Thomas	C	Ninth Circuit	2023	2025
Richard C. Wesley	C	Second Circuit	2020	2026
Lisa B. Wright	ESQ	Assistant Federal Public Defender (Appellate) (DC)	2019	2025
Edward Hartnett Reporter	ACAD	New Jersey	2018	2025

* Ex-officio - Solicitor General

subcommittee chairs in bold

APPELLATE RULES SUBCOMMITTEES

Amicus Disclosures Subcommittee Linda Coberly Bert Huang Lisa Wright, Esq.	**Bankruptcy Appeals Subcommittee** George Hicks Bert Huang Justice Kruger
Costs on Appeal Subcommittee Mark Freeman **Judge Nichols** Judge Wesley	**IFP Form 4 Subcommittee** **Lisa Wright, Esq.**
Intervention on Appeal Subcommittee Mark Freeman Bert Huang Justice Kruger	

RULES COMMITTEE LIAISON MEMBERS

Liaisons for the Advisory Committee on Appellate Rules	Andrew J. Pincus, Esq. *(Standing)* Hon. Daniel A. Bress *(Bankruptcy)*
Liaison for the Advisory Committee on Bankruptcy Rules	Hon. William J. Kayatta, Jr. *(Standing)*
Liaisons for the Advisory Committee on Civil Rules	Hon. D. Brooks Smith (*Standing*) Hon. Catherine P. McEwen *(Bankruptcy)*
Liaison for the Advisory Committee on Criminal Rules	Hon. Paul J. Barbadoro (*Standing*)
Liaisons for the Advisory Committee on Evidence Rules	TBD (*Criminal*) Hon. Edward M. Mansfield *(Standing)* Hon. M. Hannah Lauck (*Civil*)

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
Staff

H. Thomas Byron III, Esq.
Chief Counsel
Office of the General Counsel – Rules Committee Staff
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE
Washington, DC 20544
Main: 202-502-1820

Allison A. Bruff, Esq.
Counsel
(Civil, Criminal)

Bridget M. Healy, Esq.
Counsel
(Appellate, Evidence)

S. Scott Myers, Esq.
Counsel
(Bankruptcy)

Shelly Cox
Management Analyst

Rakita Johnson
Administrative Analyst

FEDERAL JUDICIAL CENTER
Staff

Hon. John S. Cooke
Director
Federal Judicial Center
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE
Washington, DC 20544

Carly E. Giffin, Esq.
Research Associate
(Bankruptcy)

Laural L. Hooper, Esq.
Senior Research Associate
(Criminal)

Marie Leary, Esq.
Senior Research Associate
(Appellate)

Dr. Emery G. Lee
Senior Research Associate
(Civil)

Timothy T. Lau, Esq.
Research Associate
(Evidence)

Tim Reagan, Esq.
Senior Research Associate
(Standing)

TAB 1B

	FRAP Item	Proposal	Source	Current Status
	16-AP-D	Rule 3(c)(1)(B) and the Merger Rule	Neal Katyal	Effective 12/2021
	17-AP-G	Rule 42(b)–discretionary "may" dismissal of appeal on consent of all parties	Christopher Landau	Effective 12/2022
	18-AP-E	Provide privacy in Railroad Retirement Act cases as in Social Security cases	Railroad Retirement Board	Effective 12/2022
	None assigned	Rules for Future Emergencies Rules 2 and 4	Congress (CARES Act)	Effective 12/2023
	None assigned	Add Juneteenth to Rule 26	Congress	Effective 12/2023
6	18-AP-A	Rules 35 and 40 – Comprehensive review	Department of Justice	Discussed at S18 meeting and subcommittee formed Discussed at F18 meeting Discussed at S19 meeting Discussed at F19 meeting Discussed at S20 meeting Discussed at F20 meeting Draft approved for submission to Standing Committee S21 Remanded by Standing Committee June 21 Draft approved for resubmission to Standing Committee F21 Draft approved for publication by Standing Committee January 22 Correction approved for submission to Standing Committee S22 Correction approved for publication by Standing Committee June 21 Discussed at F22 meeting Final approval for submission to Standing Committee S23 Approved by Standing Committee June 23 Approved by Judicial Conference Sept 23
4	21-AP-D	Costs on Appeal	Alan Morrison	Initial consideration of suggestion and subcommittee formed F21 Discussed at S22 meeting Discussed at F22 meeting Discussed at S23 meeting Draft approved for submission to Standing Committee S23

	FRAP Item	Proposal	Source	Current Status
				Draft approved for publication by Standing Committee June 23
4	None assigned	Rule 39; Direct Appeals; Rules 4 & 6; Resetting Time to Appeal in Bankruptcy Cases	Bankruptcy Committee	Discussed at F22 meeting and subcommittee formed Discussed at S23 meeting Draft approved for submission to Standing Committee S23 Draft approved for publication by Standing Committee June 23
1	19-AP-C	IFP Standards	Sai	Initial consideration F19 Discussed at S20 meeting and subcommittee formed Discussed at F20 meeting Discussed at S21 meeting Discussed at F21 meeting Discussed at S22 meeting Discussed at F22 meeting and held
1	20-AP-D	IFP Forms	Sai	Initial consideration F20 and referred to IFP subcommittee Discussed at S21 meeting Discussed at F21 meeting Discussed at S22 meeting Discussed at F22 meeting and held
1	21-AP-B	IFP Forms	Sai	Initial consideration and referred to IFP subcommittee S21 Discussed at F21 meeting Discussed at S22 meeting Discussed at F22 meeting and held
1	21-AP-C	Amicus Disclosures	Senator Whitehouse & Representative Johnson	Issue noted and subcommittee formed F19 Initial consideration of suggestion S21 Discussed at F21 meeting Discussed at S22 meeting Discussed at F22 meeting Discussed at S23 meeting Discussed at F23 meeting
1	21-AP-E	Electronic Filing by Pro Se Litigants	Sai	Initial consideration of suggestion and referred to reporters F21 Discussed at S22 meeting Discussed at F22 meeting Discussed at S23 meeting Discussed at F23 meeting
1	20-AP-C	Pro Se Electronic Filing	Usha Jain	Initial consideration F20 and tabled pending consideration by Civil Rules Committee Referred to reporters F21

	FRAP Item	Proposal	Source	Current Status
				See 21-AP-E
1	21-AP-G	Comment on 21-AP-C	Chamber of Commerce	Initial consideration S22 See 21-AP-C
1	21-AP-H	Comment on 21-AP-C	Senator Whitehouse & Representative Johnson	Initial consideration S22 See 21-AP-C
1	22-AP-A	Comment on 21-AP-C	Senator Whitehouse & Representative Johnson	Initial consideration S22 See 21-AP-C
1	22-AP-E	Social Security Numbers in Court Filings	Senator Widen	Initial consideration S23 Discussed at S23 meeting Discussed at F23 meeting
1	22-AP-G	Intervention on Appeal	Stephen Sachs	Initial consideration and subcommittee formed S23 Discussed at F23 meeting
1	23-AP-A	Rule 29; Amicus Briefs	DRI Center	Initial consideration and referred to amicus subcommittee S23
1	23-AP-B	Rule 29; Amicus Briefs	Atlantic Legal Foundation	Initial consideration and referred to amicus subcommittee S23
1	23-AP-C	Intervention on Appeal	Judith Resnik	Initial consideration and subcommittee formed S23 See 22-AP-G
1	23-AP-I	Comment on 21-AP-C	Senator Whitehouse & Representative Johnson	Initial consideration S24
1	23-AP-K	Comment on 21-AP-C	Senator Whitehouse & Representative Johnson	Initial consideration S24
1	24-AP-A	Regulate expert information in amicus briefs	David DeMatteo	Initial consideration S24
1	23-AP-J	PACER Access	Andrew Straw	Initial consideration S24
1		Rule 15; premature petitions	Judge Randolph	Initial consideration S24
1	24-AP-B	Use of pseudonym for minors	DOJ	Initial consideration S24

	FRAP Item	Proposal	Source	Current Status
0	None assigned	Review of rules regarding appendices	Committee	Discussed at F17 meeting and a subcommittee formed to review Discussed at S18 meeting and removed from agenda Will reconsider in S21 Discussed at S21 meeting and postponed until S24
0	22-AP-C	Third-Party Litigation Funding Disclosure	Lawyers for Civil Justice	Initial consideration F22 Discussed and held pending Civil Committee S23
0	22-AP-D	Comment on 22-AP-C	International Legal Finance Association	Initial consideration S23 See 22-AP-C
0	19-AP-E	Electronic Filing Deadlines	Judge Chagares	Discussed at June 19 meeting of Standing Committee and joint committee formed Discussed at F19 meeting Discussed at S20 meeting Discussed at F20 meeting Discussed at S21 meeting Discussed at F21 meeting Discussed at S22 meeting Discussed at F22 meeting Discussed at F23 meeting and removed from agenda
0	23-AP-D	New rule regarding contempt	Joshua Carback	Initial consideration F23 and removed from agenda Discussed and held pending action by other Advisory Committees F23
0	23-AP-F	Nationwide filing deadline	Howard Bashman	Initial consideration F23 and removed from agenda
0	23-AP-G	Civil Rule 11	Andrew Straw	Initial consideration F23 and removed from agenda
0	23-AP-H	Rule 17	Thomas Dougherty	Initial consideration F23 and removed from agenda

0 recently removed 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, 2023

Current Step in REA Process:

- Effective December 1, 2023

REA History:

- Transmitted to Congress (Apr 2023)
- Transmitted to Supreme Court (Oct 2022)
- Approved by Standing Committee (June 2022 unless otherwise noted)
- Published for public comment (Aug 2021 – Feb 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
BK Form 410A	Published in August 2022. Approved by the Standing Committee in June 2023. 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." The amendments would put the burden on the claim holder to identify the elements of its claim.	

Effective December 1, 2023

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- Published for public comment (Aug 2021 – Feb 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
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 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 16	The technical proposed amendment corrects a typographical error in the cross reference under (b)(1)(C)(v).	
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.	

Effective December 1, 2023

Current Step in REA Process:

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- Published for public comment (Aug 2021 – Feb 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
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:

- Transmitted to Supreme Court (Oct 2023)

REA History:

- Approved by Standing Committee (June 2023 unless otherwise noted)
- Published for public comment (Aug 2022 – Feb 2023 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	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.	
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 107	The proposed amendment was published for public comment as new Rule 611(d), but is now new Rule 107.	EV 1006

Effective (no earlier than) December 1, 2024

Current Step in REA Process:

- Transmitted to Supreme Court (Oct 2023)

REA History:

- Approved by Standing Committee (June 2023 unless otherwise noted)
- Published for public comment (Aug 2022 – Feb 2023 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
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 Rule 107.	EV 107

Effective (no earlier than) December 1, 2025

Current Step in REA Process:

- Published for public comment (Aug 2023 – Feb 2024 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (Jan and June 2023 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 6	The proposed amendments would address resetting the time to appeal in cases where a district court is exercising original jurisdiction in a bankruptcy case by adding a sentence to Appellate Rule 6(a) to provide that the reference in Rule 4(a)(4)(A) to the time allowed for motions under certain Federal Rules of Civil Procedure must be read as a reference to the time allowed for the equivalent motions under the applicable Federal Rule of Bankruptcy Procedure. In addition, the proposed amendments would make Rule 6(c) largely self-contained rather than relying on Rule 5 and would provide more detail on how parties should handle procedural steps in the court of appeals.	BK 8006
AP 39	The proposed amendments would provide that the allocation of costs by the court of appeals applies to both the costs taxable in the court of appeals and the costs taxable in the district court. In addition, the proposed amendments would provide a clearer procedure that a party should follow if it wants to request that the court of appeals to reconsider the allocation of costs.	
BK 3002.1 and Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R	Previously published in 2001. Like the prior publication, the 2023 republished amendments to the rule are intended to encourage a greater degree of compliance with the rule's provisions. A proposed midcase assessment of the mortgage status would no longer be mandatory notice process brought by the trustee but can instead be initiated by motion at any time, and more than once, by the debtor or the trustee. A proposed provision for giving only annual notices HELOC changes was also made optional. Also, the proposed end-of-case review procedures were changed in response to comments from a motion to notice procedure. Finally, proposed changes to 3002.1(i), redesignated as 3002.1(i) are meant to clarify the scope of relief that a court may grant if a claimholder fails to provide any of the information required under the rule. Six new Official Forms would implement aspect of the rule.	
BK 8006	The proposed amendment to Rule 8006(g) would clarify that any party to an appeal from a bankruptcy court (not merely the appellant) may request that a court of appeals authorize a direct appeal (if the requirements for such an appeal have otherwise been met). There is no obligation to file such a request if no party wants the court of appeals to authorize a direct appeal.	AP 6
Official Form 410	The proposed amendment would change the last line of Part 1, Box 3 to permit use of the uniform claim identifier for all payments in cases filed under all chapters of the Code, not merely electronic payments in chapter 13 cases. If approved, the amended form would go into effect December 1, 2024.	

Effective (no earlier than) December 1, 2025

Current Step in REA Process:

- Published for public comment (Aug 2023 – Feb 2024 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (Jan and June 2023 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
CV 16	The proposed amendments to Civil Rule 16(b) and 26(f) would address the "privilege log" problem. The proposed amendments would call for development early in the litigation of a method for complying with Civil Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials.	CV 26
CV 16.1 (new)	The proposed new rule would provide the framework for the initial management of an MDL proceeding by the transferee judge. Proposed new Rule 16.1 would provide a process for an initial MDL management conference, designation of coordinating counsel, submission of an initial MDL conference report, and entry of an initial MDL management order.	
CV 26	The proposed amendments to Civil Rule 16(b) and 26(f) would address the "privilege log" problem. The proposed amendments would call for development early in the litigation of a method for complying with Civil Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials.	CV 16

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; most recent first

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
A bill to provide remote access to court proceedings for victims of the 1988 Bombing of Pan Am Flight 103 over Lockerbie, Scotland	**H.R. 6714** *Sponsor:* Van Drew (R-NJ) *Cosponsors:* Nadler (D-NY) Smith (R-NJ) **S. 3250** *Sponsor:* Cornyn (R-TX) *Cosponsor:* Gillibrand (D-NY)	CR 53	**Most Recent Bill Text:** https://www.congress.gov/118/plaws/publ37/PLAW-118publ37.pdf **Summary:** Provides remote access to criminal proceedings for victims of the 1988 Bombing of Pan Am Flight 103 over Lockerbie, Scotland notwithstanding any provision of the Federal Rules of Criminal Procedure or other law or rule to the contrary.	• 1/26/2024: S. 3250 signed by President; became Public Law No. 118-37 • 1/18/2024: House passed S. 3250 • 12/11/2023: H.R. 6714 introduced; referred to Judiciary Committee • 12/11/2023: S. 3250 received in the House and held at the desk • 12/06/2023: S. 3250 passed in the Senate with an amendment by unanimous consent • 12/06/2023: Senate Judiciary Committee discharged by Unanimous Consent • 11/08/2023: S. 3250 introduced in Senate; referred to Judiciary Committee
National Guard and Reservists Debt Relief Extension Act of 2023	**H.R. 3315** *Sponsor:* Cohen (D-TN) *Cosponsors:* Cline (R-VA) Dean (D-PA) Burchett (R-TN) **S. 3328** *Sponsor:* Durbin (D-IL) *Cosponsors:* 8 bipartisan cosponsors	Interim BK Rule 1007-I; Official Form 122A1; Official Form 122A1-Supp.	**Most Recent Bill Text:** https://www.congress.gov/118/plaws/publ24/PLAW-118publ24.pdf **Summary:** Extends the applicability of Interim Rule 1007-I and existing temporary amendments to Official Form 122A1 and Official Form 122A1-Supp. for four years after December 19, 2023.	• 12/19/2023: H.R. 3315 signed by President; became Public Law No 118-24. • 12/14/2023: H.R. 3315 passed Senate without amendment by Unanimous Consent • 12/11/2023: H.R. 3315 passed in the House • 11/29/2023: H.R. 3315 reported by the House Judiciary Committee • 11/15/2023: S. 3328 introduced; referred to Judiciary Committee • 05/15/2023: H.R. 3315 introduced in House; referred to Judiciary Committee

Supreme Court Ethics, Recusal, and Transparency Act of 2023	**H.R. 926** *Sponsor:* Johnson (D-GA) *Cosponsors:* 135 Democratic cosponsors **S. 359** *Sponsor:* Whitehouse (D-RI) *Cosponsors:* 43 Democratic or Democratic-caucusing cosponsors	AP, BK, CV, CR	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr926/BILLS-118hr926ih.pdf https://www.congress.gov/118/bills/s359/BILLS-118s359rs.pdf **Summary:** Would require the Supreme Court and JCUS to issue and prescribe—through an expedited Rules Enabling Act process— (a) codes of conduct for justices and judges; (b) rules of procedure requiring certain disclosures by parties and amici; and (c) rules of procedure for prohibiting or striking an amicus brief that would result in disqualification of a justice, judge, or magistrate judge.	• 09/05/2023: S. 359 placed on Senate Legislative Calendar under General Orders • 07/20/2023: S. 359 reported with an amendment from Senate Judiciary Committee • 02/09/2023: S. 359 introduced in Senate; referred to Judiciary Committee • 02/09/2023: H.R. 926 introduced in House; referred to Judiciary Committee
Government Surveillance Transparency Act of 2023	**H.R. 5331** *Sponsor:* Lieu (D-CA) *Cosponsor:* Davidson (R-OH)	CR 41	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr5331/BILLS-118hr5331ih.pdf **Summary:** Would amend CR 41(f)(1)(B) by adding that an inventory shall disclose whether the provider disclosed to the government any electronic data not authorized by the court and whether the government searched persons or property without court authorization. Would provide for public access to docket records for certain criminal surveillance orders in accordance with rules promulgated by JCUS.	• 09/01/2023: H.R. 5331 introduced in House; referred to Judiciary Committee
Protecting Our Democracy Act	**H.R. 5048** *Sponsor:* Schiff (D-CA) *Cosponsors:* 158 Democratic cosponsors	CR 6; CV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr5048/BILLS-118hr5048ih.pdf **Summary:** Would require the Supreme Court and JCUS to prescribe rules—through an expedited Rules Enabling Act process—to ensure the expeditious treatment of a civil action brought to enforce a congressional subpoena. Would preclude any interpretation of CR 6(e) to prohibit disclosure to Congress of certain grand-jury materials related to individuals pardoned by the President.	• 07/27/2023: H.R. 5048 introduced in House; referred to Oversight & Accountability, Judiciary, Administration; Budget, Transportation & Infrastructure, Rules, Foreign Affairs, Ways & Means, and Intelligence Committees

Back the Blue Act of 2023	**H.R. 355** *Sponsor:* Bacon (R-NE) *Cosponsors:* 18 Republican cosponsors **H.R. 3079** *Sponsor:* Bacon (R-NE) *Cosponsors:* 20 Republican cosponsors **S. 1569** *Sponsor:* Cornyn (R-TX) *Cosponsors:* 41 Republican cosponsors	§ 2254 Rule 11	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr355/BILLS-118hr355ih.pdf https://www.congress.gov/118/bills/hr3079/BILLS-118hr3079ih.pdf https://www.congress.gov/118/bills/s1569/BILLS-118s1569is.pdf **Summary:** Would amend Rule 11 of the Rules Governing Section 2254 Cases by adding: "Rule 60(b)(6) of the Federal Rules of Civil Procedure shall not apply to a proceeding under these rules in a case that is described in section 2254(j) of title 28, United States Code."	• 05/11/2023: S. 1569 introduced in Senate; referred to Judiciary Committee • 05/05/2023: H.R. 3079 introduced in House; referred to Judiciary Committee • 01/13/2023: H.R. 355 introduced in House; referred to Judiciary Committee
Restoring Artistic Protection (RAP) Act of 2023	**H.R. 2952** *Sponsor:* Johnson (D-GA) *Cosponsors:* 31 Democratic cosponsors	EV	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2952/BILLS-118hr2952ih.pdf **Summary:** Would amend the Federal Rules of Evidence by adding a new Rule 416 to limit the admissibility of evidence of a defendant's creative or artistic expression against such defendant.	• 04/27/2023: Introduced in House; referred to Judiciary Committee
Sunshine in the Courtroom Act of 2023	**S. 833** *Sponsor:* Grassley (R-IA) *Cosponsors:* Klobuchar (D-MN) Durbin (D-IL) Blumenthal (D-CT) Markey (D-MA) Cornyn (R-TX)	CR 53	**Most Recent Bill Text:** https://www.congress.gov/118/bills/s833/BILLS-118s833is.pdf **Summary:** Would permit district court cases to be photographed, electronically recorded, broadcast, or televised, notwithstanding any other provision of law, after JCUS promulgates guidelines.	• 03/16/2023: Introduced in Senate; referred to Judiciary Committee

Bankruptcy Venue Reform Act	**H.R. 1017** *Sponsor:* Lofgren (D-CA) *Cosponsor:* 7 Democratic & 2 Republican cosponsors	BK	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr1017/BILLS-118hr1017ih.pdf **Summary:** Would require the Supreme Court to prescribe rules through the Rules Enabling Act process to allow government attorneys to appear and intervene in Title 11 proceedings without charge, and without meeting any requirement under any local court rule relating to attorney appearances or the use of local counsel, before any bankruptcy court, district court, or bankruptcy appellate panel.	• 02/14/2023: Introduced in House; referred to Judiciary Committee

Legislation Requiring Only Technical or Conforming Changes
118th Congress
(January 3, 2023–January 3, 2025)

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Election Day Holiday Act of 2024	**H.R. 7329** *Sponsor:* Eshoo (D-CA) *Cosponsor:* 21 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr7329/BILLS-118hr7329ih.pdf **Summary:** Would make Election Day a federal holiday.	• 02/13/2024: Introduced in House; referred to Oversight & Accountability Committee
Indigenous Peoples' Day Act	**H.R. 5822** *Sponsor:* Torres (D-AL) *Cosponsors:* 86 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr5822/BILLS-118hr5822ih.pdf **Summary:** Would replace the term "Columbus Day" with the term "Indigenous Peoples' Day" as a legal public holiday.	• 09/28/2023: Introduced in House; referred to Oversight & Accountability Committee
Diwali Day Act	**H.R. 3336** *Sponsor:* Meng (D-NY) *Cosponsors:* 15 Democratic & 1 Republican cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr3336/BILLS-118hr3336ih.pdf **Summary:** Would make Diwali (a/k/a Deepavali) a federal holiday.	• 05/15/2023: Introduced in House; referred to Oversight & Accountability Committee

September 11 Day of Remembrance Act	**H.R. 2382** *Sponsor:* Lawler (R-NY) *Cosponsors:* 4 Democratic & 2 Republican cosponsors **S. 1472** *Sponsor:* Blackburn (R-TN) *Cosponsor:* Wicker (R-MS)	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2382/BILLS-118hr2382ih.pdf https://www.congress.gov/118/bills/s1472/BILLS-118s1472is.pdf **Summary:** Would make September 11 Day of Remembrance a federal holiday.	• 05/04/2023: S. 1472 introduced in Senate; referred to Judiciary Committee • 03/29/2023: H.R. 2382 introduced in House; referred to Oversight & Accountability Committee
Workers' Memorial Day	**H.R. 3022** *Sponsor:* Norcross (D-NJ) *Cosponsors:* 11 Democratic cosponsors	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr2382/BILLS-118hr2382ih.pdf **Summary:** Would make Workers' Memorial Day a federal holiday.	• 04/28/2023: Introduced in House; referred to Oversight & Accountability Committee
St. Patrick's Day Act	**H.R. 1625** *Sponsor:* Fitzpatrick (R-PA) *Cosponsor:* Lawler (R-NY)	AP 26, 45; BK 9006; CV 6; CR 45, 56	**Most Recent Bill Text:** https://www.congress.gov/118/bills/hr1625/BILLS-118hr1625ih.pdf **Summary:** Would make St. Patrick's Day a federal holiday.	• 03/17/2023: Introduced in House; referred to Oversight & Accountability Committee
Lunar New Year Day Act	**H.R. 430** *Sponsor:* Meng (D-NY) *Cosponsors:* 58 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
Rosa Parks Day Act	**H.R. 308** *Sponsor:* Sewell (D-AL) *Cosponsors:* 115 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

TAB 1E

Federal Judicial Center

Date: March 6, 2024

To: Advisory Committees on Rules of Practice and Procedure

From: Tim Reagan
Federal Judicial Center Research Division

Re: Federal Judicial Center Research Projects

This memorandum summarizes current and recently completed Federal Judicial Center research relevant to the Federal Rules of Practice and Procedure. Center researchers attend committee, subcommittee, and working-group meetings and provide empirical research as requested. The Center also conducts research to develop manuals and guides.

Current Research for Rules Committees

Complex Criminal Litigation Website

As suggested by the Criminal Rules Committee, the Center is developing as one of its special-topics websites (curated content) a collection of resources on complex criminal litigation.

Attorney Admissions

The Center is conducting research for the Standing Rules Committee's subcommittee on admissions to the district courts' bars.

Completed Research for Rules Committees

Default and Default Judgment Practices in the District Courts

At the request of the Civil Rules Committee, the Center studied district-court practices with respect to the entry of defaults and default judgments under Civil Rule 55. In most districts, the clerk of court enters defaults, perhaps in consultation with chambers. District practices with respect to entry of default judgments for a sum certain were more varied; in many districts, the clerk of court never enters default judgments pursuant to the national rule.

Mandatory Initial Discovery Pilot (MIDP)—Final Report

At the request of the Civil Rules Committee, the Center studied a pilot program in two districts, in which initial disclosures required by the Federal Rules of Civil Procedure were supplemented with broader disclosure requirements (www.fjc.gov/content/376773/mandatory-initial-discovery-

pilot-final-report). Among other findings, pilot cases had shorter disposition times than nonpilot cases, controlling for case type, district, and the effects of the Covid-19 pandemic.

Jury-Trial Demands in Terminated Civil Cases, Fiscal Years 2010–2019

Prepared for the Civil Rules Committee, this study observed that jury-trial demands were recorded in half of the federal courts' civil cases, but only 0.7% of civil cases were resolved by jury trials (www.fjc.gov/content/373277/jury-trial-demands-terminated-civil-cases-fiscal-years-2010-2019).

Federal Rule of Civil Procedure 42(a) Consolidation, Appellate Finality, and Hall v. Hall

Prepared for the Appellate Rules and Civil Rules Advisory Committees, this study examined potential issues arising from the Supreme Court's 2018 decision in *Hall v. Hall* that a case that has been consolidated with other cases may become appealable before other cases in the consolidation (www.fjc.gov/content/373279/federal-rule-civil-procedure-42a-consolidation-appellate-finality-and-hall-v-hall). The research did not observe widespread losses of appeal rights following the decision in *Hall*.

Federal Courts' Electronic Filing by Pro Se Litigants

In light of interest in whether self-represented litigants should be provided expanded electronic filing opportunities, the Center interviewed a modified random sample of seventy-eight clerks of court or members of their staffs in late 2021 and early 2022, including courts of appeals, district courts, and bankruptcy courts (www.fjc.gov/content/368499/federal-courts-electronic-filing-pro-se-litigants).

Electronic filing avoids the burden of visiting a courthouse or the delay inherent in regular mail. One option for electronic filing is use of the court's CM/ECF (case management, electronic case filing) system, which is how attorneys typically file now. Another option is email or its equivalent, such as an electronic drop box. Courts vary according to whether they generally permit or forbid these methods and whether they allow for exceptions to their general rules. Some courts have arrangements with some prisons (typically state prisons) for electronic submissions by prisoners.

Some courts do not require paper service by paper filers on parties already receiving electronic service.

Electronic Filing Times in Federal Courts

In light of a proposal to require electronic filing to be completed by the close of business on the day that the filing is due, the Center catalogued the times all docket entries were made in 2018 for all federal courts of appeals, district courts, and bankruptcy courts (www.fjc.gov/content/365889/electronic-filing-times-federal-courts). About nine in ten attorney filings were made before 6:00 p.m.

A survey of attorneys' practices and preferences was piloted but discontinued because of the Covid-19 pandemic. Preliminary pilot data suggested that most attorneys working for large firms preferred a filing deadline earlier than midnight, and most other attorneys preferred a midnight deadline.

Electronic Filing in State Courts

The Center surveyed electronic filing rules for thirty states selected to equally represent each of the federal circuits (www.fjc.gov/content/373599/electronic-filing-state-courts).

Current Research for Other Judicial Conference Committees

The Privacy Study: Unredacted Sensitive Personal Information in Court Filings

At the request of the Committee on Court Administration and Case Management, the Center is conducting research on unredacted personal information in public filings, an update to research prepared for the Committee on Rules of Practice and Procedure in 2010 and 2015 (Unredacted Social Security Numbers in Federal Court PACER Documents, www.fjc.gov/content/313365/unredacted-social-security-numbers-federal-court-pacer-documents).

Remote Public Access to Court Proceedings

At the request of the Committee on Court Administration and Case Management, the Center has conducted focus groups with district judges, magistrate judges, and bankruptcy judges to learn about their experiences during the pandemic providing remote public access to proceedings with witness testimony.

Case Weights for Bankruptcy Courts

Data collection has begun for the Center's updated research on case weights for bankruptcy courts. Case weights are used in the computation of weighted caseloads, which in turn are used when assessing the need for judgeships in bankruptcy courts. The research was requested by the Committee on Administration of the Bankruptcy System.

Completed Research for Other Judicial Conference Committees

Evaluation of the Interim Recommendations from the Cardone Report

In 2023, the Center completed for the Defender Services Committee and the Executive Committee an assessment of the implementation of thirty-five recommendations for how the courts manage their responsibilities under the Criminal Justice Act, which specifies how the courts provide financially needy criminal defendants with legal representation (www.fjc.gov/content/380873/evaluation-interim-recommendations-cardone-report). The

recommendations were provided in 2017 by the Cardone Committee, named after its chair, Western District of Texas Judge Kathleen Cardone.

Court Orders Issued During the COVID-19 Pandemic on Criminal Justice Act Interim Voucher Payments

This report—prepared as part of the Center's research on recommendations in the 2017 Cardone report—summarizes federal court orders issued during the coronavirus pandemic regarding interim payments to Criminal Justice Act panel attorneys (www.fjc.gov/content/376241/court-orders-issued-during-covid-19-pandemic-criminal-justice-act-interim-voucher).

Federal-State Court Cooperation: Surveys of U.S. District and U.S. Court of Appeals Chief Judges and State and Territorial Chief Justices and Court Administrators

Prepared for the Committee on Federal-State Jurisdiction, this report updates the findings of a 2016 survey of U.S. chief district judges regarding their past, current, and future plans for cooperation with the state courts, as well as their use of state-federal judicial councils as a forum for communication between the courts (www.fjc.gov/content/378684/federal-state-court-cooperation-surveys-us-district-and-us-court-appeals-chief-judges).

Other Current Research

Manual for Complex Litigation

The Center is preparing a fifth edition of its Manual for Complex Litigation (fourth edition, www.fjc.gov/content/manual-complex-litigation-fourth).

Reference Manual on Scientific Evidence

The Center is collaborating with the National Academies of Science, Engineering, and Medicine to prepare a fourth edition of the *Reference Manual on Scientific Evidence* (third edition, www.fjc.gov/content/reference-manual-scientific-evidence-third-edition-1).

Manual on Recurring Issues in Criminal Trials

The Center is preparing a seventh edition of what previously was called *Manual on Recurring Problems in Criminal Trials* (sixth edition, www.fjc.gov/content/manual-recurring-problems-criminal-trials-sixth-edition-0).

Benchbook for U.S. District Court Judges

The Center is preparing a seventh edition of its *Benchbook for U.S. District Judges* (sixth edition, www.fjc.gov/content/benchbook-us-district-court-judges-sixth-edition).

Other Completed Research

Special-Topic Website: Science Resources

The Center maintains a website for federal judges with resources related to scientific information and methods (www.fjc.gov/content/326577/overview-science-resources). Topics include fingerprint identification, neuroscience, the opioid crisis, DNA technologies, and water and the law.

Emergency Election Litigation: From Bush v. Gore to Covid-19

The Center prepared 513 case studies of how the federal courts have managed emergency election litigation from 2000 through 2020; the case studies include 717 individual emergency cases (www.fjc.gov/content/382726/emergency-election-litigation-federal-courts-bush-v-gore-covid-19). Individual case studies are also posted separately on the Center's website (www.fjc.gov/content/case-studies).

Jurisdictions with a High Number of Civil Jury Trials

Congress directed the Center to study factors related to high numbers of civil jury trials in some jurisdictions (www.fjc.gov/content/376750/jurisdictions-high-number-civil-jury-trials). The ten districts with the highest rates of civil jury trials were all small to medium in size. Civil trial rates ranged from 0.29% to 2.75%; the rates for a large majority of districts (82%) were between 0.5% and 1.5%.

COVID-19 and the U.S. District Courts: An Empirical Investigation

This examination of district-court case processing during the coronavirus pandemic showed an overall slowing of case processing but an overall reduction in backlogs (www.fjc.gov/content/374523/covid-19-district-courts-empirical-investigation). For some courts, however, their backlogs increased.

Resolving Unsettled Questions of State Law: A Pocket Guide for Federal Judges

The Center prepared a short guide to what federal judges might consider when applying unsettled questions of state law (www.fjc.gov/content/373468/resolving-unsettled-questions-state-law-pocket-guide-federal-judges).

National Security Case Studies: Special Case-Management Challenges

The Center published its seventh edition of *National Security Case Studies: Special Case-Management Challenges* in 2022 (www.fjc.gov/content/372882/national-security-case-studies-special-case-management-challenges-seventh-edition). The cases studied include terrorism prosecutions, espionage prosecutions, and other criminal and civil cases. Challenges include handling classified information and other security concerns.

Results of a Survey of U.S. District and Magistrate Judges: Use of Virtual Technology to Hold Court Proceedings

The Center surveyed federal district and magistrate judges about the use of virtual technology before and after the onset of the coronavirus pandemic (www.fjc.gov/content/370037/results-survey-district-magistrate-judges-virtual-technology-court-proceeding).

TAB 2

TAB 2A

MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
January 4, 2024

The Judicial Conference Committee on Rules of Practice and Procedure (the Standing Committee) met in a hybrid in-person and virtual session in Austin, Texas, on January 4, 2024. The following members attended:

Judge John D. Bates, Chair
Judge Paul J. Barbadoro
Elizabeth J. Cabraser, Esq.
Louis A. Chaiten, Esq.
Judge William J. Kayatta, Jr.
Justice Edward M. Mansfield
Dean Troy A. McKenzie
Judge Patricia A. Millett
Hon. Lisa O. Monaco, Esq.*
Andrew J. Pincus, Esq.
Judge Gene E.K. Pratter
Judge D. Brooks Smith
Kosta Stojilkovic, Esq.
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 B. 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

Others who provided support to the Standing Committee, in person or remotely, included Judge J. Paul Oetken, Chair of the Joint Subcommittee on Attorney Admission; Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, Professor Joseph Kimble, and Joseph F. Spaniol, Jr., Esq., consultants to the Standing Committee; H. Thomas Byron III, Esq., Secretary to the Standing Committee; Allison A. Bruff, Esq., Bridget M. Healy, Esq., and S. Scott Myers, Esq., Rules Committee Staff Counsel; Shelly Cox, Rules Committee Staff; Zachary Hawari, Law Clerk to the Standing

* 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.

Committee; Hon. John S. Cooke, Director of the Federal Judicial Center (FJC); and Dr. Tim Reagan, Senior Research Associate, FJC.

OPENING BUSINESS

Judge John Bates, Chair of the Standing Committee, called the meeting to order. He welcomed attendees and members of the public, including those who were attending remotely. He also welcomed new Standing Committee members Justice Edward M. Mansfield and Louis A. Chaiten, Esq. Judge Bates recognized Professor Joseph Kimble for his selection by the Michigan State Bar to receive the Roberts P. Hudson Award for his service to the Bar and legal profession. He also noted that Professors Kimble and Garner deserve a lot of credit for their work on restyling the federal rules.

Upon motion by a member, seconded by another, and without dissent: **The Standing Committee approved the minutes of the June 6, 2023, meeting.**

Mr. Thomas Byron, Secretary to the Standing Committee, noted that the latest set of proposed rule amendments had been submitted to the Supreme Court for review and, if all goes smoothly, will be transmitted to Congress in the spring to take effect on December 1, 2024.

Judge Bates remarked that it is good for the Standing Committee to be aware of the projects underway by the FJC and that a short memorandum regarding that work begins on page 94 of the agenda book. Dr. Reagan explained that the FJC assigns liaisons to various Judicial Conference committees and conducts empirical research for the committees. The FJC's role, he explained, is to contribute methodological expertise and objective research capacity without taking policy positions. Judge Bates thanked the FJC for the continuing support and superb research done on behalf of the Rules Committees.

JOINT COMMITTEE BUSINESS

Joint Subcommittee on Attorney Admission

Judge J. Paul Oetken, chair of the Joint Subcommittee on Attorney Admission and a member of the Bankruptcy Rules Committee, and Professors Struve and Bradt reported on this item. A written report starts on page 101 of the agenda book. The joint subcommittee is considering a proposal from Dean Alan Morrison and others to make admission to the bars of the federal district courts more uniform.

Professor Struve noted the joint subcommittee was in the early stages of its work and thanked its members, who represent the Bankruptcy, Civil, and Criminal Rules Committees. She explained that the Morrison proposal highlights the variation in the criteria for admission to the bars of district courts. It notes that many federal districts require membership in the bar of the state in which the district is located, and in four states this in effect requires that lawyers pass the local state bar exam in order to be admitted to the district court bar. The proponents point out that the admission requirements can be time consuming and expensive and that seeking admission pro hac vice can also be burdensome given varying local counsel requirements and fees. They argue there is no reason for a district court to require in-state bar admission. Their petitions for various restrictive districts to change their local provisions have been unsuccessful.

The proposal contains three options. Option One is to centralize attorney admission and discipline within the Administrative Office of the United States Courts (AO), allowing attorneys in good standing in any state bar to be admitted to practice in any federal district court. Option Two provides that admission in any district court would entitle an attorney to practice in all other districts but would not centralize the process within the AO. Option Three bars district courts from having a local rule that would require in-state bar admission as a condition of admission to practice in the district court.

Professor Struve explained that there have been periodic discussions about attorney admission criteria over the last 90 years. An attorney proposed a nationwide rule for the district courts in 2002, but it did not garner much rulemaking interest or discussion. In the early 2000s, Professor Coquillette examined the adjacent, but separate, topic of centralizing federal rules on attorney conduct, which received a lot of pushback. Professor Coquillette added that the DOJ was the moving party for the unified rules of attorney conduct, but every bar association was against it.

Professor Struve noted that Appellate Rule 46 is one model that already exists in the national rules. It provides for admission to the courts of appeals based on an attorney being of good moral and professional character and being admitted to practice in the United States Supreme Court, a state high court, or another federal court.

The joint subcommittee held its first meeting in October 2023. There was no interest in adopting Option One. There were questions of feasibility and concerns that a centralized office within the AO would lack the local knowledge and contacts required for effective attorney discipline proceedings.

There was some interest in Options Two and Three. In-state admission requirements are particularly burdensome, especially in states that require taking the bar exam for admission. But members were mindful of the local courts' interests in protecting the quality of law practice. Additionally, courts use admission fees for funding important work, and there could be revenue effects. The subcommittee was inclined to consider models with elements of Options Two and Three. There would likely still be separate applications to each district in which one wishes to practice and perhaps fees as well.

The subcommittee also recognized the need to be mindful of rulemaking authority and 28 U.S.C. § 1654, which refers to the rules of courts that permit attorney admission. However, the existence of Appellate Rule 46 suggests rulemaking on attorney admissions has not been foreclosed. Professor Coquillette recalled that some senators had offered to pass legislation giving the Rules Committees power to make rules involving attorney conduct. Going forward, the subcommittee plans to look further into these issues.

Professor Struve also reported that, in response to the agenda book materials, Dean Morrison and others explained that their primary goal is to eliminate barriers that prevent lawyers who are admitted to practice in one district from practicing in another. While not wedded to centralizing admission, they would suggest addressing district variation in how often attorneys must renew their licenses and how much the court charges. They have no interest in removing authority from individual districts to discipline attorneys.

Judge Bates explained that he populated the joint subcommittee with people from jurisdictions with different approaches so there will be a thorough examination through the subcommittee process. There are a lot of issues, and it is a pretty important matter for many courts across the country and for the Bar.

An academic member commented that Option Three has the most promise as there is no good reason today to require in-state bar admission. A practitioner member echoed that Option Three has the best chance of progressing. He acknowledged that there may be something to be served by requiring membership in the local bar but offered three points in support of something like Option Three. First, he noted that in-state bar admission is not a great proxy for experience. For example, he practiced in a particular district for years as an Assistant United States Attorney but was not able to be admitted as a private attorney because he was not barred in that state. Second, the concern around pro hac vice fees can be dwarfed by fees paid to local counsel. Third, reciprocity is not a full solution because defense attorneys must go wherever the case is.

A judge member made the point that spouses of military service members face extraordinary barriers when trying to maintain legal careers while moving around the country every few years. She emphasized the considerable difficulty and cost of admission to state bars and noted that many states already make exceptions to their bar requirements for military spouses. There is also a need to reduce the variable expenses, or possibly make an exception, for military spouses and others who cannot afford these expenses. Option Three should be the bare minimum and would show respect for military service members and their spouses.

Judge Bybee agreed that this project is well worth the effort to study. He noted, however, that diversity cases are an area in which attorneys need to know the state law. The state bar might object to an out-of-state attorney taking a matter from state court directly to federal court. That argument is less compelling for other forms of jurisdiction, but it is not clear how the rules could distinguish between diversity jurisdiction cases as opposed to other or mixed jurisdiction cases.

Professor Struve noted that the subcommittee had not yet considered the issue, but Dean Morrison's proposal attempted to rebut the diversity case argument in his submission.

Another judge member asked what it would cost to initiate Option One at the AO. She also asked about the range of fees across the country for admission pro hac vice, noting that such fees were a substantial source of court income in her district. She suggested that it might be desirable to encourage parity among those fees.

Professor Struve indicated the subcommittee had not conducted its own systematic study yet, but they had been informed that pro hac vice admission fees can reach $500 in some districts.

Another judge member questioned the aptness of the analogy between appellate and district practice given how circumscribed the responsibilities of counsel are on appeal as compared to litigation in the district court. Additionally, he would be cautious about making changes that would make cases less likely to feature repeat players; in his experience, the involvement of attorneys who are known to the court tends to increase the quality of practice.

Another judge member observed that there are many concerns wrapped up in this issue and many ways those concerns could be addressed. Option Three is the most promising. But it is

important to involve state bars in some respect because it is important for district courts and state bars to work together to monitor attorney practice and discipline. Option One is less preferable because it could lead to lower standards. She also noted that it has become more common for attorneys to practice remotely or in another close-proximity jurisdiction. Her district had an issue with attorneys who were living and practicing in the state but applying pro hac vice in every case, seemingly to get around the in-state bar requirement. If the rulemakers were to adopt an approach that mandates reciprocity, it may be that an attorney who lives in a particular jurisdiction for a certain amount of time should be required to be admitted to that bar, possibly with an exception for military spouses.

A practitioner member expressed sympathy for this proposal as someone who spends a great deal of time and money getting admitted pro hac vice in federal courts across the country. But he asked whether districts that require in-state bar admission justify that requirement based on better behavior from repeat, in-state attorneys. He also asked if the subcommittee had looked at whether it would be unauthorized practice of law for an attorney to litigate a lengthy diversity case in federal court without being admitted to that state's bar.

Professor Struve responded that the subcommittee had not yet looked into that issue but that it can.

A judge member noted that these issues are not limited to diversity cases. A federal case often has a federal claim with numerous state law claims under supplemental jurisdiction. There is a concern that, despite soliciting clients within a state, a national practitioner who can only represent clients in federal court might be less familiar with state law that can, at times, afford the plaintiff greater relief than federal law.

Judge Bates thanked the subcommittee for its work so far. He noted that the authority question is particularly important with respect to Option One but is not necessarily eliminated with respect to the other approaches. More examination needs to be done.

Judge Oetken thanked the members of the Standing Committee for their helpful comments.

Service and Electronic Filing by Self-Represented Litigants

Judge Bates introduced this agenda item, which appears on page 182 of the agenda book, and invited Professor Struve to provide an update.

Professor Struve reported that the pro se electronic filing and service working group is studying two topics: (1) whether to take steps to increase electronic access to the court for self-represented litigants by CM/ECF or otherwise and (2) whether self-represented litigants need to traditionally serve their papers on litigants who will receive a notice of electronic filings anyway. The report in the agenda book summarizes spring 2023 interviews that Professor Struve and Dr. Reagan conducted with officials in district courts. She expressed gratitude to Dr. Reagan and his colleagues for their work.

The working group hopes to develop concrete proposals on both issues for the advisory committees in their spring meetings. One potential proposal discussed in concept at the fall meetings, without eliciting immediate expressions of concern, was a rule that would set a baseline

requirement that districts that disallow CM/ECF access for self-represented litigants would need to make reasonable exceptions to that policy.

Electronic-Filing Deadlines Joint Subcommittee

Professor Struve reported on this topic. In 2019, Judge Michael Chagares proposed a study on whether the national rules on computing time should be amended to set the presumptive deadline for electronic filing earlier than midnight. In 2023, the Third Circuit adopted a local rule moving the filing deadline back in that court of appeals from midnight to 5:00 p.m. The E-Filing Deadlines Joint Subcommittee met in August 2023 and voted unanimously to recommend that no action be taken and that the subcommittee be disbanded. The Advisory Committees endorsed this recommendation at their fall meetings and removed the topic from their agendas.

Judge Bates asked if the Standing Committee had any objection to disbanding the joint subcommittee and putting this issue to rest for the moment. Hearing no objection, Judge Bates disbanded the joint subcommittee and removed the matter from the agenda. The Committee will monitor how things play out in the Third Circuit.

Redaction of Social Security Numbers

Mr. Byron reported that the advisory committee reporters have begun to discuss Senator Ron Wyden's proposal to require complete redaction of Social Security numbers in court filings, instead of the current requirement in the privacy rules of redacting all but the last four digits of those numbers. The reporters' discussions are still in the early stages.

Professor Marcus noted the likelihood that this project, and thus the Standing Committee, will need to confront the question of whether the various sets of rules should continue to take a uniform approach to this topic.

Mr. Byron elaborated that a desire for uniformity was one historical motivation for the current rules. The Bankruptcy Rules Committee had identified the last four digits of a Social Security number as being extremely valuable in bankruptcy cases for creditors and other participants. The other committees essentially deferred to the Bankruptcy Rules Committee on this issue and also required redaction of all but the last four digits. The working group is currently reconsidering whether uniformity is still a predominant concern that should overrule other concerns such as privacy or identity theft. There are also already some variations among the rule sets. One issue is whether the Criminal, Civil, and Appellate Rules Committees want to consider requiring full redaction.

Privacy Report

Judge Bates asked Mr. Byron to report on the status of the 2024 report to Congress.

Mr. Byron explained that the Judiciary has an ongoing statutory obligation to study and report to Congress every two years on the adequacy of the privacy rules. Rules Committee Staff has been working with staff from the Committee on Court Administration and Case Management (CACM) on the privacy report. CACM has requested some FJC research projects that are relevant

to this question, but those projects likely will not be completed in time to fully report their results to Congress this year.

Ideally, a draft report will be ready in time for the Standing Committee to consider and approve at the June meeting.

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 on October 19, 2023, in Washington, D.C. The Advisory Committee presented several information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 219.

Judge Bybee updated the Standing Committee on two proposals out for public comment. The Advisory Committee has received one comment on the proposed amendment to Rule 39. It has received no comments on the proposed amendment to Rule 6, which involves some very complicated changes dealing with direct appeals in bankruptcy cases. Judge Bybee thanked the Bankruptcy Rules Committee and others who commented on those changes prior to publication. The Advisory Committee will not hold hearings on Rules 6 and 36 due to a lack of requests to testify and expects to seek final approval from the Standing Committee in June 2024.

Information Items

Amicus Disclosures. Judge Bybee and Professor Hartnett reported on this item. The Advisory Committee hopes to have a proposal before the Standing Committee in June 2024.

Professor Hartnett provided background on the proposal. The Advisory Committee reviewed proposed legislation, the AMICUS Act, which would have treated repeat amicus curiae filers like lobbyists, requiring them to register and to disclose contributors who had provided 3% or more of their revenue. That approach was rejected by the Advisory Committee because there is a difference between lobbying and submitting a public amicus brief to which there is an opportunity to respond. On the other hand, sometimes judges care not only about the contents of an amicus's arguments but also who the amicus is.

The Advisory Committee has tried to balance disclosure with free speech and free association rights. The current draft recognizes the distinctions (a) between contributions by a party and by a nonparty and (b) between contributions earmarked for the preparation of a brief and contributions to the organization generally. For example, the 25% threshold for disclosure is meant to avoid discouraging speech and association while recognizing that this level of contribution could give the contributor real influence on the speech. Striking this balance also informed how to set a de minimis threshold amount for disclosure of earmarked contributions by a nonparty.

The Advisory Committee has narrowed down the questions at issue, and Judge Bybee reported on three recent developments.

First, as to the appropriate lookback period for determining contributions by a party, the Advisory Committee had considered whether the proposed rule should use a fiscal year or the 12-

month period preceding the brief's filing. Neither was perfect, but the Advisory Committee has arrived at an elegant solution and would welcome feedback. To determine the threshold contribution amount that would require disclosure, this approach would multiply the amicus's prior fiscal year revenue by 25% and see whether a party had contributed more than that dollar amount within the last 12 months. This effectively combines the two periods into a single, easily calculable figure and closes a potential loophole.

Second, the proposed amendment had incorporated language from the AMICUS Act that would have excluded from disclosure certain amounts received in the "ordinary course of business." But no one was sure what that language meant, and it did not seem essential. To simplify matters, the Advisory Committee has deleted that phrase from the proposed amendment.

Third, the current rule broadly requires disclosure of any contribution earmarked for a particular brief, but it exempts contributions by members of the amicus. That was seen by some as a loophole because it allowed someone to join an amicus at the last minute and avoid disclosure. The Advisory Committee proposed setting a de minimis contribution amount of $1,000 that would not be reportable even when earmarked for the preparation of a brief. This avoids problems arising with a GoFundMe-style amicus brief. For any contribution over $1,000, it must be disclosed unless it comes from someone who has been a member for at least 12 months. Anyone who has been a member for less than 12 months is treated like a nonmember.

Judge Bybee welcomed any input from the Standing Committee.

Judge Bates thanked Judge Bybee, Professor Hartnett, and the Advisory Committee for their work. This important project began with communications from members of Congress to the Supreme Court. The matter was referred to the Standing Committee and then to the Advisory Committee. It has a lot of ramifications and has drawn public and congressional interest.

A judge member agreed that these are elegant solutions and commended the Advisory Committee for its work. Regarding the last sentence of subdivision (d), she recalled the concern expressed about individuals joining an amicus for the purpose of contributing toward a brief. She inquired whether that is a problem, and, if so, whether such individuals would now get around having to disclose that they are funding a brief by creating a new amicus, rather than joining an existing one.

Judge Bybee explained the Advisory Committee's sense that there are people who are willing to form an amicus organization with a name that completely obscures who is behind it. To address this issue, under subdivision (d), while the amicus need not disclose the contributing members if the amicus has existed for fewer than 12 months, it must disclose the date of creation. There is also a new provision in Rule 29(a)(4)(D), requiring 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.

A practitioner member commented that, unsurprisingly, there are people that see a case and would like to influence it without filing briefs in their own names, so they form organizations to do so. The disclosure of the date of creation is a check on this. It will flag to the reader that this is

an organization that does not have a long-standing interest or was formed for the purpose of filing an amicus brief if, for example, it was formed after the case was filed.

Another practitioner member added that nothing is perfect, but this solution does address the issue and provides relevant disclosure.

Another judge member also thought that the solution in subdivision (b) was elegant. However, the concern addressed in that subdivision (the relationship between the amicus and a party) was probably not the concern motivating the legislators who submitted the suggestion. It is more of a judicial-looking concern about the adversarial process. He expressed ambivalence on that issue because he was not sure how he would make better, or different, use of amicus briefs if he knew more about who was behind them beyond what they say and who the lawyers are.

Instead, subdivision (d) is directly responsive to the legislators' concerns, and some additions may be needed to guard against engineering to circumvent subdivision (d). For example, if someone funded an organization up front and it does the amicus briefing, would the amicus need to say anyone contributed funds for the brief? The Advisory Committee may want to consider something like submitting or drafting "briefs"—rather than "the brief," that is a particular brief—to capture an organization that is funded generally to file amicus briefs in a certain type of litigation.

A practitioner member wondered whether the $1,000 threshold is too high. It would not require that many like-minded payers each contributing $999 to fund a brief. If the focus is on GoFundMe campaigns, an amount in the $100 range might be more appropriate and make it much more difficult for a group of wealthy people to fund a brief through $999 contributions.

Judge Bates observed that a perfect product is not achievable here. He asked Judge Bybee to address another issue regarding whether to follow the Supreme Court in its recent change to permit amicus briefs without requiring leave of court or consent of the parties.

Judge Bybee explained that the current proposal follows the Supreme Court Rules in not requiring leave of court or consent of the parties. However, the Supreme Court recently issued its own ethics guidelines noting that it has different concerns from lower appellate courts due to the dynamics of disqualification. There is a rule of necessity at the Supreme Court under which the Justices will not regularly recuse due to amici, but that has not been the practice in courts of appeals. Large courts with sophisticated systems for identifying possible conflicts can fairly easily work around an amicus brief if it requires a judge's recusal at the panel stage. But it can be more complicated when the appeal progresses to en banc proceedings where an amicus could strategically file a brief to ensure the disqualification of a judge. The Advisory Committee is still thinking about these issues and would welcome thoughts on whether the rule should revert to the motion requirement to forestall the problem of a strategic en banc amicus filing.

Judge Bates remarked that he hoped that this discussion had been beneficial to the Advisory Committee's continuing efforts and that the Standing Committee would look forward to the next step.

In forma pauperis. Judge Bybee reported that the Advisory Committee has been working diligently and conducting surveys on in forma pauperis status and expected to have a proposal before the Standing Committee in June 2024.

Intervention on appeal. Judge Bybee reported that there is a subcommittee considering intervention on appeal. Although there is not yet a working draft, the subcommittee would appreciate getting a sense of where the Standing Committee stands on this issue. It is a controversial issue that has been studied by the Advisory Committee before, and it came up recently in the Supreme Court.

An academic member thought it would be a worthwhile undertaking to consider what a rule on intervention on appeal might look like. In teaching the relevant cases, he was surprised to learn about the system in the courts of appeals for handling intervention on appeal. They have tried to borrow Civil Rule 24, which itself has ambiguities and difficulties, to fit in the appellate structure. That might be fine because intervention on appeal should not be common. But he would encourage the Advisory Committee to think through this issue, which has come up so frequently in the last few years.

Judge Bybee thanked the Standing Committee for its comments, and Judge Bates thanked Judge Bybee and Professor Hartnett for their 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 on September 14, 2023, in Washington, D.C. The Advisory Committee presented three action items and several information items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 249.

Judge Connelly reported that the Advisory Committee has been active, engaged, and productive. She thanked the reporters for the terrific job they have done.

Action Items

Proposed amendment to Rule 1007(h) (Interests in Property Acquired or Arising After a Petition Is Filed). Judge Connelly reported on this item. The text of the proposed amendment appears on page 256 of the agenda book.

Generally, everything a debtor owns becomes part of the bankruptcy estate. Rule 1007 sets a timeline for the debtor to file schedules of the estate's property. It also provides a deadline and mechanism for filing a supplemental schedule for certain types of property interests listed in Bankruptcy Code Section 541(a)(5) that the debtor acquires within 180 days after filing the petition.

However, bankruptcy cases under Chapters 11, 12, and 13 of the Code can take three to five years or longer to resolve, and property the debtor acquires during this period is also property of the estate. The proposal would amend Rule 1007 to account for supplemental schedules to list

those other postpetition property interests that the debtor acquires and that become property of the estate under Bankruptcy Code Section 1115, 1207, or 1306.

Courts have been managing this issue through local rules and administrative orders, and this rule would dispel any concern about whether local courts have the authority to do so. Local management is important because courts have different interpretations about whether a debtor has an ongoing obligation to report postpetition acquisitions other than what is currently required under Rule 1007(h). The Advisory Committee did not want to adopt a particular position on those questions. The proposal also serves to put the debtor and counsel on notice that the court might require the filing of a supplemental schedule.

An academic member commented that this seems like an opportunity to fill a gap in the rules. He recalled researching cases where, for example, a debtor has a valuable cause of action, seeks to pursue it post-bankruptcy, and could be estopped from asserting it later for failure to disclose it. However, given that case law has developed, he questioned whether there is a need for rulemaking. He does not object to publication but is nervous about unintended consequences.

Professor Bartell noted that this proposal does not address judicial estoppel for a cause of action that a debtor had at the time of filing the petition and failed to disclose. It only addresses postpetition assets. It is a weaker version of the original proposal, which would have created a mandatory rule for disclosure. That created problems with how to craft a test for what to disclose. Instead, this proposal empowers local courts to impose a disclosure requirement if they wish to do so.

Professor Gibson added that courts disagree about whether, in the absence of a request by a party, a U.S. trustee, or the court, a debtor in this situation has a continuing duty to reveal postpetition property. It would be helpful for courts that believe there is such a continuing duty to make that fact clear, because failure to satisfy that duty could lead to judicial estoppel.

Judge Connelly sought approval to publish the proposed amendment for public comment. Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Rule 1007(h) for public comment.**

Proposed amendment to Rule 3018 (Chapter 9 or 11—Accepting or Rejecting a Plan). Judge Connelly reported on this item. The proposed amendment starts on page 258 of the agenda book.

Rule 3018 governs creditor acceptance or rejection of a Chapter 9 or Chapter 11 plan for reorganization. Although Chapter 9 municipal reorganizations are pretty rare, Chapter 11 reorganizations are very common. (Chapter 11 reorganizations ordinarily involve a business debtor but could involve an individual debtor.) Plan confirmation criteria will be different depending on whether creditors have accepted the plan.

Under Rule 3018, creditors have an opportunity to vote on a plan by indicating acceptance or rejection through a written ballot. The proposal would amend subdivisions (a) and (c) to permit courts to also consider an acceptance—or the change or withdrawal of a rejection—that is made

by a creditor's attorney or authorized agent and is part of the record. That can be done orally at the confirmation hearing or by stipulation.

This proposal addresses two common practices. First, parties are often heavily involved in negotiations leading up to the plan confirmation hearing. This proposal would facilitate effective negotiations by allowing the court to consider acceptances at the confirmation hearing reflecting those negotiations. Second, creditors are not required to vote, and some do not vote at all for a variety of reasons. Most, but not all jurisdictions, do not treat a nonvote as an acceptance. This proposal would reduce the practical difficulties of submitting a written ballot in a four-to-five-week period. While that turn-around time has not proven a challenge for the private sector, it may be a barrier for the government, which is the least likely creditor to vote. Among other reasons not to vote, getting authorization from the Secretary of the Treasury in that timeframe may present an issue for the IRS. This rule would create a potential opportunity for the IRS to participate by authorizing the DOJ to accept a plan.

This proposal is particularly important for small businesses. Subchapter V of Chapter 11 was enacted in 2020 to allow a special fast track for small businesses that cannot typically afford regular Chapter 11 practice. If a subchapter V plan is confirmed as consensual with sufficient acceptances, discharge occurs, the debtor may exit Chapter 11, and the subchapter V trustee's service ends. That means the small business is not burdened with continuing administrative expenses. In contrast, if there are not sufficient acceptances, the debtor does not get an immediate discharge and must remain under the court's purview throughout the plan period. The subchapter V trustee is also the disbursing agent throughout this process. So, there are administrative expenses, and remaining in Chapter 11 for multiple years may have an impact on the business.

Judge Connelly acknowledged that the government expressed concern about this proposal during the Advisory Committee's discussions. The Advisory Committee felt publishing the proposal would provide useful feedback and give the government more time to review it.

Ms. Shapiro explained that the government opposed the proposal in the Advisory Committee because it was concerned that the rule change would pressure the government to accept plans that it lacks the resources to fully review. There was also concern that the change from requiring written acceptances to permitting oral acceptances might result in judges pressuring Assistant United States Attorneys to accept a plan that was not able to go through the process for government review and approval. That said, the government will vote in favor of publication, and it intends to submit a letter to the Advisory Committee setting out its concerns.

A judge member expressed that, while he had no issue with the rule, he wondered whether its structure worked. Current Rule 3018(a)(3) seems to require cause for any change or withdrawal of acceptance or rejection. The proposed additional text in Rule 3018(a)(3)—"The court may also do so as provided in (c)(1)(B)"—appears to permit the court to permit the change or withdrawal of a rejection without cause. It seems the tail has grown much larger than the dog here.

Professor Gibson acknowledged the judge member's point. She noted that courts are already accepting settlements and changes from rejections to acceptances at the confirmation hearing even without the rule explicitly allowing it.

Judge Connelly sought approval to publish the proposed amendment for public comment. Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Rule 3018(a) and (c) for public comment.**

Proposed amendment to Official Form 410S1 (Notice of Mortgage Payment Change). Judge Connelly reported on this item. The proposed revised form starts on page 260 of the agenda book.

Proposed amendments to Rule 3002.1, which require mortgage creditors in a Chapter 13 case to disclose payment changes and other details that occur over the course of the case were published for public comment in 2023. The proposal addresses home equity lines of credit (HELOCs), among other issues. There can be a lot of variation in HELOC payments, and the proposed rule would allow the notice of change to be made either at the time of the change or annually with a reconciliation amount.

One of the public comments to Rule 3002.1 noted a need to update the official form to implement this change. The forms subcommittee determined that Official Form 410S1 should be revised to provide space for an annual HELOC notice at Part 3. If the proposed amendment is published in 2024, the form will be on the same timeline to take effect as proposed Rule 3002.1.

Judge Connelly sought approval to publish the proposed amendment for public comment. Upon motion by a member, seconded by another, and without opposition: **The Standing Committee gave approval to publish the proposed amendment to Official Form 410S1 for public comment.**

Information Items

Judge Connelly stated that none of the information items mentioned in the Advisory Committee's report required approval or specific feedback at this time. She elaborated on two items.

Reconsideration of proposed Rule 3002.1 (Notice Relating to Claims Secured by a Security Interest in the Debtor's Principal Residence in a Chapter 13 Case). At the June 2023 Standing Committee meeting, Judge Connelly requested permission to publish extensive changes to Rule 3002.1, including amendments to the subdivision addressing noncompliance that would authorize the court to enforce the rule by awarding noncompensatory sanctions. There was a robust discussion at the meeting, and, at Judge Connelly's request, Rule 3002.1 was published for comment without the provision on noncompensatory sanctions so that the Advisory Committee could discuss the points raised by the Standing Committee.

The Advisory Committee will defer further discussion of that subdivision for now, pending consideration of the public comments on Rule 3002.1 and further development in the case law.

Remote testimony in contested matters. The Advisory Committee is considering a proposal to address the procedure for a bankruptcy judge to permit remote testimony in contested matters in bankruptcy cases. The proposed amendments were discussed in September, but the Advisory Committee deferred any recommendation so that certain Judicial Conference

committees, particularly CACM, could be informed and have an opportunity to provide input. The Advisory Committee plans to consider the proposal further at its meeting in April, and there will probably be an agenda item on this topic for the Standing Committee's meeting in June.

Professor Marcus observed that Civil Rule 43(a)'s strong presumption in favor of non-remote open-court testimony might in future be altered based in part on experience under the Bankruptcy Rules.

Judge Bates thanked Judge Connelly and the Advisory Committee.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenberg and Professors Marcus and Bradt presented the report of the Advisory Committee on Civil Rules, which last met on October 17, 2023, in Washington, D.C. The Advisory Committee presented several information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 288.

Judge Rosenberg updated the Standing Committee on proposals out for public comment. In August 2023, proposed amendments to Rules 16 and 26, dealing with privilege log issues, and a new Rule 16.1 on multidistrict litigation (MDL) proceedings were published for public comment. Public comments can be viewed on the regulations.gov website, and a summary of the comments will be provided in the Advisory Committee's spring agenda book. The Advisory Committee is holding three public hearings on these changes. Twenty-four witnesses testified at the first hearing, which was held in person in Washington, D.C., on October 16, 2023. The next two hearings are scheduled for January 16 and February 6, 2024, and will be conducted remotely. So far, there have been 16 written submissions for the January 16 hearing and 32 witnesses scheduled to testify. Another 24 witnesses are currently scheduled for the February hearing.

Information Items

Rule 41 Subcommittee. Judge Rosenberg and Professor Bradt reported on this item.

Judge Cathy Bissoon chairs the subcommittee considering Rule 41(a). There is a circuit split about the meaning of the word "action" in Rule 41(a)(1)(A), which allows the plaintiff to dismiss an action by filing a notice or stipulation of dismissal. Some courts only allow an entire action to be dismissed, not a claim or an action against a particular party. Those courts require an amendment under Rule 15 for dropping anything less than the entire action.

The subcommittee has engaged in outreach to several attorney groups since the last report to the Standing Committee, including Lawyers for Civil Justice, the American Association for Justice, and the National Employment Lawyers Association. The subcommittee also sent a letter to federal judges through the Federal Judges Association. There were only eight responses, which were somewhat ambivalent and reflected different interpretations of the rule.

Judge Rosenberg reported that, to date, there have been sketches of possible rule amendments but no concrete proposals. There will be a subcommittee meeting before the April Advisory Committee meeting, and it is possible that the subcommittee may agree upon a proposal

to present to the full committee. An amended rule could clarify how much leeway a plaintiff has to dismiss something less than the entire action and whether that should extend to individual claims. Tangential considerations include the deadline by which a plaintiff can voluntarily dismiss without a stipulation or court order, who must sign a stipulation of dismissal, and which dismissals should be with or without prejudice.

Professor Bradt added that in the subcommittee's extensive outreach, the first question was whether there is a real-world problem for litigants. The answer seems to be yes, particularly in jurisdictions that interpret the rule to allow voluntary dismissal only of the entire action. That often leads to makeshift solutions, serial amendments to complaints, and follow-on motion practice and pleadings. The rough consensus of the members of the subcommittee seems to be that the rule ought to be more flexible than limiting dismissal to the entire action, but the degree of flexibility will be debated at upcoming meetings.

Discovery Subcommittee. Judge Rosenberg and Professor Marcus reported on this item. Chief Judge David Godbey chairs the Discovery Subcommittee. Judge Rosenberg noted that a number of issues were being considered by the subcommittee.

Serving subpoenas. The first issue is service of subpoenas under Rule 45(b)(1), and discussion begins on page 294 of the agenda book. There is some ambiguity on whether service is satisfied by something other than in-hand service. The prior Rules Law Clerk prepared an extensive memorandum on the requirements in state courts. There was no consistent thread to provide guidance, but the subcommittee has concluded that the rule's ambiguity has produced sufficient wasteful litigation activity to warrant an effort to clarify the rule.

The subcommittee's consensus was that requiring in-person service in every instance was not desirable. The proposed sketch at page 295 in the agenda book materials would permit subpoena service by any means of service authorized under Rule 4(d), (e), (f), (h), or (i), or authorized by court order or by local rule if reasonably calculated to give notice.

Professor Marcus noted that this is a work in progress. At the Advisory Committee meeting, the DOJ raised concerns about the inclusion of Rule 4(i), and the Advisory Committee expects to hear more.

Filing under seal. Judge Rosenberg reported that the next issue relates to filing under seal. The Advisory Committee has received a number of submissions urging that the rules explicitly recognize that a protective order under Rule 26(c) invokes a good cause standard, rather than the more demanding standards in the common law and First Amendment context for sealing court files. The subcommittee discussed making an explicit distinction between filing under seal and the issuance of a protective order for materials exchanged through discovery. It has developed a proposed sketch for Rule 26(c)(4) and Rule 5(d)(5), appearing on page 297 of the agenda book, and feedback would be welcome.

The Advisory Committee discussed that making it more difficult to file under seal could prove troublesome in litigation with highly confidential, technical, and competitive information. The attorney members stressed the variation across districts. There were also suggestions to consult with clerks' offices since they are essential to the day-to-day handling of these issues.

Professor Marcus observed that the aspect of the draft proposal that emphasizes that existing Rule 26(c) does itself not authorize filing under seal had been discussed in previous years. He suggested that the Standing Committee's input would be particularly useful on the further sketches presented in the agenda book at pages 300-03 concerning procedures for handling motions to seal. Such procedural questions include (1) whether the motion to seal must be filed openly, (2) whether materials can be filed under a tentative or preliminary seal to meet deadlines, (3) whether the party seeking to file under seal needs to give notice to anyone with a confidentiality interest, (4) what happens if the motion to seal is not granted, (5) when the seal will be removed, (6) whether a member of the public can intervene to seek to unseal sealed materials, and (7) whether a party can retrieve its sealed materials from the court's file after termination of the action (and how such a retrieval would affect the record in the event of an appeal).

A practitioner member commented that this is a complicated topic. While a lot of cases have confidential information, there is a lot of over-designation, and if parties are persistent about sealing, it can come down to how much the other party or the court wants to push back. Certain kinds of cases may also present various First Amendment issues, which should not be defined by rule. The member wondered whether the rule should set a floor while the Committee Note could recognize that First Amendment or other concerns could lead the court to be more aggressive in policing sealing.

A judge member emphasized the great inconsistency in case law as to the difference between protective orders and sealing orders. She also noted that district courts will likely apply a different standard in criminal cases (for example, as to plea and sentencing issues) than they do in civil cases. There is a need for guidance concerning what a court ought to consider when thinking about a sealing order and whether it should be different in civil and criminal cases. She added that it can be a significant technical challenge for the clerk's office when a party requests for only part of a large filing to be sealed.

Alluding to the work (more than a decade previously) of the Standing Committee's Privacy Subcommittee, Professor Marcus recalled that there had been considerable concern over access to information in presentence reports; but this, he observed, is not the Civil Rules Committee's focus. The sketch also was not intended to alter the scope of First Amendment and common law rights to access court documents.

Another judge member commented that the motion should tell the court why the records need to be sealed. It would not be possible to set a hard-and-fast rule governing whether the motion to seal can itself be filed under seal. There should be no taking back of documents once filed on CM/ECF. If a motion is denied, the party can refile it in a manner consistent with what the court ordered. Otherwise, the material should remain inaccessible and effectively under seal but not able to be used in the case. That preserves the record for appeal. Professor Marcus asked if the bracketed language in the sketch that says "unless the court orders otherwise" (page 300, line 409 in the agenda book) would work. The judge member agreed that would make sense and the party can request that it be filed under seal and give a reason why.

Judge Bates observed that this is a very complex, large project for the Advisory Committee and its subcommittee. It is also a fairly difficult area because any rule would have tremendous

effects on the various districts and their local rules. Because of the inconsistency, it would require revision of local rules, as well.

Cross-border discovery. Judge Rosenberg and Professor Marcus reported that consideration of cross-border discovery is in the very early stages. The proposal comes from Judge Michael Baylson, who presented at the Advisory Committee's October meeting. He and Professor Gensler have prepared an article published in *Judicature* entitled "Should the Federal Rules Be Amended to Address Cross-Border Discovery?" They propose that the Advisory Committee should consider how the Civil Rules could better guide judges and attorneys in cases involving foreign discovery. The Sedona Conference submitted a letter in support.

The Advisory Committee recognized that this will be a major undertaking but felt it is worth pursuing. This topic may not be limited to discovery and evidence gathering and could implicate Rule 44.1, regarding proof of foreign law, and service of process. A new subcommittee chaired by Judge Manish Shah has been appointed to undertake this project. The first subcommittee meeting will be in January.

When, in the 1980s, the rulemakers sent to the Supreme Court a proposed amendment dealing with discovery for use in U.S. cases, the United Kingdom objected, the Court returned the proposal to the rulemakers, and no further action was taken. Professor Marcus observed that in *Societe Nationale Industrielle Aerospatiale v. U.S. District Court*, 482 U.S. 522 (1987), the Supreme Court refused to require first resort to the Hague Convention procedures for foreign discovery and allowed the federal courts to use the Federal Rules as to the parties before the American court. The proposed rule was criticized as following the view of the dissent in *Aerospatiale* rather than the view of the majority. However, things have changed significantly since the 1980s due to the increase in discovery of digital materials. Professor Marcus noted that, more recently, Judge David Campbell successfully used the Hague Convention procedures in a case before him.

Professor Marcus also observed that a separate statute, 28 U.S.C. § 1782, governs U.S. discovery for use in proceedings abroad. The subcommittee will also consider whether to address that topic.

Professor Marcus asked for suggestions about what to do and who might be an expert on this subject.

A judge member recalled listening to Judge Baylson and Judge Lee Rosenthal discussing this topic. Judge Baylson is very knowledgeable and has dedicated a great deal of considerable thought to it.

Ms. Shapiro noted that the DOJ has a great deal of experience with cross-border discovery and mutual legal assistance requests. It was noted that Joshua Gardner will represent the DOJ on the subcommittee.

Rule 7.1 Subcommittee. Judge Rosenberg reported that the subcommittee is considering suggestions from Judge Ralph Erickson and Magistrate Judge Patricia Barksdale, prompted by the concern that the recusal statute potentially covers significantly more situations than the disclosure requirement in Rule 7.1(a). The Rule 7.1 Subcommittee, chaired by Justice Jane N. Bland, was

created in March 2023 to consider whether a rule amendment is needed to better inform judges of the circumstances that might trigger the statutory duty to recuse.

Currently, Rule 7.1(a) provides for disclosure of any parent corporation of a party and any publicly held corporation owning 10% or more of a party's stock. In contrast, the recusal statute, 28 U.S.C. § 455(b)(4), provides that a judge shall recuse when he knows that he, individually or as a fiduciary, or his spouse or his minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding. The statute defines "financial interest" as ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party.

To address this potential gap, Judge Erickson suggested requiring disclosure of grandparent corporations. Magistrate Judge Barksdale proposed requiring that parties check all the judge's publicly available financial disclosures and file a notice of any conflict.

The Advisory Committee has also considered the local rules from the 50 district courts that have rules on this subject, which are catalogued in a memorandum from a former Rules Law Clerk. There are a few options being considered.

The Judicial Conference's Codes of Conduct Committee has indicated that the Advisory Committee's consideration of a potential rule amendment would not conflict with its work. There is also relevant pending legislation, the Judicial Ethics and Anti-Corruption Act of 2023, which would bar a justice or judge from owning any interest in any security, trust, commercial real estate, or privately held company, with exceptions for mutual funds and government (or government-managed) securities.

The subcommittee plans to meet before the full Advisory Committee meeting in April with the goal of presenting a proposed amendment, if any is deemed necessary, at the April meeting.

Professor Bradt explained that the drafting challenge—and where Standing Committee feedback would be helpful—is in figuring out language to sufficiently capture the full range of circumstances in which a judge might be required to recuse without making the disclosure requirement unduly burdensome. One problem with only requiring disclosure of a parent corporation is that there might still be a grandparent company or other related entity giving the judge a financial interest.

There have also been concerns that it would be difficult for a rule to capture the everchanging landscape of financial instruments and business associations. Local rules have taken a wide variety of approaches. Some local rules expand the general categories of entities to be disclosed beyond those in Rule 7.1(a), using words like "affiliation" or "entity." Others require disclosure of defined financial relationships, like an insurer or third-party litigation funder. Another option is to require disclosure of entities owning a percentage of stock smaller than 10%. The 10% ownership threshold in the current rule is thought to serve as a proxy for control. A lower percentage might better capture the financial interest requirement of the recusal statute.

Judge Bates observed that, while there was no feedback from the Standing Committee right now, there is more work to do, and that may engender some feedback in the future.

Random Case Assignment. Judge Rosenberg and Professor Bradt reported on this item. The Advisory Committee decided at the October meeting to accept the random assignment of cases as a project to explore. Attention on this issue has increased due to concerns that in high-profile cases, especially cases seeking nationwide injunctions against executive action, plaintiffs are engaged in a form of forum shopping, particularly in single-judge divisions of district courts.

The Brennan Center for Justice submitted a proposal urging the adoption of a rule to require the randomization of judicial assignment within districts for certain civil cases. Others have also expressed interest in this topic. In July 2023, nineteen United States senators sent a letter to Judge Rosenberg. The following month, the American Bar Association (ABA) adopted a resolution urging federal courts to implement district-wide random case assignment. The House and Senate Judiciary Committees have also held hearings on issues related to nationwide injunctions and forum shopping.

Judge Rosenberg noted that there are questions about whether a national rule can require reallocation of business among divisions of a district court or whether, under 28 U.S.C. § 137, such questions are beyond the scope of rulemaking. Since the October meeting, Professor Bradt has been researching the threshold consideration of whether this is an area for potential rulemaking.

Professor Bradt set out a sequence of relevant questions to consider. First, would a rule on this topic be a general rule of practice and procedure such that it falls within the Rules Enabling Act (REA)'s grant of rulemaking authority? Second, if so, should the supersession clause of the REA be invoked to override the provision in Section 137 giving districts local control over the division of their business? There are also statutory provisions governing the structure of district courts, including divisions, and, for prudential reasons, the Advisory Committee has avoided rulemaking in this area. There are further prudential questions of whether the Advisory Committee ought to act and, if so, what a rule might look like.

In tailoring any potential rule, it would be necessary to define the problem they would be seeking to solve. That is, in which kinds of cases should a rule impose a random case assignment requirement? The Brennan Center submission suggested that a rule should encompass any case in which a party seeks injunctive relief that may have an effect outside the district. The ABA suggested any case in which the United States is a party. Various local rules identify particular subject matters of cases.

Professor Bradt requested feedback from the Standing Committee about whether this is an appropriate subject for rulemaking.

Judge Bates commented that this is obviously an issue of great importance to the Judiciary. These initial issues of authority and prudential considerations of whether this is something that should be addressed through the rules process are very important and need to be thought about at the outset.

A judge member noted that there might be some benefit to working on this issue, even if it turns out not to be within the scope of authority of the Rules Committees. There might be a future legislative proposal on this topic at some point, and it would be nice to have had a committee like

this advance its thinking so that the Judiciary might be able to make suggestions to Congress. A practitioner member agreed. There is a need for objective analysis of what might be done. Although a little out of order, coming up with some ideas of what a solution might be, even if we ultimately do not act, could contribute to informing other actors who might be more able to do something directly. Judge Bates agreed that it can be illuminating to other possible actors that the Rules Committees are looking seriously at an issue and that they have some ideas as to how it can be approached.

Ms. Shapiro noted that the DOJ sent the Advisory Committee a letter in December formally taking the position that rulemaking on this subject is within the grant of authority in the REA. Judge Rosenberg commented that the DOJ's extensive and helpful letter came in after the agenda book materials were put together. Judge Bates agreed the letter was comprehensive and thoroughly addressed the authority question although it did not address the important prudential issues as much.

Professor Hartnett flagged a terminology issue. Although commentators often use the term "nationwide injunction," the problem is not an injunction's geographic scope. An injunction in a patent case barring one party from infringing the other's patent standardly does apply outside the district of the court that entered the injunction. The concern is that the injunction reaches beyond the parties. Using the terminology of "nonparty" injunction is more accurate and reduces the risk of a rule that does not address the real problem.

Another practitioner member echoed Professor Hartnett's observation that it is important to think carefully about the problem the Advisory Committee might target. But "nonparty" does not solve the issue of forum shopping to enjoin the United States.

Professor Hartnett clarified that the problem with injunctions against the United States arises when the injunction is read not only to enjoin the United States with regard to a particular plaintiff, but also with respect to nonparties.

Professor Coquillette commented that the prudential consideration is central. When Congress gets involved by making a rule directly, style and consistency can suffer, so it is a fundamental principle that the Rules Committees should be cautious about issues that Congress is considering.

Demands for Jury Trials in Removed Actions. Judge Rosenberg and Professor Marcus reported on this item. A 2015 suggestion focused on the 2007 restyling project's change in the tense of a verb in Rule 81(c). When this submission was initially presented to the Standing Committee in 2016, two members of the Standing Committee proposed a change to Rule 38 to change the default rule so that parties need not demand a jury trial. Such a change would have obviated the need to consider the underlying Rule 81(c) suggestion. After considerable research by the FJC, the Advisory Committee decided not to propose a change in Rule 38's default rule on jury demands, and that proposal was removed from the Advisory Committee's agenda. The Advisory Committee will consider the Rule 81(c) suggestion again at its April meeting, but the Standing Committee need not spend time on it right now.

Other topics. Judge Rosenberg and Professor Marcus reported on a few issues that the Advisory Committee lacked the capacity and resources to consider presently but that remained on its agenda.

The Advisory Committee has paused consideration on a Civil Rule 62(b) suggestion related to notice of premiums for supersedeas bonds. The proposal comes from the Appellate Rules Committee after it published a proposed change to Appellate Rule 39 in response to a Supreme Court decision. This issue is discussed in the agenda book starting on page 316. Judge Bates observed that the Appellate Rules Committee believes there is a possible need for a change to Civil Rule 62 but that the Civil Rules Committee was not as sure. He invited the advisory committees to continue discussing the subject outside the context of this meeting.

Another information item concerned a proposal about attorney's fee awards for Social Security appeals. Professor Marcus noted that the Supplemental Rules for Social Security cases only went into effect about a year ago. Moreover, one district is considering a local rule on this topic. Further experience could inform any later rulemaking efforts; in the meantime, the Advisory Committee does not recommend action on this proposal.

Professor Marcus directed the Committee's attention to the discussion in the agenda book (starting at page 328) of items to be removed from the Advisory Committee's agenda.

Judge Bates thanked Judge Rosenberg and the reporters for the thoroughness of their report on many important subjects.

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 on October 26, 2023, in Minneapolis, Minnesota. The Advisory Committee presented three information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 367.

Information Items

Rule 17 and pretrial subpoena authority. Judge Dever reported that Judge Nguyen chairs the subcommittee examining potential changes to Rule 17 concerning subpoenas. There was a conference in October 2022 where the subcommittee gathered information about whether there is a problem with Rule 17, whether there are differences from court to court in the application of Rule 17, and how the *Nixon* standard of relevance, admissibility, and specificity is being applied. It has continued to gather information about this issue from experts and attorneys in industries associated with potentially relevant issues, such as the Stored Communications Act.

The subcommittee is now in the drafting process and has a meeting scheduled in February to discuss specific language. There are some basic principles outlined on page 369 of the agenda book. For example, there needs to be judicial supervision of any subpoena issued because it carries the authority of the court. The rule also needs to distinguish between personal or confidential information and other information. There should also be an option for an ex parte process.

Rule 23 and government consent to bench trials. Judge Dever reported on this item. To have a bench trial, Rule 23(a) currently requires a written request from the defendant, the consent of the United States, and the approval of the court. The Federal Criminal Procedure Committee of the American College of Trial Lawyers proposes removing the government from that process when the defendant can provide reasons sufficient to overcome the presumption in favor of a jury trial.

The Advisory Committee had questions about the proposal at its April 2023 meeting and gathered information from the DOJ and the defense community. The Advisory Committee discussed the findings at its meeting in October. The proposal initially suggested there might be a backlog of cases due to the pandemic, but that turned out not to be the case. Only eight of the 94 districts said there was something of a backlog. But any rule change would not happen soon enough to address it. The Advisory Committee also learned that there is not a uniform DOJ policy on whether the government consents to a bench trial, and it varies by United States Attorney. In some districts the United States Attorney's Office always prefers a jury trial.

The Advisory Committee also discussed the leading Supreme court case addressing Rule 23, *Singer v. United States*, 380 U.S. 24 (1965), which recognized that the court could order a bench trial over the government's objection where there were compelling reasons associated with a defendant's need to get a fair trial. There were also a couple of cases that arose during the pandemic in which a court invoked the *Singer* language. The Advisory Committee could not find sufficient space between the *Singer* standard and other reasons that would be sufficient to overcome the presumption in favor of a jury trial.

The Advisory Committee voted overwhelmingly, but not unanimously, to remove this item from its agenda.

Judge Dever explained that the Advisory Committee also discussed the defense bar's concern that defendants were not receiving an acceptance of responsibility credit when they only went to trial to preserve a suppression issue for appeal. It viewed this as a Sentencing Guidelines issue, rather than an issue with the Federal Rules of Criminal Procedure.

Professor Beale recalled that the Advisory Committee discussed notifying the United States Sentencing Commission about this issue, but there was a question about whether such communication should come from the Criminal Rules Committee or the Standing Committee.

Judge Bates remarked that the mechanism of a communication to the Sentencing Commission could be worked out if the Advisory Committee thought it was a good idea and the Standing Committee agreed. The question was whether the Standing Committee agreed that the Sentencing Commission should be informed that the Advisory Committee thought an issue exists with respect to the acceptance of responsibility credit.

Professor Beale noted that some judges already give an acceptance of responsibility credit in this circumstance, but defense counsel reported that they frequently cannot get the credit. The Advisory Committee does not believe there is a uniform practice. But the Advisory Committee did not conduct an in-depth study on the issue and preferred to ask the Sentencing Commission to examine it.

Judge Dever added that U.S.S.G. § 3E1.1 currently gives the judge discretion. It does not say that a defendant who goes to trial cannot get the credit. But in the Commentary to § 3E1.1, the Application Notes do not include an example for giving the defendant credit after going to trial to preserve an issue for appeal. The Advisory Committee was unsure if the Sentencing Commission could amend the Application Notes to add an explicit example of this.

Judge Bates commented that the Advisory Committee's observation was that it would be a good idea to communicate to the Sentencing Commission that this seems to be an issue that might merit some examination, but not to make any specific recommendation.

A judge member asked for clarification on what would be communicated as a good idea. Is it that, if anyone is going to look at this issue, it should be the Sentencing Commission as opposed to the Rules Committees? She noted that judges have a lot of discretion at sentencing, and it is important to present this as an issue for the Sentencing Commission without taking a position.

Another judge member asked if the proposition was to formally communicate a concern.

Judge Bates asked the Advisory Committee to word the proposition.

Professor Beale stated that concerns were raised at the Advisory Committee's meeting about this issue. The Advisory Committee felt it was not a Criminal Rules issue but wanted to communicate those concerns to the Sentencing Commission. The Advisory Committee would take no position on whether the Sentencing Commission should do something. Rather, it would transmit those concerns, saying that the issue is not properly addressed to the Rules Committees.

Judge Dever commented that the Advisory Committee would be happy to send a letter to the Sentencing Commission but that it did not want to get ahead of the Standing Committee.

Judge Bates thought it was important for the Standing Committee to know whether the concern came from the Advisory Committee or only some of its members.

Professor King responded that the concern was raised by several members of the Advisory Committee. At the end of the discussion, Judge Dever asked the Advisory Committee about sending something to the Sentencing Commission. There was committee-wide agreement that the appropriate place to resolve this concern was at the Sentencing Commission and that it was important enough that the Advisory Committee wanted it to be conveyed. At the end of the meeting, Judge Bates and Judge Dever had a conversation about who should do it.

Judge Bates clarified that the communication, which might come from the Standing Committee or the Advisory Committee, would be a factual recitation—namely, that these concerns were raised but the Advisory Committee felt that they were more appropriately addressed to the Sentencing Commission.

A judge member stated that he does not see the role of the Standing Committee as being a clearinghouse of concerns and suggestions. Usually, the Rules Committees do not refer things along. They tell the suggester when they have come to the wrong place. Consequently, when one of the Rules Committees formally refers something to another governmental body, that referral conveys that the committee has a serious concern that should require more attention than it might

have received otherwise. There might be occasions on which the Rules Committees would make such a referral, but they should only do so after employing the same sort of vetting process that they use when making recommendations on rules. There may be other sides to the issue. For example, he suspected some United States Attorneys might have a different perspective than the defense counsel who had voiced concerns.

In light of the last-mentioned comment, Judge Bates asked Ms. Shapiro whether she had any comments to contribute on behalf of the DOJ. She did not. Professor Struve commented that a DOJ representative at the Advisory Committee meeting had observed that this issue might belong with the Sentencing Commission.

Judge Bates commented that they may be making more out of this issue than was needed. In fairness to the Advisory Committee, it was doing the right thing by checking with the Standing Committee. Judge Bates asked if there were any other concerns with the Advisory Committee sending something to the Sentencing Commission indicating the issue had come up and that the view was that it should be referred to the Sentencing Commission for any further exploration.

The judge member with the prior concern cautioned against creating a precedent of the Advisory Committee referring matters even if it includes a referral statement that the committee was not taking any position. But he acknowledged that the disclaimers would ameliorate the concern that a referral would come with a recommendation.

Judge Bates observed that this was a little different from what typically happens when a Rules Committee, possibly through the Rules Committee Staff, coordinates with another Judicial Conference Committee, often CACM. Communications with the Sentencing Commission regarding potential changes to the Guidelines or commentary are more sensitive and require care. But it is not beyond the capacity of the Advisory Committee to take that into account when drafting a letter to the Sentencing Commission.

Judge Bates asked if there were any other concerns about the Advisory Committee taking that sort of modest communication. Aside from the judge member who spoke earlier, there were no objections.

Rule 53 and broadcasting court proceedings in the cases of United States v. Donald J. Trump. Judge Dever reported on this item. Thirty-eight members of Congress asked the Judicial Conference to authorize the broadcasting of court proceedings in the cases of *United States of America v. Donald J. Trump*. The Advisory Committee discussed the lack of Rules Enabling Act authority to promulgate a rule applying to a single defendant and noted that any rule would become effective, at the absolute earliest, in December 2026, which would likely be after a trial in the relevant cases. A coalition of media organizations later submitted a suggestion on this topic more generally, apart from the specific cases against Donald Trump.

In light of this, the Advisory Committee has formed a subcommittee to study whether to propose amendments to Rule 53. The subcommittee anticipates meeting in March, and the Advisory Committee plans to discuss this issue at its April meeting.

Judge Dever added that, for anyone who wanted to get a history of the issues, the AO has a terrific paper on its website titled *History of Cameras, Broadcasting, and Remote Public Access*

in Courts. Thirty years ago, the Advisory Committee, in a divided vote, recommended that Rule 53 be amended to permit broadcasting consistent with Judicial Conference policy. At the Standing Committee, the chair cast a tie-breaking vote, and the proposal went to the Judicial Conference where it was voted down. Rule 53 has not been substantively amended since it took effect in 1946.

Judge Dever also noted that some cross-committee projects are described in the Criminal Rules Committee's written report in the agenda book. Judge Bates observed that the Criminal Rules Committee was considering some important issues. The Rule 17 issue is a big one, and there is a lot of work yet to be done. There has been a lot going on recently regarding remote proceedings and broadcasting, and it may be the right time to look seriously at Rule 53.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Schiltz presented the report of the Advisory Committee on Evidence Rules, which last met on October 27, 2023, in Minneapolis, Minnesota. The Advisory Committee presented several information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 399.

Information Items

Judge Schiltz reported that at the last meeting, the Advisory Committee heard from two panels. The first panel, made up of five law professors, was invited to speak on any changes they would make to the Federal Rules of Evidence. A second panel featured two experts in artificial intelligence who educated the Advisory Committee about AI and its implications for litigation and the Evidence Rules. The focus was on deep fakes and the ability of AI to produce convincing, but fake, evidence that is hard to detect and will present a real problem for federal trials.

Following the presentations, the Advisory Committee discussed the suggestions, and decided to pursue three matters.

The first proposal being considered is a potential amendment to Rule 609, which addresses when prior convictions can be brought up to impeach a witness on the stand. The proposal is that only convictions for crimes indicating actual dishonesty or false statement would be admissible to impeach, and other types of convictions would not be admissible. The argument is that other types of convictions are not especially probative of credibility. There is also a high price to a defendant who wants to testify but is worried about the admission of prior convictions for crimes such as attempted murder or child pornography.

The second proposal is for a new Rule 416 governing the admissibility of evidence that a victim of alleged misconduct—most often sexual misconduct—had previously made false accusations of similar misconduct. This proposal came from one of the professors on the first panel, who noted that there is a great deal of confusion in the case law about how to treat evidence that a victim of an alleged crime had made false accusations of similar alleged crimes.

The third proposal is a possible amendment to the hearsay rule. The committee is considering two options with respect to out-of-court statements made by a witness on the stand who is under oath and subject to cross examination. A broad option could say that no such prior statements made by a testifying witness can be excluded as hearsay—although it could still be

excluded under Rule 403. A narrower version could say that no prior *inconsistent* statement of a testifying witness can be excluded under the hearsay rule. Today, a prior inconsistent statement can be introduced for its truth only if made under oath at a prior proceeding, which is rare.

The Advisory Committee also plans to hold a conference to further its study of AI and machine-based evidence. The issues, including authentication, hearsay, and expert testimony, are incredibly complicated, and AI technology is changing quickly. The committee's initial focus will likely be on issues of authenticity.

Judge Bates observed that the Chief Justice has focused on AI as an important issue for the Judiciary. These are very difficult issues that the Advisory Committee is considering. In some regards, the difficulty lies in understanding the issues. As to Rule 609, any change in that Rule will be controversial. He thanked Judge Schiltz for the report and the committee's continuing efforts on all those matters.

OTHER COMMITTEE BUSINESS

The Rules Law Clerk provided a legislative update. The legislation tracking chart begins on page 416 of the agenda book. Since the agenda book was published in December, the National Guard and Reservists Debt Relief Extension Act of 2023 became law, meaning that Interim Bankruptcy Rule 1007-I will continue to apply for at least another four years.

Action Item

Judiciary Strategic Planning. This was the last item on the meeting's agenda. Judge Bates asked the Standing Committee to authorize him to work with Rules Committee Staff to respond to the Judicial Conference regarding strategic planning. Without objection, the Standing Committee authorized Judge Bates to work with Rules Committee Staff to submit a response regarding Strategic Planning on behalf of the Standing Committee.

CONCLUDING REMARKS

Judge Bates thanked the Standing Committee members and other attendees. The Standing Committee will next convene on June 4, 2024, in Washington, D.C.

TAB 2B

Agenda E-19 (Summary)
Rules
March 2024

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 items 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, 2024. 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 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, 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; Allison A. Bruff, Bridget M. Healy, and Scott Myers, Rules Committee Staff Counsel; Zachary T. Hawari, 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, on behalf of Deputy Attorney General Lisa O. Monaco.

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 two suggestions affecting all four Advisory Committees—suggestions to allow expanded access to electronic filing by pro se litigants and to modify the presumptive deadlines for electronic filing. (The Advisory Committees had removed the latter suggestion from their agendas, and the Committee approved the disbanding of the joint subcommittee that had been formed to consider it.) Additionally, the Committee received a report from a joint subcommittee (composed of representatives from the Bankruptcy, Civil, and Criminal Rules Committees) concerning a suggestion to adopt nationwide rules governing admission to practice before the U.S. district courts. The Standing Committee also heard a report concerning coordinated efforts by several advisory committees concerning a suggestion to require complete redaction of social security numbers and an update from its Secretary on the 2024 report to Congress on the adequacy of the privacy rules.

FEDERAL RULES OF APPELLATE PROCEDURE

Information Items

The Advisory Committee met on October 19, 2023. The Advisory Committee discussed several issues, including possible amendments to Rule 29 (Brief of An Amicus Curiae) and Appellate Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis). In addition, the Advisory Committee considered suggestions regarding intervention

on appeal and the redaction of social security numbers in court filings. The Advisory Committee removed from its agenda suggestions regarding the record in agency cases and regarding filing deadlines.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Form Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rule 1007(h) (Interests in Property Acquired or Arising After a Petition Is Filed), Rule 3018 (Chapter 9 or 11—Accepting or Rejecting a Plan), and Official Form 410S1 (Notice of Mortgage Payment Change) with a recommendation that they be published for public comment in August 2024. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 1007(h) (Interests in Property Acquired or Arising After a Petition Is Filed)

The proposed amendment to Subdivision (h) would clarify that a court may require an individual chapter 11 debtor or a chapter 12 or chapter 13 debtor to file a supplemental schedule to report property or income that comes into the estate post-petition under § 1115, 1207, or 1306.

Rule 3018(c) (Form for Accepting or Rejecting a Plan; Procedure When More Than One Plan Is Filed)

Subdivision (c) would be amended to provide more flexibility in how a creditor or equity security holder may indicate acceptance, or a change or withdrawal of a rejection, of a plan in a chapter 9 or chapter 11 case. In addition to allowing acceptance by written ballot, the amended rule would also authorize a court to permit a creditor or equity security holder to accept a plan (or change or withdraw its rejection of the plan) by means of its attorney's or authorized agent's statement on the record, including by stipulation or by oral representation at the confirmation hearing. A conforming change would be made to subdivision (a)(3) ("Changing or Withdrawing an Acceptance or Rejection").

Official Form 410S1 (Notice of Mortgage Payment Change)

The amended form would provide space for an annual Home Equity Line of Credit notice.

Information Items

The Advisory Committee met on September 14, 2023. In addition to the recommendation discussed above, the Advisory Committee continued its consideration of a suggestion to require redaction of the entire social security number from filings in bankruptcy and gave preliminary consideration to a suggestion for a new rule addressing a court's decision to allow remote testimony in contested matters in bankruptcy cases.

FEDERAL RULES OF CIVIL PROCEDURE

Information Items

The Advisory Committee on Civil Rules met on October 17, 2023, and considered several information items. The Advisory Committee continued to discuss Rule 41 (Dismissal of Actions), and in particular whether to amend the rule to address caselaw limiting Rule 41(a) dismissals to dismissals of an entire action. It also discussed the work of the discovery subcommittee, which is considering proposals to amend Rule 45 (Subpoena) and to address filing under seal. The Advisory Committee formed a new subcommittee to study cross-border discovery. The Advisory Committee also heard updates from its subcommittee on Rule 7.1 (Disclosure Statement). The Advisory Committee commenced consideration of suggestions concerning civil case assignment in the district courts.

Other topics discussed by the Advisory Committee include the Bankruptcy Rules Committee's consideration of a suggestion to permit remote testimony in contested matters, a suggestion to amend Rule 62(b) (Stay of Proceedings to Enforce a Judgment), a suggestion to amend Rule 54(d)(2)(B) (Judgment; Costs) with respect to attorney-fee awards in Social Security

cases, and a suggestion to amend Rule 81(c) (Applicability of the Rules in General; Removed Actions) with respect to jury demands in removed cases.

The Advisory Committee also discussed and removed from its agenda suggestions regarding Rule 10 (Form of Pleadings), Rule 11 (Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions), Rule 26(a)(1) (Initial Disclosure), Rule 30(b)(6) (Depositions by Oral Examination), Rule 53 (Masters), and Rule 60(b)(1) (Relief from a Judgment or Order), and a proposed new rule on contempt.

At upcoming hearings, the Civil Rules Committee will hear testimony from many witnesses on the proposed amendments that have been published for public comment—namely, proposed amendments to Rule 16(b)(3) (Pretrial Conferences; Scheduling; Management) and Rule 26(f)(3) (Duty to Disclose; General Provisions Governing Discovery) and proposed new Rule 16.1 (Multidistrict Litigation).

FEDERAL RULES OF CRIMINAL PROCEDURE

Information Items

The Advisory Committee on Criminal Rules met on October 26, 2023, and considered several information items. The Advisory Committee continues to consider a possible amendment to Rule 17 (Subpoena), prompted by a suggestion from the White Collar Crime Committee of the New York City Bar Association. The Advisory Committee's Rule 17 subcommittee will develop a draft of a proposed amendment to clarify the rule and to expand the scope of parties' authority to subpoena material from third parties before trial.

The Committee also considered a recent request from 38 members of Congress to authorize broadcasting of proceedings in the cases of *United States v. Donald J. Trump*. The Committee concluded that it does not have the authority under the Rules Enabling Act to exempt specific cases from Rule 53 (Courtroom Photographing and Broadcasting Prohibited), which

generally prohibits the broadcasting of judicial proceedings from the courtroom in criminal cases. Further, any amendment to Rule 53 to allow exceptions for particular cases—for example, the cases of *United States v. Donald J. Trump*—would not take effect earlier than December 1, 2026, due to the requirements of the rulemaking process set forth by the Rules Enabling Act and Judicial Conference Procedures. The Committee received a later suggestion from a media coalition to amend Rule 53 to permit broadcasting of criminal proceedings. Given the timing of its receipt, the proposal was not discussed by the Committee at its October 2023 meeting, but the chair appointed a subcommittee to consider the proposal going forward.

The Advisory Committee decided to remove from its agenda a proposal submitted by the Federal Criminal Procedure Committee of the American College of Trial Lawyers to amend Rule 23 (Jury or Nonjury Trial) to eliminate the requirement that the government consent to a defendant's waiver of a jury trial. In order for a bench trial to occur, current Rule 23 requires a written waiver by the defendant of the right to trial by jury, the government's consent, and the court's approval. Among a variety of concerns discussed by the Advisory Committee, one relates to a defendant's ability to obtain credit for acceptance of responsibility under U.S.S.G. § 3E1.1(b) after a jury trial held solely to preserve an antecedent issue for appeal when the government has declined to either accept a conditional plea or consent to a bench trial. Though some members of the Advisory Committee voiced support for clarifying that judges may award acceptance of responsibility in these circumstances, members saw this as a Guidelines issue, not a rules issue. The Advisory Committee expressed support for making the United States Sentencing Commission aware of the concerns expressed by some members of the Committee. After discussion, the Standing Committee (over one member's objection) determined that the Advisory Committee chair could convey the members' concerns to the Sentencing Commission.

FEDERAL RULES OF EVIDENCE

Information Items

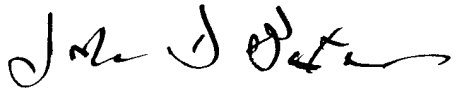
The Advisory Committee on Evidence Rules met on October 27, 2023. In connection with the meeting, the Advisory Committee held a panel discussion with several Evidence scholars on suggestions for changes to the Evidence Rules, followed by a presentation by experts on artificial intelligence and "deep fakes." Following the panel discussion and presentation, the Advisory Committee discussed the potential rule amendments raised by the presenters. In particular, the Advisory Committee decided to consider a possible amendment to delete Rule 609(a)(1), which allows admission of felony convictions not involving dishonesty or false statement, and another possible amendment that would add a new Rule 416 to the Evidence Rules to govern the admissibility of evidence of false accusations. In addition, the Advisory Committee will consider a possible amendment to Rule 801(d)(1) (Definitions That Apply to This Article; Exclusions from Hearsay) to provide for broader admissibility of prior statements of testifying witnesses. The Advisory Committee considered but decided not to pursue a possible amendment to Rule 803(4) (Exceptions to the Rule Against Hearsay) that would have narrowed the hearsay exception for statements made for purposes of medical treatment or diagnosis by excluding from that exception statements made to a doctor for purposes of litigation.

JUDICIARY STRATEGIC PLANNING

The Committee was asked to provide recommendations for discussion topics at the next long-range planning meeting scheduled for March 11, 2024 and future long-range planning meetings of Judicial Conference committee chairs. Recommendations on behalf of the

Committee were communicated to Judge Scott Coogler, the judiciary planning coordinator, by letter dated January 11, 2024.

Respectfully submitted,



John D. Bates, Chair

Paul Barbadoro
Elizabeth J. Cabraser
Louis A. Chaiten
William J. Kayatta, Jr.
Edward M. Mansfield
Troy A. McKenzie
Patricia Ann Millett
Lisa O. Monaco
Andrew J. Pincus
Gene E.K. Pratter
D. Brooks Smith
Kosta Stojilkovic
Jennifer G. Zipps

TAB 3

Minutes of the Fall Meeting of the

Advisory Committee on the Appellate Rules

October 19, 2023

Washington, DC

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 19, 2023, at approximately 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: George Hicks, Professor Bert Huang, Judge Carl J. Nichols, Judge Sidney Thomas, and Lisa Wright. Solicitor General Elizabeth Prelogar was represented by Mark Freeman, Director of Appellate Staff, Civil Division, Department of Justice. Linda Coberly 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; H. Thomas Byron, Secretary to the Standing Committee, Rules Committee Staff (RCS); Alison Bruff, Counsel, RCS; Shelly Cox, Management Analyst; Bridget M. Healy, Counsel, RCS; Zachary Hawari, Rules Law Clerk, RCS; Professor Catherine T. Struve, Reporter, Standing Committee on the Rules of Practice and Procedure; and Professor Edward A. Hartnett, Reporter, Advisory Committee on the Appellate Rules.

Judge Daniel Bress, Member, Advisory Committee on the Bankruptcy Rules and Liaison to the Advisory Committee on the Appellate Rules; Andrew Pincus, Member, Standing Committee on the Rules of Practice and Procedure, and Liaison to the Advisory Committee on the Appellate Rules; Molly Dwyer, Clerk of Court Representative; Professor Daniel R. Coquillette, Consultant, Standing Committee on the Rules of Practice and Procedure; and Tim Reagan, Federal Judicial Center, attended via Teams.

I. Introduction and Preliminary Matters

Judge Bybee opened the meeting and welcomed everyone, particularly the new members of the Committee, Judge Sidney Thomas, George Hicks, and Linda Coberly, and the new Rules Law Clerk, Zachary Hawari. He noted that Justice Leondra Kruger was unable to attend and was excused. He also welcomed the observers, both those in person and those online. He also gave special thanks to Danielle Spinelli, whose term has expired, for her many contributions.

Judge Bybee stated that Tab 1 of the agenda book included various background materials. He noted that Tab 2 included the minutes and report of the Standing Committee meeting in June of 2023, and called attention to pages 46-53 of the agenda book, which contains the minutes of that meeting that involved the Appellate Rules. He reported that this Advisory Committee brought three action items to the Standing Committee and that all three were approved: Amendments to Rules 35 and 40 (dealing with rehearing) were given final approval, and amendments to Rule 39 (dealing with costs) and to Rule 6 (dealing with bankruptcy appeals) were approved for publication.

II. Approval of the Minutes

The minutes of the March 29, 2023, Advisory Committee meeting (Agenda book page 110) were approved.

III. Discussion of Joint Committee Matters

Professor Struve presented an update regarding two joint committee matters, electronic filing and service for unrepresented parties (Agenda book 132) and establishing an earlier deadline for electronic filings. (Agenda book 152).

A. Unrepresented Parties; Filing and Service

The working group considering the issue of electronic filing and service for unrepresented parties has been focused on both the issue of increasing access to some kind of electronic filing (ECF or an alternative) and the issue of reducing the burden of serving documents (other than process). Interviews with district court employees from nine districts informed the discussion. The consensus of the working group is that there is no need for unrepresented litigants to serve paper copies on other parties because those other parties receive a notice of electronic filing (NEF) once the papers filed by an unrepresented litigant are placed on ECF. Professor Struve is not presenting a sketch of what a rule change implementing this idea would look like at this meeting. That's because the working group is considering a broader revision that would reflect the reality that pretty much everything is being served electronically today. A sketch will follow at a later meeting. As for access to electronic filing, there are varied reactions. One possibility for a national rule would be to require that all districts at least allow for reasonable exceptions to any general bar on electronic filing by unrepresented litigants. The courts of appeals nationally are further along in permitting electronic filing and may not take this approach. Professor Struve asked anyone with suggestions for drafting to send them to her, noting that the true skeptics of broader access are not on this committee.

Mr. Freeman wondered whether the working group was considering the systems that are replacing EM/ECF in some courts, prompting questions about the new systems. Ms. Dwyer stated that they are working on it in the Ninth Circuit. She

added that she doesn't understand the reluctance in some district courts to electronic filing. She noted that they have not had problems with it in the Ninth Circuit.

B. Earlier Deadlines (19-AP-E)

Professor Struve thanked Judge Bybee for chairing the joint subcommittee dealing with the suggestion that the midnight deadline for electronic filing be moved to an earlier time than midnight. The Federal Judicial Center conducted two terrific studies compiling data regarding time of filing. In addition to this research, there is a recent development: In July of 2023, the Court of Appeals for the Third Circuit promulgated a local rule establishing a 5:00 p.m. deadline. Taking all this into consideration, the joint subcommittee recommends that no action be taken and that it be disbanded. The Bankruptcy and Civil Rules Committees have removed the suggestions from their agenda. A new and distinct suggestion regarding the deadline for electronic filing in the courts of appeals is later on the agenda.

Judge Bybee noted that the recommendation that the joint subcommittee be disbanded is directed to the Standing Committee. He invited a motion to remove suggestion 19-AP-E from this committee's agenda. That motion was made and approved unanimously. Judge Bybee voiced his approval of this experiment in inter-circuit federalism; we will see how it works out.

C. Social Security Numbers in Court Filings (22-AP-E)

Mr. Byron provided an oral update regarding the suggestion by Senator Wyden that courts require the complete redaction of social security numbers, not simply redaction of all but the last four digits. This poses the most serious issue in bankruptcy, and other advisory committees have to date allowed the Bankruptcy Rules Committee to take the lead. At this point, however, it appears unlikely that the Bankruptcy Rules Committee will propose amendments requiring full redaction, raising the question of whether the value of consistency across the various sets of rules outweighs the value of proposing amendments that would require full redaction in the Civil, Criminal, and Appellate Rules. Because Appellate Rule 25 incorporates the other rules, it is probably not necessary to amend the Appellate Rules.

The Reporter added that he had been unable to imagine an appellate case in which it would be necessary for a publicly filed brief or appendix to include a social security number. He invited committee members to let him know if they imagined such a case. He noted that in the rare case where it might be necessary for the judges to know the social security number, it could be filed under seal.

IV. Discussion of Matters Published for Public Comment

The Reporter provided a report about two matters that have been published in August of 2023 for public comment: proposed amendments to Rule 6 (dealing with bankruptcy appeals) and Rule 39 (dealing with costs). (Agenda book page 165).

No comments have been received yet. The comment period will be open until February of 2024 and comments are likely to be submitted and considered by the relevant subcommittees before the spring meeting. Because Danielle Spinelli's term has expired, a new member of the Bankruptcy Appeals Subcommittee is needed. Judge Bybee appointed George Hicks.

In response to a question from the Reporter, Mr. Byron noted that the Civil Rules Committee briefly considered this Committee's request that Civil Rule 62 be amended to complement the proposed amendment to Appellate Rule 39. On the one hand, there was some skepticism of the need for such an amendment because the issue rarely arises. On the other hand, it was also recognized that even if the issue arises rarely, there is value in making a simple change that is not likely to have adverse unintended consequences. Mr. Byron added that, from his perspective, it would be useful to provide guidance or feedback about why it might be valuable. Judge Bates added that while the issue does seem to be rare, there does seem to be an easy fix. He suggested that it would be helpful for the reporters for the Appellate and Civil Rules Committees to talk further about the need for an amendment.

V. Discussion of Matters Before Subcommittees

A. Amicus Briefs—Rule 29 (21-AP-C; 21-AP-G; 21-AP-H; 22-AP-A)

Judge Bybee presented the report of the amicus disclosure subcommittee. (Agenda book page 168). He noted that we have been working on this for several years and called attention to the minutes of the discussion of the issue at the June 2023 Standing Committee meeting. (Agenda book 49-52). The subcommittee met and had a vigorous and extensive discussion.

The first issue on the table involves working draft Rule 29(b) on page 174 of the agenda book. Draft 29(b)(1) and (b)(2) are basically in the existing rule. Draft 29(b)(3) is new but has not provoked much controversy. Draft 29(b)(4) is new and requires the disclosure of certain contributions by parties to an amicus. The current focus is on the look-back period for determining what needs to be disclosed. Using a 12-month period before the filing of the brief could be burdensome, but using the prior year could miss the very sort of contributions of most concern.

The subcommittee believes that it has found an elegant solution: use the prior fiscal year to determine the disclosure threshold, but the 12-month period before filing the brief to determine what contributions need to be disclosed. An amicus looks

at its revenue for the prior fiscal year, calculates 25% of that amount, and then sees whether a party has contributed more than that amount in the 12 months before filing the brief. Both periods are used, but in different ways. The math is pretty simple, even if it sounds more complicated in the form of a story problem.

A judge member asked whether the term "revenue" adequately captured how nonprofits are funded, raising a concern about whether contributions count as revenue for tax reporting. The Reporter stated that he thought that the term "gross revenue" in the working draft included contributions. A liaison member stated that from an accounting perspective, contributions are revenue and suggested that the Committee Note make clear that this is the sense in which the term is used. A lawyer member said that IRS Form 990 used the term "gross receipts" and that this might be a broader term; it would be helpful to consult tax folks and clarify in the Committee Note. An academic member asked if this excluded endowment income; the Reporter answered that the subcommittee had not thought about that question. Judge Bybee observed that this could vastly increase the denominator, and the academic member added that this would be true for a small number of amici.

A lawyer member asked if the Standing Committee had commented on the question of how prevalent a problem there is, especially with regard to parties. The Reporter stated that the issue of whether there is a sufficient problem to warrant a rule change has been a recurrent issue at every step of the process. A liaison member added that while the problem does not really occur with parties, it would be odd to have a rule that addresses nonparties and not say anything about parties. Judge Bates agreed with the Reporter that the broad question of whether there is a sufficient problem to warrant a rule change has been with us at every step, but not focused exactly the way that the lawyer member did.

A judge member stated that he had raised the question when he first joined the Committee. He found that there was broad agreement that we would not want parties funding an amicus without judges knowing about it, but less broad agreement regarding nonparties. There is a disconnect: There may not be an actual problem with party behavior, but agreement that we should know if it does happen; there may be more of an issue with nonparty behavior, but less agreement about what to do about it. Judge Bates added that the current rule addresses both parties and nonparties.

A judge member stated that he liked the concept of the two different look back periods. The right language needs to be found to cover profits, nonprofits, endowments.

Judge Bybee then turned to a different topic: the relationship between a nonparty and an amicus. The current rule exempts all members of an amicus from the need to disclose earmarked contributions. This opens a loophole: someone can join an amicus at the last minute to avoid disclosure. The current rule also has no dollar threshold; all earmarked contributions by nonmembers must be disclosed.

The draft rule sets a $1000 threshold for disclosure, thereby enabling crowd funding. It also retains the member exception—but limits that exception to those who have been members for at least 12 months, thereby closing the loophole. That approach raises a new issue: What if the amicus is not that old? Rather than subject a new amicus to the 12-month membership requirement, and lose all member protection, a new amicus need not disclose contributing members, but must disclose the date it was created. This dovetails with the new requirement in draft Rule 29(a)(4)(D) to describe the history of an amicus. In response to a question by Judge Bates, Judge Bybee agreed that a trade association that is totally funded by its members would not have to disclose its members.

A lawyer member raised a concern about recently joined members not having the protection of members, noting that a trade association might want broader participation but that what acts as a trigger for some to join is an amicus brief. They might not join in order to fund the brief, but the brief might be what leads them to join the association. The Reporter responded that this draft rule requires the disclosure only of earmarked contributions. A liaison member stated that the draft rule provides a pretty elegant solution to the member problem, avoiding the problem that eliminating the member exclusion would disadvantage certain kinds of organizations that have to pass the hat for amicus briefs. As a drafting matter, it should be "fewer" than 12 months.

A judge member agreed that the approach in the working draft makes sense. An academic member urged further thought to the astro-turfing problem in that founding members are never disclosed. A lawyer member responded that the rule has been limited to earmarked contributions.

A liaison member observed that an amicus has an incentive to show a broad base so that if, in its self-description, it failed to say anything about how many members it had, that would raise a red flag. He also thought that the $1000 threshold was too high, and perhaps there should be different thresholds for members and nonmembers. A lawyer member agreed that the amount should be lower.

The Reporter asked for suggested dollar amounts. Judge Bates asked how much more disclosure would be captured by drawing a distinction between members and nonmembers and whether it would produce drafting problems in a rule that is already long and complicated. Judge Bybee observed that the draft effectively treats recent members as non-members. A lawyer member suggested $100 or $500 as a threshold.

Judge Bates urged the Committee, when presenting a proposal to the Standing Committee, to address First Amendment concerns as carefully as possible. The Reporter noted that the subcommittee has kept those concerns in mind at every step and agreed that a proposal should be explicit about addressing these concerns.

Judge Bybee then turned to working draft Rule 29(a)(2) which largely follows a recent amendment to the Supreme Court's rules in eliminating the requirement of a motion (or party consent) to the filing of an amicus brief. At the last meeting of this Committee, a concern was raised that allowing an amicus brief to be filed so long as it brings to the court's attention "relevant matter" that the parties did not would run the risk of inviting amicus briefs raising waived or forfeited issues. To meet this concern, the working draft adds the requirement that the matter not only be relevant but that it be "properly considered by the court." The Reporter explained that the idea was to avoid trying to specify in the rule text what was and was not properly considered, but mention things such as waiver, forfeiture, judicial notice, and legislative facts in the Committee Note.

Mr. Freeman said that he was skeptical of the utility of the subcommittee's addition and feared that it would invite motions to strike. He also wondered how it would apply to a classic Brandeis brief. While he has some concerns about the language from the Supreme Court rule ("relevant matter"), he would not add anything further. A lawyer member stated that the subcommittee's language would create more problems than it would resolve and risk weaponizing motions to strike. Judge Bates added that judges might disagree about what is properly considered.

Judge Bybee suggested, as a drafting matter, that (a)(3) might be folded into (a)(2).

A judge member noted that he was late to the game but feared that allowing the filing of amicus briefs without either a motion or consent would force the recusal of lots of judges, particularly at the petition for rehearing en banc stage. He feared that an amicus could target a filing so as to require recusal. Striking the brief later is not a remedy; when a petition for rehearing en banc has been filed, there is no entity to strike the brief. The case is in between the panel and the en banc court and neither is in a position to strike the brief.

Mr. Freeman noted that the existing rule, which permits filing on consent, would seem to present the same problem. The judge member responded that he would prefer to eliminate that option as well, requiring leave of court in all instances, but that consent filing poses less of a problem. He also noted two other kinds of problematic amicus briefs: 1) a letter to the editor style of amicus brief from a concerned citizen and 2) a brief submitted by lawyers for marketing purposes so they can say on their website that their amicus briefs were accepted in various courts.

Mr. Freeman suggested that a distinction could be drawn between the panel stage and the en banc stage. A liaison member agreed, noting that in most circuits the identity of the panel isn't revealed in time to file an amicus brief. The judge member acknowledged that the problem was mostly at the en banc stage, but that it can happen at the panel stage, such as when a panel takes a comeback case.

A different judge member stated that in 20 years he hasn't had a problem at the panel stage, while there have been some at the en banc stage, although not targeted. He preferred the existing rule; there is no trouble; why is there a need to change it?

In response to a question from Mr. Byron, the judge who first raised this concern explained that the real problem is the netherworld: once the court calls for a response to a petition for rehearing en banc, it waits for the en banc vote. A panel would not act on a motion. For that reason, empowering the court to prohibit a filing wouldn't help; there is no entity to do it. The way it works now is that no one acts on the motion until the en banc court is assembled. Then leave can be denied.

Judge Bates noted that it is worthwhile to look at this issue again. There seems to be a difference between the en banc and panel stages. The judge who raised the issue agreed, adding that the only reason to change is conformity to the Supreme Court; there is no great need. It's not a big deal to grant leave, and it would be nice to be able to reject letters to the editor. Ms. Dwyer agreed that the current rule does not present a problem, but there would be a problem with the proposed change. The rest of the proposal is complicated enough; don't change this.

A liaison member noted that there is a difference between filing an amicus brief in the Supreme Court and in the court of appeals. In the Supreme Court, the brief must be printed. That speed bump does not exist in the court of appeals.

The judge who raised the issue emphasized the need, at the minimum, to leave the existing procedure at the rehearing stage.

Judge Bybee then stated that the subcommittee had considered whether to address amicus briefs at other stages, such as stay applications, but decided not to do so. Mr. Freeman noted that this consideration was in response to his comment at the last meeting and that he does not disagree with the subcommittee's conclusion. Mr. Byron asked if the subcommittee had considered amicus briefs after a petition for rehearing en banc is granted; the Reporter answered no. A lawyer member noted that if the rule is not going to address amicus briefs at the stay stage, it should not address amicus briefs after rehearing en banc is granted. Judge Bybee agreed that we should not start down the road of all permutations.

The amicus subcommittee also needs a new member because of the departure of Danielle Spinelli. Judge Bybee appointed Linda Coberly.

The Committee then took a short break before resuming at approximately 11:00 a.m.

B. Intervention on Appeal (22-AP-G; 23-AP-C)

Mr. Freeman presented the report of the intervention on appeal subcommittee. (Agenda book page 177). He thanked the Reporter for the memo and draft rule, which provides a good basis for discussion.

Mr. Freeman explained that the problem is that there is no existing Federal Rule of Appellate Procedure governing intervention on appeal, unlike the Federal Rules of Civil Procedure which treat intervention as of right and permissive intervention separately in Civil Rule 24. FRAP 15(d) refers to intervention on appeal obliquely but provides no standard. In the absence of a governing Federal Rule of Appellate Procedure, most courts reason by analogy to Civil Rule 24. But the analogy is imperfect. Plus, Civil Rule 24 is ambiguous in key respects, particularly regarding what "interests" are sufficient to support intervention. There is a wide variety of views. If we tracked Rule 24, we would duplicate that ambiguity.

Why address this issue now? The Supreme Court has specifically noted that no Appellate Rule governs intervention on appeal. Twice in recent years it has granted cert to address intervention on appeal, but both cases mooted out for different reasons. An academic brief filed in the *Mayorkas* case suggested rule making and included a list of items that rule makers might consider.

The philosophy of the subcommittee is to avoid encouraging circumvention of district court discretion or the standard of review, to not replicate the ambiguity of Civil Rule 24, and to track the existing gestalt of court of appeals decisions. Those decisions, going back to the 1962 *McKenna* decision in the Fifth Circuit, speak at a high level of generality, reserving intervention on appeal to exceptional cases for imperative reasons. A rule could usefully provide more content.

Mr. Freeman then turned to the working draft on page 182 of the agenda book. It is not clear where a new rule governing intervention should go; the working draft numbers it Rule 7.1, placing it with other rules governing preliminary stages. It is designed to narrowly permit intervention on appeal without replicating the ambiguity in Civil Rule 24 or taking a position on the proper interpretation of Civil Rule 24.

Draft Rule 7.1(a) makes intervention as a party disfavored, preferring amicus status. It requires that a motion to intervene be filed promptly, show that the requirements of (b) are met, and explain the movant's legal interest required by (c). Rule 7.1(b) tracks some of the requirements in Civil Rules 19 and 24; it also requires that intervention not create a problem with diversity jurisdiction under section 1367. Rule 7.1(c) addresses what interests support intervention and draws from an article written by Professor Caleb Nelson, an article that was addressed to intervention in district court. Rule 7.1(c)(3) and (4) address the most traditional interests: claiming an interest in property and situations where a claim is being litigated on behalf of the proposed intervenor in a representative capacity. Rule 7.1(c)(1) and (2) are more different; a proposed intervenor cannot rely simply on the precedential effect of a

decision but must have an existing claim or defense or contingent claim. Rule 7.1(d) contains special provisions for governments, permitting intervention to defend a law or government action, and permitting agencies or officers to do so where authorized by law. These intervenors need not comply with the other provisions of the Rule, except as to timeliness. Rule 7.1(e) permits the court to transfer the motion to the district court to address contested factual issues and provides that if the court grants the motion to intervene, the intervenor becomes a party for all purposes, unless the court orders otherwise. Finally, it makes clear that denial of intervention does not preclude the filing of an amicus brief.

Judge Bates asked if the reason the Committee previously decided against creating such a rule was the risk of unintended consequences. Mr. Freeman stated that his recollection was that there was a fear that a rule would encourage more motions to intervene. He noted that the government was internally riven because some still have that fear. Mr. Byron added that the genie is out of the bottle; the Supreme Court has granted cert on the issue.

Professor Struve thanked the subcommittee and the Reporter for sorting through the questions. She thought it made sense to decouple intervention on appeal from Civil Rule 24, but also thought that the Committee Note should make clear that someone is better off trying in the district court and appealing rather than simply seek to intervene on appeal. An analogy could be made to the need to seek a stay in the district court before seeking one in the court of appeals. She also suggested that federally recognized Indian tribes be included in 7.1(d); the definition of "state" in FRAP 1(b) does not include tribes.

Judge Bates asked if a motion transferred to the district court under 7.1(e) would be governed by FRAP 7.1 and not Civil Rule 24. Mr. Freeman said yes and added that there is a mandate issue to be addressed.

A liaison member echoed prior comments that this is a terrific effort to identify the issues. He stated that the language in Rule 7.1(c) is difficult to parse and wants it to be clear that where a private party saw no need to appeal because it was fully represented by the government but then this was no longer true, intervention would be permitted.

A different liaison member asked what was meant by the provision in Rule 7.1(e) that intervention would be for all purposes unless the court orders otherwise. Mr. Freeman stated that it preserved the discretion of the court to allow intervention for a limited purpose, such where a party's interest is limited to an injunction (and not damages) or to a constitutional issue (but not a statutory issue). The Reporter added that it is designed to establish a clear default rule that, unless the court orders otherwise, intervention on appeal carries over to the case on remand.

Mr. Freeman turned to the issue raised by the liaison member about changes in the government's position. He observed that most recent cases are like that, but they aren't the only ones. It is commonplace for the favored party in an administrative proceeding to intervene on appeal to defend the agency action. Are the standards in (c) adequate for that situation, or do we need different standards in such cases? Timeliness may be different under different statutory schemes. In addition, there are also some statutes that mandate intervention, such as 35 U.S.C. § 143. Language should be added like intervention as of right under Civil Rule 24(a). There are also situations where foreign sovereigns are sued, and the United States intervenes to protect the foreign policy interests of the United States. If a new rule is created, we need to be aware of this.

A judge member asked what is meant by "promptly" in Rule 7.1(a). Mr. Freeman responded that there were two notions of timeliness in the working draft. Rule 7.1(a) focused on timeliness from the docketing of the appeal; Rule 7.1(b)(1) focused on timeliness in the overall litigation. The judge member suggested specifying a specific time after a specific event, such as 30 days after docketing or 7 days after the principal brief. It shouldn't be allowed so late that it would enable someone to intervene after the panel decision in order to petition for cert independent of the parties. A liaison member suggested that timeliness could be measured from a change in circumstances. An academic member suggested after both briefs are filed. A lawyer member suggested that timeliness is captured by (b)(1) and that (a)(1) may not be needed. Another lawyer member agreed that (b)(1) can do some work and noted that Civil Rule 24 has a timeliness requirement. Perhaps it can run from the moment when one's rights are not being protected. And perhaps an end date rather than a start date is necessary, such as in no event after oral argument so that someone can't intervene just to petition for cert.

Judge Bybee asked about a case where a party orally argues an appeal and then withdraws? The lawyer member responded that, apart from FRAP 28(j), parties are done after oral argument. There is no need for a new view from appellees once an appeal is argued. For appellants, existing rules govern dismissal of appeals. Mr. Freeman suggested that there has to be something about what triggers the time, such as the first time that an Act of Congress is called into question. A judge member wondered how this worked with being a party for all purposes: If someone intervenes right before argument, do they have the right to file a brief and participate in oral argument? Mr. Freeman stated that an intervenor should be a party for all purposes: cert, remand, discovery. The burdens of party status have to come along with the benefits. An academic member suggested flipping the default, so that an intervenor was a party only for the specific purposes designated by the court.

Judge Bates wondered if there was a reason (c)(1) includes defenses but (c)(2) does not. He also suggested that "the legality of" in (d) is superfluous.

Mr. Freeman noted that (c) is dense and hard to track. Perhaps it would be better to look at circumstances in which courts of appeals have permitted intervention and describe them. He added that the focus seems to be on civil cases, not criminal cases; perhaps that should be explicit. There might be cases, such as a federal prosecution for a state offense, where intervention might be appropriate.

A liaison member wondered about the consequences of (e) if intervention on appeal is allowed for an interlocutory appeal. Mr. Byron suggested that the "legality of" provision of (d) could be viewed as a corollary to the statutory power to intervene to defend the constitutionality of a statute. [28 U.S.C. § 2403(b).] Mr. Freeman suggested that Civil Rule 24 tracks it more closely.

The Reporter observed that (d) leaves to the underlying federal or state law who is empowered to defend its law, and that Judge Bates may be right that the phrase "legality of" is redundant. He added that (e) sets a default rule, leaving the court of appeals with discretion to limit the scope of the intervention. Mr. Freeman emphasized that intervention should carry over: An intervenor is bound by the judgment and should be subject to discovery. A lawyer member added that this helps maintain the distinction between an amicus and an intervening party.

A judge member stated that the working draft correctly incentivizes seeking intervention as early as possible or warranted, so readers will see that they can't sit on their rights and then seek to intervene because they would not be able to satisfy the new rule. In response to a question from the Reporter, this judge member stated that the benefit of a new rule would outweigh the cost of more motions.

Judge Bybee asked if anyone thought that the project was not worth pursuing. A lawyer member said that clients ask about intervention on appeal and there needs to be some guidance. It would be very useful to put some stakes in the ground and establish a high bar. Mr. Freeman said that it depends on how we work through some of these issues. Rule 7.1(c) is the hardest. It is drawn from Professor Nelson's article but may not work in the court of appeals. It would be a big mistake to encourage more intervention. What happens in an APA case involving an agency rule? If the challenge to a rule wins, then there may be a case against the government if its new rule comes out the other way. Does (c) mean that advocacy groups on both sides can intervene? The lawyer member added that the introduction could be sharper, and (b) made clearer whether all seven items must be shown and, if so, whether allowing intervention remains discretionary. And if it does remain discretionary, does (c) have to be so granular?

A judge member observed that Rule 7.1 would in some respects be more prescriptive than Civil Rule 24 and wondered whether district judges might look to it with regard to Civil Rule 24. Mr. Freeman emphasized that we are not looking to take a view about how Civil Rule 24 should operate in district court.

A different judge member suggested that the Committee Note indicate that a motion to intervene be made as soon as possible because of the effect on the parties, especially after briefing. A liaison member suggested that a new rule might encourage people to file motions out of an abundance of caution because they could at least say that they tried. He acknowledged, as a judge member noted, that people have always had the ability to move to intervene, but worried that there may be more pressure to do so. The judge member suggested framing the new rule as recognizing that this has always been allowed, that it isn't creating a new mechanism but codifying and clarifying an existing one. In response to a question by Judge Bybee about intervention in the Supreme Court, the Reporter stated that while there was intervention in original cases in the Supreme Court, he did not recall one way or the other about intervention in other cases. A lawyer member recalled that it may have happened in rare circumstances.

The Committee took a lunch break of approximately one-half hour.

After the lunch break, the Reporter sought to gauge the Committee's view of the status of the amicus project. Coming into this meeting, he had hoped that we would be on track to ask the Standing Committee, at its June 2024 meeting, to publish a proposed rule for public comment. Today's meeting raised some questions, including about the right term to use to measure revenue and how to deal with endowment income. Assuming we can resolve those issues, is it possible to seek publication in 2024? A judge member responded that conceptually there is no real concern, that it's a matter of getting the technical questions right, and that we are still on track.

Judge Bybee confirmed that, with regard to intervention on appeal, the subcommittee had sufficient guidance from the Committee to do further work in the spring.

VI. Discussion of Recent Suggestions

A. Contempt Procedures (23-AP-D)

The Reporter presented a suggestion by Joshua Carback to create a new Appellate Rule 42 to deal with contempt procedures. (Agenda book page 187). This suggestion is a small part of a large proposal to reform contempt procedures that involves statutory changes as well as amendment to the Federal Rules of Bankruptcy Procedure, Civil Procedure, and Criminal Procedure. The proposed Federal Rule of Appellate Procedure would simply piggyback on the Civil and Criminal Rules.

The memo in the Agenda book suggests tabling this suggestion pending action by other Advisory Committees. The Civil Rules Committee removed the item from its agenda, so perhaps this Committee would consider doing so as well. The Committee

decided, without objection, to retain the suggestion on its agenda pending action by other Advisory Committees.

B. Nationwide Filing Deadline (23-AP-F)

The Reporter presented a suggestion by Howard Bashman to establish a nationwide filing deadline of 5:00 p.m. to restore uniformity among courts of appeals. Alternatively, he suggests that the Committee examine the authority of the Court of Appeals for the Third Circuit to have established a 5:00 p.m. deadline in that circuit or recommend that it reinstate the midnight deadline. While this is closely related to the matter discussed earlier that had been handled by a joint subcommittee, it is possible that the Advisory Committee might want to take different action on this suggestion.

A judge member stated that the Third Circuit is entitled to do what it wants. It wouldn't work in the Ninth Circuit with its five time zones. Judge Bates noted that Judge Chagares (the Chief Circuit Judge in the Third Circuit) agreed that it would not work for the Ninth Circuit.

The Committee, without dissent, voted to remove the suggestion from the agenda.

C. Civil Rule 11 (23-AP-G)

The Reporter presented a suggestion by Andrew Straw, who disagrees with a passage contained in the Spring 2023 agenda book of the Civil Rules Committee. (Agenda book page 226). It is not clear what he wants this Committee to do.

Judge Bates suggested that perhaps he envisions this Committee as having appellate review power over the Civil Rules Committee.

The Committee, without dissent, voted to remove the suggestion from the agenda.

D. Record in Agency Cases—Rule 17 (23-AP-H)

The Reporter presented a suggestion by Thomas Dougherty, who suggests the Rule 17 be amended to require an agency, if it cites a page of its record in a brief, to file the pages of the full section or titled portion containing that page, as well as any pages that are cross-referenced on that cited page. (Agenda book page 231). Such a rule would require the inclusion of completely unnecessary material. In addition, it is not clear why the existing rule—which requires that any part of the record must be sent to the court if the court or a party so requests—is inadequate.

The Committee, without dissent, voted to remove the suggestion from the agenda.

VII. Review of Impact and Effectiveness of Recent Rule Changes

Judge Bybee directed the Committee's attention to a table of recent amendments 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, but Professor Struve noted that there is some case law praising the new Rule 3.

VIII. New Business

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

IX. Adjournment

Judge Bybee announced that the next meeting will be held on April 10, 2024, with the location to be determined.

He thanked everyone, noting that at every meeting he says that a lot of people with a lot of important things to do have put in a lot of time to prepare and participate. Even small changes to court rules can make significant improvements. If we can make such improvements, our time is well worth it.

The Committee adjourned at approximately 1:20 p.m.

TAB 4

TAB 4A

Item 4A will be an oral report.

TAB 4B

MEMORANDUM

To: Advisory Committee Chairs

From: Reporters' Privacy Rules Working Group
H. Thomas Byron III, Chief Counsel, Rules Committee Staff
Zachary Hawari, Rules Law Clerk

Re: Update on Review of Privacy Rules

Date: March 19, 2024

I. Background and Overview

In 2022, Senator Ron Wyden suggested that the Rules Committees reconsider whether to require complete redaction of social-security numbers (SSNs) in federal-court filings (suggestions 22-AP-E, 22-BK-I, 22-CV-S, 22-CR-B). The redaction requirements—including the requirement that filers redact all but the last 4 digits of SSNs—are generally consistent across the privacy rules (Appellate Rule 25(a)(5), Bankruptcy Rule 9037, Civil Rule 5.2(a), and Criminal Rule 49.1(a)). See E-Government Act of 2002, Pub. L. No. 107-347, § 205(c)(3)(A)(ii), 116 Stat. 2914 ("Such rules shall provide to the extent practicable for uniform treatment of privacy and security issues throughout the Federal courts.").

The partial SSN redaction requirement in the privacy rules was adopted and retained in large part due to concerns that participants in bankruptcy cases needed the last 4 digits of a debtor's SSN. In light of that history, the Advisory Committees concluded in 2022 that the Bankruptcy Rules Committee should first determine the extent to which that need remains paramount before the Appellate, Civil, and Criminal Rules Committees consider whether any different approach would be warranted in non-bankruptcy cases. The Bankruptcy Rules Committee has tentatively determined that it would not be feasible to require complete redaction of SSNs in all bankruptcy filings, but that committee is considering a range of options that could include eliminating SSNs from some filings. Those issues remain under review and are unlikely to result in a recommendation to publish any proposed amendments to the Bankruptcy Rules before 2025.

The reporters and Rules Committee Staff have been discussing Senator Wyden's suggestion and related issues concerning the privacy rules. We have tentatively concluded that any amendments to the Civil and Criminal Rules concerning the redaction of SSNs should not be considered in isolation but should be part of a more considered review of the privacy rules. The following sections outline possible areas of inquiry that the Rules Committees might consider.

II. Sketch of Rules Amendments Requiring Complete Redaction of SSNs

The Rules Committees could consider amendments that would require complete SSN redaction by amending Civil Rule 5.2(a) and Criminal Rule 49.1(a) along these lines:

> (a) REDACTED FILINGS. Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing must [fully] redact the social-security number or taxpayer-identification number and may include only:
>
> (1) ~~the last four digits of the social-security number and taxpayer-identification number;~~
>
> ~~(2)~~ the year of the individual's birth;
>
> (~~3~~2) the minor's initials; and
>
> (4~~3~~) the last four digits of the financial-account number.

The Bankruptcy Rules Committee is considering this suggestion, among other possible approaches to amending the rules governing SSNs in bankruptcy filings.[1]

Several considerations warrant a broader review of the privacy rules before moving forward to consider this or a similar proposal in isolation. First, the Federal Judicial Center is conducting a study of unredacted privacy information—including SSNs—in court filings. That study could help inform the Rules Committees' understanding of whether the privacy rules warrant further review and possible amendment. Second, the Rules Committees have received additional suggestions concerning possible amendments to the privacy rules. While the proposal outlined above could move forward while the committees consider other suggestions, the Rules Committees generally seek to avoid multiple proposed amendments to any individual rule, preferring instead to present a single set of consolidated changes after comprehensive consideration. This approach helps educate courts, litigants, and the public about rules changes, avoiding confusion and the risk of amendment fatigue.

Because the committees will be considering other privacy rule suggestions, as well as the conclusions of the ongoing FJC study, it seems prudent to consider any proposed amendment requiring full redaction of social-security numbers along with any other proposed amendments to the privacy rules that the committees conclude may be warranted after careful review of the issues.

[1] There would likely be no need for an amendment of Appellate Rule 25(a)(5), which specifies that the other privacy rules apply to appellate filings in particular categories of cases.

III. Other Privacy Rule Issues

A. The Bankruptcy Rules Committee is considering suggestions to streamline the caption on many notices by limiting or eliminating detailed information about a debtor, including the debtor's SSN, from subsequent notices after the meeting of creditors notice (23-BK-D, 23-BK-J). That committee is considering the suggestions in conjunction with its ongoing consideration of the continuing need and utility of including the last 4 digits of an individual's SSN in bankruptcy filings.

B. The Department of Justice has recently submitted a suggestion to amend Criminal Rule 49.1(a)(3), which currently requires including in a filing only the initials of a known minor, to require instead the use of a pseudonym in order to better protect the privacy interests of minors who are victims or witnesses (suggestion 24-CR-A). Because similar requirements appear in the Bankruptcy and Civil Rules, and are incorporated in the Appellate Rules, the suggestion has been forwarded to those advisory committees as well (suggestions 24-AP-B, 24-BK-D, 24-CV-C).

C. Nearly 20 years have passed since the Rules Committees initially considered the privacy rules, and this could present a timely opportunity to review the rules and consider whether any amendments might be warranted in light of the passage of time, or whether practice under the rules has identified other areas of concern. For example, the committees could consider whether any other personal information, not included in the redaction requirements, might warrant protection today.

Some issues could concern provisions that are common to the privacy rules. For example, the exemptions from the redaction requirements in subdivision (b) of each of the privacy rules include language that could be ambiguous or overlapping; additional inquiry could identify whether any of these provisions pose a practical problem to litigants or courts. And the waiver provision in subdivision (h) might warrant clarification. Those inquiries should proceed on a coordinated basis, either by continuing the work of the reporters' working group, by designating one advisory committee to take the lead, or by asking the Standing Committee Chair to appoint a joint subcommittee.

Moreover, an Advisory Committee might seek to consider issues solely related to filings in appellate, bankruptcy, civil, or criminal proceedings. For example, the Bankruptcy Rules Committee is already considering such questions. And the Criminal Rules Committee might review several provisions in Criminal Rule 49.1 that address unique concerns, such as arrest or search warrants and charging documents (Rule 49.1(b)(8)-(9)).

* * * *

The Rules Committee Staff will continue to work with the relevant Advisory Committee Chairs and reporters to identify any areas of common concern and to

assist in any necessary coordination. We anticipate that the reporters' advisory group will continue its discussions over the next several months. Each Advisory Committee can also consider whether it wishes to appoint a subcommittee to consider these issues or instead to await further information.

TAB 4C

U.S. Department of Justice

Criminal Division

Acting Assistant Attorney General *Washington, DC 20530*

March 7, 2024

The Honorable James C. Dever III
Chair, Advisory Committee on Criminal Rules
United States Courthouse
310 New Bern Ave.
Raleigh, NC 27601

The Department of Justice (the Department) proposes an amendment to Rule 49.1 of the Federal Rules of Criminal Procedure to require that in all publicly available court filings, the parties refer to minors by pseudonyms.

1. Federal Rule of Criminal Procedure 49.1, titled "Privacy Protection for Filings Made with the Court," provides in relevant part that "[u]nless the court orders otherwise," court filings "that contain[] … the name of an individual known to be a minor … may include only … the minor's initials." Fed. R. Crim. P. 49.1(a)(3). It has become clear in recent years, however, that referring to child victims and child witnesses by their initials—especially in crimes involving the sexual exploitation of a child—is insufficient to ensure the child's privacy and safety. Project Safe Childhood prosecutors and victim witness personnel, for example, know that child-exploitation offenders sometimes track federal criminal filings and take other measures in an effort to uncover the identity of child victims and contact and harass—and thereby further victimize—the minors. And this is to say nothing of the increased shame, embarrassment, and fear that a child victim or witness may face if their identity as a victim or witness were to become publicly known.

In 2022, the Department of Justice issued The Attorney General Guidelines for Victim and Witness Assistance (the AG Guidelines). As most relevant here, the AG Guidelines state that "Department personnel should scrupulously protect children's privacy in accordance with 18 U.S.C. § 3509(d), the AG Guidelines, and other Department policies." 2022 AG Guidelines, Article III.L.1.d. Although the prior version of the Guidelines had permitted use of initials or an alias to identify children,[1] the 2022 AG Guidelines direct that

[1] The 2011 Attorney General Guidelines for Victim and Witness Assistance provided that "[a] child's name or other identifying information (other than *initials or an alias*) should not be

"[a] child's name or other identifying information (*other than a pseudonym*) should not be reflected in court documents or other public records unless otherwise required by law." 2022 AG Guidelines, Article III.L.1.d. (emphasis added). The 2022 AG Guidelines also caution that "Department personnel should be aware that information in multiple sources can be put together to trace the identity of victims or witnesses." *Id.* at Art. II.D.1.

Federal courts have referred to minors by pseudonyms. *See, e.g.*, *Paroline v. United States*, 572 U.S. 434, 439 (2014) (noting that the child victim "goes by the pseudonym 'Amy' for this litigation"); *United States v. Viarrial*, 730 F. App'x 694, 695 n.1 (10th Cir. 2018) (unpublished) ("To protect the privacy of those involved, this opinion refers to Mr. Viarrial's child victims and his former partner with the pseudonyms [*e.g.*, Jane Doe] used in the indictment, jury instructions, and verdict form."); *Brodit v. Cambra*, 350 F.3d 985, 995 n.1 (9th Cir. 2003) (Berzon, J., dissenting) ("The charging documents and much of the trial transcript refer to the child in this case by the pseudonym 'Jane Doe.' Accordingly, I will also use this pseudonym."); *Collmorgen v. Lumpkin*, 2023 WL 6388551, at *5 (S.D. Tex. 2023) ("To protect the child victim's privacy, the [state] appellate court used pseudonyms to refer to him and his family members. This Court will do the same—referring to the child victim as Maxwell and referring to the State's rebuttal witness as Kaitlyn."); *Doe v. Avon Old Farms School, Inc.*, 2023 WL 2742330, at *1 n.1 (D. Conn. 2023) ("I refer to the … daughters with the 'Jane Doe' pseudonym throughout this opinion—as the parties do in their filings—because the girls are minors and this case includes sexual harassment and assault allegations."); *United States v. Stivers*, 2020 WL 2804074, at *1 n.1 (S.D. Ind. 2020) ("'Vicky' is a pseudonym for the actual minor victim depicted in the series, which the Court will adopt to refer to the victim in this Order. All of the references to 'Vicky' in this Order and in the other criminal cases discussed herein refer to the same person."). These cases support the Department's policy and practice as well as the Department's recommendation to amend Rule 49.1.

Finally, amending Rule 49.1(a)(3) to change "the minor's initials" to "a pseudonym" will not prejudice criminal defendants. To the extent that a defendant has the right to know the actual identity (*e.g.*, name) of a minor, that right can be protected through sealed filings that identify the child while making sure that publicly available filings use only the pseudonym. *See generally* 18 U.S.C. § 3509(d)(2); *see also* 2022 AG Guidelines, Art. II.D.1. In addition, and where appropriate, a party can seek a protective order to help ensure that information that should not be released publicly is in fact not released publicly. *See* 18 U.S.C. § 3509(d)(3); Fed. R. Crim. P. 49.1(e); 2022 AG Guidelines, Art. II.D.1.

2. For the reasons set forth above, the Department proposes to amend Rule 49.1(a) as follows (stricken text in red; proposed new text in blue):

> **(a) Redacted Filings.** Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number,

---

reflected in court documents or other public records unless otherwise required by law." 2011 AG Guidelines, Article III.L.1.d (emphasis added).

taxpayer-identification number, or birth date, the name of an individual known to be a minor, a financial-account number, or the home address of an individual, a party or nonparty making the filing may include only:

(1) the last four digits of the social-security number and taxpayer-identification number;

(2) the year of the individual's birth;

(3) ~~the minor's initials~~ in reference to a minor, a pseudonym;

(4) the last four digits of the financial-account number; and

(5) the city and state of the home address.

* * *

We appreciate your assistance with this proposal, and we look forward to working with the Committee on this issue.

Sincerely,

NICOLE ARGENTIERI
Digitally signed by NICOLE ARGENTIERI
Date: 2024.03.07 10:41:35 -05'00'

Nicole M. Argentieri
Acting Assistant Attorney General

TAB 4D

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett

Re: Pseudonym for minors (24-AP-B)

Date: March 12, 2024

The Department of Justice has suggested that Criminal Rule 49.1 be amended to require that minors be identified by pseudonym. The current rule requires that minors be identified by initials, but it may be too easy to uncover a child's name from those initials.

Appellate Rule 25(a)(5) provides:

> 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.

Because the Appellate Rules piggyback on the other rules, I suggest that the Appellate Rules Committee defer to the Criminal Rules Committee to take the lead here. Alternatively, if this suggestion is considered together with other privacy issues and the Standing Committee decides to appoint a joint subcommittee, the Appellate Committee might seek representation on that joint subcommittee.

TAB 5

TAB 5A

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Costs Subcommittee

Re: Rule 39

Date: February 27, 2024

Proposed amendments for FRAP 39 were published in August 2023 for public comment. The proposed amendments, as published, follow this report.

We have received three comments on the proposal. Two of them are positive; one is negative.

Minnesota Bar. The Minnesota State Bar Associations' Assembly, its policy-making body, voted to support the proposed rule. AP-2023-0001-0007. Writing about proposed amendments to FRAP 6 (and to various Bankruptcy Rules and Civil Rules) in addition to FRAP 39, it explained that it "believes that the proposed changes will foster transparency and possibly efficiency between parties and the court."

California Lawyers Association. The Committee on Appellate Courts of the California Lawyers Association's Litigation Section provided more extensive comments in support of the proposed amendments. AP-2023-0001-0008. In general, it "believes that the proposal provides clarity to courts and practitioners regarding the respective authority of circuit courts and district courts to allocate and tax costs," and "cogently addresses the issues regarding FRAP 39 raised" by the Supreme Court in *Hotels.com*.

In particular, it supports the introduction of the term "allocate" because it "achieves greater clarity for practitioners and courts," and the codification of the holding in *Hotels.com* because it assists those who rarely practice in the courts of appeals. It thinks that the amendment deals with the concerns that led the Supreme Court to suggest a modification of the Rules. And it "agrees that the Rules Committee should explore an amendment to Federal Rules of Civil Procedure 62."

Andrew Straw. Andrew Straw suggested that no costs should be allocated against a party who was allowed to proceed in forma pauperis. AP-2023-0001-0005. Because his comment is so short, and was not submitted as an attached document, the relevant text is reproduced here:

> Regarding FRAP Rule 39, if an appeal is allowed in forma pauperis either on motion or because the case below was allowed in forma pauperis, no allocation of costs to the indigent person should be made in any case. The very risk of financial catastrophe is an unacceptable chilling of the right

to appeal and thus of the First Amendment right to petition and receive a court decision.

The subcommittee does not recommend changing Rule 39 to prohibit a court of appeals from deciding that a party with IFP status should pay costs. The IFP statute permits "the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor." 28 U.S.C. § 1915(a)(1). But it also provides, "Judgment may be rendered for costs at the conclusion of the suit or action as in other proceedings," 28 U.S.C. § 1915(f)(1), and requires prisoners to pay filing fees over time. 28 U.S.C. § 1915(b).

The subcommittee does not believe that these public comments warrant any changes to the proposed amendments. Instead, it recommends final approval of the proposed amendments as published.

These proposed amendments to FRAP 39 do not guarantee that a judgment winner in the district court will be aware of the premium paid for a bond before expiration of the time to ask the court of appeals to reconsider the allocation of the costs. Indeed, these amendments do not guarantee that a judgment winner in the district court will be aware of the possibility that it might have to pay those costs if the court of appeals reverses. To minimize the chances that a party—including one who does not think to consult the Federal Rules of Appellate Procedure while a request to approve a bond is pending in the district court—might be caught unawares, the Advisory Committee on Civil Rules might consider an amendment to Civil Rule 62 that would require disclosure to the judgment winner of the cost of the bond or that would add a cross-reference to FRAP 39.

TAB 5B

TO: Honorable John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: California Lawyers Association, Litigation Section,
Committee on Appellate Courts

DATE: February 16, 2024

RE: Comment on Proposed Revisions to Federal Rules of Appellate Procedure, Rule 39

The Committee on Appellate Courts ("CAC") of the California Lawyers Association's Litigation Section appreciates the opportunity to comment on the proposed revisions to Federal Rules of Appellate Procedure ("FRAP" or "Rules"), Rule 39, proposed by the Advisory Committee on Appellate Rules ("Advisory Committee"). Established in 2018, the California Lawyers Association is a nonprofit, voluntary organization comprising thousands of licensed attorneys that is dedicated to the professional advancement of attorneys practicing in the State of California. The Committee on Appellate Courts consists of over twenty experienced appellate practitioners and court staff, drawn from a wide range of practice areas. As part of its mission, the CAC frequently shares its views regarding proposals to change rules that govern appellate practice.

The CAC welcomes the amendments to FRAP 39. The CAC believes that the proposal provides clarity to courts and practitioners regarding the respective authority of circuit courts and district courts to allocate and tax costs.

The CAC concludes that the amendment cogently addresses the issues regarding FRAP 39 raised by the U.S. Supreme Court in *City of San Antonio, Texas v. Hotels.com, L. P.*, 593 U.S. 330 (2021) ("*Hotels.com*"). Under FRAP 39(e), certain costs on appeal are to be taxed in the district court (those that are incurred in the district court, such as the preparation and transmission of the record, and premiums paid for a bond, and the filing fee for the notice of appeal), while costs incurred in the court of appeals are taxed in that court (e.g., costs for printing the parties' briefs). The appellant in that case contended that, in light of FRAP 39's statutory scheme and language, the district court has sole authority to apportion costs among the parties following remand. The Supreme Court in *Hotels.com* disagreed and concluded that FRAP 39 empowers the court of appeals to not only designate which party can receive costs but also provides the authority to divide up (or "allocate") costs among the parties. *Id.* at 337-

338. The Court stated that the rule "gives discretion over the allocation of appellate costs to the courts of appeals" without permitting the district court to "take a second look at the equities" and reallocate costs following remand. *Id*. at 338. In so holding, the Court rejected several arguments from the appellant that nonetheless raise points that merited an amendment.

First, the amendment addressed the ambiguity arising from the use of the word "taxable" in FRAP 39. Appellant contended that the ordinary meaning of "taxable" means an item that is capable of getting (but is not necessarily) taxed, and so the district court's authority to tax costs must necessarily attach with it the power to allocate costs (because it may choose to tax or not tax any given cost item). *Id.* at 339. The Supreme Court stated that "taxable" as used in FRAP 39, may "mean no more than that the party seeking those costs will not get them unless it submits a bill of costs with the verification specified by statute." *Id*. But even with the Court's clarification, the term "taxable" is awkward and confusing. By introducing the term "allocate" to define the power of courts to divide costs among the parties, the amendment achieves greater clarity for practitioners and courts.

Second, the proposed new FRAP 39(c) would codify the Supreme Court's holding that the court of appeals has power to allocate the costs taxable in the court of appeals and the costs taxable in the district court. This would improve the rule and assist practitioners who rarely practice in federal courts of appeals and may not be aware of *Hotels.com*.

Third, the Supreme Court found that the appellant raised a valid concern that "parties will be unable to obtain review of their objections to Rule 39(e) costs if the district court cannot provide relief after the matter returns to that court." *Hotels.com*, 593 U.S. at 344. The Supreme Court suggested a modification of the Rules to address this issue. The Advisory Committee has done just that. The amendment creates a procedure allowing a party to move the court of appeals to reconsider the allocation within 14 days after entry of judgment, authorizing the court of appeal to retain jurisdiction for this limited purpose. This also strikes the CAC as a reasonable method of addressing review of an allocation decision following remand and should be adopted.

Finally, the CAC agrees with the Advisory Committee that the Rules must address, in some fashion, premiums paid on a supersedeas bond. Appellate costs are often so low that it would not be worth the trouble of filing a memorandum of costs. The main appellate cost item that can be substantial is the premium paid on a supersedeas bond. While the Advisory Committee could not reach an agreement on amending FRAP 39 to address this issue, the CAC agrees that the Rules Committee should explore an amendment to Federal Rules of Civil Procedure 62.

Overall, the CAC believes the amendment to FRAP 39 will be helpful and effective. In particular, the CAC welcomes the clear distinction between "taxable" costs and allocation of costs. The CAC also believes the amendment would assist practitioners,

particularly those who do not regularly practice in the federal appeals courts, by codifying the holding of *Hotels.com*.

CONTACTS:

Committee on Appellate Courts
Bryce Young
Chair, Committee on Appellate Courts,
Litigation Section
California Lawyers Association
(619) 892-6946
bayoung147@gmail.com

California Lawyers Association
Saul Bercovitch
Associate Executive Director,
Governmental Affairs
(916) 516-1704
saul.bercovitch@calawyers.org

MSBA

Minnesota
State Bar
Association

600 Nicollet Mall
Suite 380
Minneapolis, MN
55402-1039

www.mnbar.org

Telephone
612-333-1183
National
800-882-MSBA
Fax
612-333-4927

President
Paul Floyd

President-Elect
Samuel Edmunds

Treasurer
Thomas R. Pack

Secretary
Kenya Bodden

Chief Executive Officer
Cheryl Dalby

February 8, 2024

Via Email
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

Dear Committee Members,

On December 7, 2023, the Minnesota State Bar Association's (MSBA) Assembly, its policy-making body,voted to support the proposed amendments to the following Federal rules and forms, as well as one new rule:

• Appellate Rules 6 and 39;

• Bankruptcy Rules 3002.1 and 8006; • Bankruptcy Official Forms 410, 410C13-M1, 410C13-M1R, 410C13-N, 410C13- NR, 410C13-M2, and 410C13-M2R; and

• Civil Rules 16, 26, and new Rule 16.1.

The MSBA believes the proposed changes will foster increased transparency and possibly efficiency between parties and the court.

Sincerely,

Cheryl Dalby

Cheryl Dalby
Chief Executive Officer

TAB 5C

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

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~~, unless the parties agree otherwise~~;

(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

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

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 the motion. The court of appeals retains jurisdiction to decide the motion after the mandate issues.

(c) Costs Governed by Allocation Determination. The allocation of costs applies both to costs taxable in the court of appeals under (e) and to costs taxable in district court under (f).

~~(b)~~**(d) 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) **Costs Taxable.** 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.

~~(e)~~ (2) **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.

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

~~(1)~~ (A) 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.

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

~~(3)~~ (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.

~~(e)~~(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~~:

* * * * *

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 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. The docketing fee, currently $500, is established by the Judicial Conference of the United States pursuant to 28 U.S.C. § 1913. The reference to filing fees paid in the court of appeals is not a reference to the $5

fee paid to the district court required by 28 U.S.C. § 1917 for filing a notice of appeal from the district court to the court of appeals. Instead, the reference is to filing fees paid in the court of appeals, such as the fee to file a notice of appeal from a bankruptcy appellate panel.

Subdivision (f). The provisions governing costs taxable in the district court are lettered (f) rather than (e). The filing fee referred to in this subdivision is the $5 fee required by 28 U.S.C. § 1917 for filing a notice of appeal from the district court to the court of appeals.

TAB 5D

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Bankruptcy Subcommittee

Re: Rule 6

Date: February 29, 2024

Proposed amendments for FRAP 6, dealing with appeals in bankruptcy cases, were published in August 2023 for public comment. The proposed amendments, as published, follow this report.

We have received only one comment on this proposal.

The Minnesota State Bar Associations' Assembly, its policy-making body, voted to support the proposed rule. Writing about proposed amendments to FRAP 39 (and to various Bankruptcy Rules and Civil Rules) in addition to FRAP 6, it explained that it "believes that the proposed changes will foster transparency and possibly efficiency between parties and the court." The subcommittee confirmed that the Advisory Committee on Bankruptcy Rules had not received any additional relevant comments.

The subcommittee recommends final approval of the proposed amendments to FRAP 6 as published.

TAB 5E

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

Rule 6. Appeal in a Bankruptcy Case or Proceeding

(a) Appeal From a Judgment, Order, or Decree of a District Court Exercising Original Jurisdiction in a Bankruptcy Case or Proceeding. An appeal to a court of appeals from a final judgment, order, or decree of a district court exercising original jurisdiction in a bankruptcy case or proceeding under 28 U.S.C. § 1334 is taken as any other civil appeal under these rules. But the reference in Rule 4(a)(4)(A) to the time allowed for motions under certain Federal Rules of Civil Procedure must be read as a reference to the time allowed for the equivalent motions under the applicable Federal

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

Rules of Bankruptcy Procedure, which may be shorter than the time allowed under the Civil Rules.

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

(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 in a bankruptcy case or proceeding under 28 U.S.C. § 158(a) or (b), but with these qualifications:

* * * * *

(C) when the appeal is from a bankruptcy appellate panel, ‘‘district court,’’ as

used in any applicable rule, means ''bankruptcy appellate panel''; and

* * * * *

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

(A) **Motion for Rehearing.**

* * * * *

(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~~ accordance 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.

* * * * *

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

* * * * *

(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 at any time during the appeal's pendency, 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 as noted ~~on the docket~~ serves as the filing date of the record. The circuit clerk must immediately notify all parties of that ~~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).

(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)~~.

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

(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).

(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.

(C) **Answer or Cross-Petition; Oral Argument.** Rule 5(b)(2) governs an answer or cross-petition. Rule 5(b)(3) governs oral argument.

(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.

(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.

(F) **Notification of the Order Authorizing Direct Appeal; Fees; Docketing 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:

- the fee required for the appeal to the district court or bankruptcy appellate panel; and
- 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.

(G) **Stay Pending Appeal.** Bankruptcy Rule 8007 applies to any stay pending appeal.

~~(A)~~(H) **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.

~~(B)~~(I) **Making the Record Available.** Bankruptcy Rule 8010 governs completing the record and making it available. When the court of appeals enters the order authorizing the direct appeal, the bankruptcy clerk must make the record available to the circuit clerk.

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

~~(D)~~(J) **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 that ~~the filing~~ date.

~~(E)~~(K) **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.

Committee Note

Subdivision (a). Minor stylistic and clarifying changes are made to subdivision (a). In addition, subdivision (a) is amended to clarify that, when a district court is exercising original jurisdiction in a bankruptcy case or proceeding under 28 U.S.C. § 1334, the time in which to file post-judgment motions that can reset the time to appeal under Rule 4(a)(4)(A) is controlled by the Federal Rules of

Bankruptcy Procedure, rather than the Federal Rules of Civil Procedure.

The Bankruptcy Rules partially incorporate the relevant Civil Rules but in some instances shorten the deadlines for motions set out in the Civil Rules. *See* Fed. R. Bankr. P. 9015(c) (any renewed motion for judgment under Civil Rule 50(b) must be filed within 14 days of entry of judgment); Fed. R. Bankr. P. 7052 (any motion to amend or make additional findings under Civil Rule 52(b) must be filed within 14 days of entry of judgment); Fed. R. Bankr. P. 9023 (any motion to alter or amend the judgment or for a new trial under Civil Rule 59 must be filed within 14 days of entry of judgment).

Motions for attorney's fees in bankruptcy cases or proceedings are governed by Bankruptcy Rule 7054(b)(2)(A), which incorporates without change the 14-day deadline set in Civil Rule 54(d)(2)(B). Under Appellate Rule 4(a)(4)(A)(iii), such a motion resets the time to appeal only if the district court so orders pursuant to Civil Rule 58(e), which is made applicable to bankruptcy cases and proceedings by Bankruptcy Rule 7058.

Motions for relief under Civil Rule 60 in bankruptcy cases or proceedings are governed by Bankruptcy Rule 9024. Appellate Rule 4(a)(4)(A)(vi) provides that a motion for relief under Civil Rule 60 resets the time to appeal only if the motion is made within the time allowed for filing a motion under Civil Rule 59. In a bankruptcy case or proceeding, motions under Civil Rule 59 are governed by Bankruptcy Rule 9023, which, as noted above, requires such motions to be filed within 14 days of entry of judgment.

Civil Rule	Bankruptcy Rule	Time Under Bankruptcy Rule
50(b)	9015(c)	14 days
52(b)	7052	14 days
59	9023	14 days
54(d)(2)(B)	7054(b)(2)(A)	14 days
60	9024	14 days

Of course, the Bankruptcy Rules may be amended in the future. If that happens, the time allowed for the equivalent motions under the applicable Bankruptcy Rule may change.

Subdivision (b). Minor stylistic and clarifying changes are made to the header of subdivision (b) and to subdivision (b)(1). Subdivision (b)(1)(C) is amended to correct the omission of the word "bankruptcy" from the phrase "bankruptcy appellate panel." Stylistic changes are made to subdivision (b)(2).

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 (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) 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)(H). Subdivision (c)(2)(H) 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)(I). Subdivision (c)(2)(I) was formerly subdivision (c)(2)(B). It continues to provide that Bankruptcy Rule 8010 governs provision of the record to the court of appeals. It adds a sentence clarifying that when the

court of appeals authorizes the direct appeal, the bankruptcy clerk must make the record available to the court of appeals.

Subdivision (c)(2)(J). Subdivision (c)(2)(J) was formerly subdivision (c)(2)(D). It is unchanged other than a stylistic change and being renumbered.

Subdivision (c)(2)(K). Subdivision (c)(2)(K) 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.

TAB 6

TAB 6A

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Amicus Subcommittee

Re: Rule 29 (21-AP-C; 21-AP-G; 21-AP-H; 22-AP-A; 23-AP-A; 23-AP-B; 23-AP-E; 23-AP-I; 23-AP-K)

Date: March 15, 2024

The subcommittee met to consider concerns raised at fall 2023 Advisory Committee meeting and the January 2024 Standing Committee meeting. It has produced a proposed amendment to Rule 29, with accompanying Committee Note, that follows this memo.[1] It recommends that the Advisory Committee approve the proposed amendment for publication and ask the Standing Committee to approve publication for public comment.

At the last meeting of the Advisory Committee, two primary concerns were raised about the working draft of Rule 29.

The Supreme Court's permissive approach to amicus filings

Under existing Rule 29, an amicus brief can be filed at the initial stage based on party consent or court permission, but court permission is necessary at the petition for rehearing stage. The Supreme Court has recently decided to freely allow the filing of amicus briefs without either party consent or court permission. When the Advisory Committee first looked at this issue, it didn't see any reason not to follow the Supreme Court's lead. Accordingly, the working draft presented at the fall meeting of the Advisory Committee eliminated these requirements. However, at that meeting, concerns were raised about following the Supreme Court's lead and allowing any amicus to file a brief without obtaining either leave of court or consent of the parties.

A major concern is that an amicus might file a brief—particularly at the rehearing stage—to force a judge's recusal. The power to strike the brief does not solve the problem, because once there is a call for a vote on a petition for rehearing en banc, the panel does not strike an amicus brief and the full court is not yet in a position to do so. An additional reason to not follow the Supreme Court's lead is that the need to print briefs at the Supreme Court introduces a speed bump there that does not exist in the courts of appeals.

Since our last meeting, the Supreme Court promulgated its Code of Conduct. It provides, "Neither the filing of a brief amicus curiae nor the participation of counsel

[1] The text has been revised in accordance with suggestions from the style consultants.

for amicus curiae requires a Justice's disqualification." Canon 3B(4). This provision of the Supreme Court's Code does not match current Appellate Rule 29(a)(2), which empowers a court of appeals to strike or prohibit the filing of an amicus brief that would result in a judge's disqualification. The Court explained this provision of its Code of Conduct this way:

> In contrast to the lower courts, where filing of *amicus* briefs is limited, the Supreme Court receives up to a thousand *amicus* filings each Term. In some recent instances, more than 100 *amicus* briefs have been filed in a single case. The Court has adopted a permissive approach to *amicus* filings, having recently modified its rules to dispense with the prior requirement that *amici* either obtain the consent of all parties or file a motion seeking leave to submit an *amicus* brief. In light of the Court's permissive *amicus* practice, *amici* and their counsel will not be a basis for an individual Justice to recuse. The courts of appeals follow a similar approach to ameliorating any risk that an *amicus* filing could precipitate a recusal. Federal Rule of Appellate Procedure 29(a)(2) states that "a court of appeals may prohibit the filing of or may strike an *amicus* brief that would result in a judge's disqualification."

Code of Conduct Commentary at 11-12.

For these reasons, the subcommittee recommends not following the Supreme Court's permissive approach.

The question then arose whether to require leave of court both at the panel stage and the rehearing stage. The subcommittee believes that the consent process does not provide a meaningful screen because the norm among most lawyers is to give consent to anyone who asks. Counsel for a party does not see the proposed amicus brief before consenting, so is not in a good position to evaluate the usefulness of the brief. And if counsel for a party does not respond promptly to a request to consent, the amicus can be left hanging, uncertain whether a motion will be appropriate.

For these reasons, the subcommittee believes that the party consent option—which already does not exist at the petition for rehearing stage—should likewise be eliminated from the initial hearing stage.

Governmental parties, however, remain empowered to file amicus briefs at either stage without leave of court.

Gross revenue

The working draft required the disclosure of "whether a party, its counsel, or any combination of parties and their counsel has, during the 12-month period before the brief was filed, contributed or pledged to contribute an amount equal to or greater

than 25% of the gross revenue of the amicus curiae for the prior fiscal year." A question was raised whether "gross revenue" was the right term for nonprofits. A related question was raised whether "gross revenue" includes endowment income.

IRS Form 990, the form used by tax exempt organizations (such as 501(c), 527, and 4947(a)(1) organizations) uses the term "total revenue" at line 12. The total revenue at line 12 includes investment income (listed on line 10), and therefore includes income earned from an endowment. The subcommittee believes that, for purposes of amicus disclosure, it is appropriate to include income from an endowment's investments, because the more income from such investments that an organization has, the less significant a contribution is to that organization. For that reason, the subcommittee recommends using the term "total revenue."

The tax forms for entities that are not tax exempt—business corporations, Form 1120, line 11; partnerships, Form 1065, line 8; individuals, Form 1040, line 9; and trusts and estates, Form 1041, line 9—use the term "total income." The subcommittee believes that amicus filings by business corporations, partnerships, and trusts and estates are rare. Plus, income and revenue are not always the same (since income of a business is often viewed as net of expenses). And for-profit entities will generally have an income statement, the top line of which will be revenue.

For that reason, the subcommittee uses the term "total revenue," which should make the calculation easy for tax exempt organizations—the most likely kind of private organization to file an amicus brief. The subcommittee believes that a natural person who is an amicus can treat his or her total income reported on IRS Form 1040 as "total revenue."

Standing Committee input

At the Standing Committee meeting, there seemed to be consensus for the idea of using the prior fiscal year to determine the disclosure threshold for contributions by parties while using the 12-month period prior to filing the brief as the relevant time for those contributions themselves.

In addition, one member of the Standing Committee suggested that the required disclosure of earmarked contributions might refer to multiple "briefs" rather than only "the brief," to capture more of what the members of Congress are concerned about. The problem with this approach is that it reopens the question of more general contributions that are not earmarked for a particular brief and would seem to require some way to define what broader category is included. In addition, the rest of 29(b) refers to "the brief"—that is, the brief in which the disclosures are being made. For these reasons, the proposal below retains the singular "brief" rather than the plural "briefs."

Another member suggested that the dollar threshold for earmarked contributions should be lower than $1000; if the point is to enable crowdfunding, $100 would be more appropriate. The subcommittee agreed.

Style, conforming amendments, and word limits

The proposal below separates into two provisions what the prior working draft had kept in one provision. In particular, the prior working draft of Rule 29(c) provided:

> (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 the party or counsel knows that an amicus has failed to make the disclosure, the party or counsel must do so.

The reason to break this into two separate provisions is that Rule 29(a)(4)(F) calls for the amicus brief to include the disclosures required by enumerated parts of the Rule. It should include the disclosure by the first sentence ("Any disclosure required by paragraph (b) must name the party or counsel.") but would not include the disclosure required by the second sentence (which is imposed on the party or counsel if the amicus fails in its duty). In order to require inclusion of the disclosures requires by the first sentence but not the second sentence, it is easiest to break them into two separate sections.

Conforming amendments to Rule 32(g) and the Appendix of Length Limits are also required. Reflection on how to do that led the subcommittee to recommend other modest changes.

Existing Rule 29(a)(5) sets the length limit for amicus briefs at the initial merits stage as one-half of the length authorized for a party's principal brief. There appear to be two reasons why it is phrased that way, rather than simply as a word limit—which is the way existing Rule 29(b)(4) is phrased for amicus briefs at the rehearing stage.

First, it preserves the ability of an amicus to rely on page limits. That seems to be of significance only to pro se litigants, and it is hard to see any reason to retain it for amici. (Indeed, eliminating that possibility may be of modest help in heading off "letter to the editor" style amicus briefs.)

Second, it means that, to the extent that Rule 29(a) applies to petitions for extraordinary writs (or perhaps even petitions for leave to appeal), the permissible length of an amicus brief is reduced from 6500 words (for ordinary appeals) to 3900 words (for petitions for extraordinary writs) and 2600 words (for petitions for leave to appeal). It's not clear that Rule 29(a) applies to such petitions; that's because it

applies to "a court's initial consideration of a case on the merits," which may fit petitions for extraordinary writs a bit awkwardly, but hardly fits petitions for leave to appeal. But assuming it does apply to these petitions, the number of times that an amicus brief is filed in the court of appeals regarding these petitions seems sufficiently small that the simplicity of a flat number of 6500 words appears worth it.

With that change, the requirement to file a certification under Rule 32(g)(1) can be simplified to require a certification in all cases, rather than just when length is computed using a word or line limit.

TAB 6B

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) **Purpose; When Permitted.** An amicus curiae brief that brings to the court's attention relevant matter not already mentioned by the parties may be of considerable help to the court. An amicus brief that does not serve this purpose—or that is redundant with another amicus brief—is disfavored. The United States, its officer or agency, or a state may file an amicus brief without leave of court. Any other amicus curiae may file a brief only with leave of court. The court 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.** A motion for leave to file must be accompanied by the proposed brief and state:

(A) the movant's interest; and

(B) the reason the brief is helpful and why it serves the purpose set forth in (a)(2).

(4) **Contents and Form**. An amicus brief must comply with Rule 32. The cover must name the party or parties supported and indicate whether the brief supports affirmance or reversal. The brief need not comply with Rule 28, but it 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, together with the pages where they are cited;

(D) 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 help the court;

(E) if an amicus has existed for less than 12 months, the date the amicus was created;

(F) unless the amicus is the United States, its officer or agency, or a state, the disclosures required by (b), (c), and (e);

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

(H) a certificate of compliance under Rule 32(g)(1).

(5) **Length**. Except with the court's permission, an amicus brief must not exceed 6,500 words.

(6) **Time for Filing**. An amicus curiae must file its brief 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. The court may grant leave for later filing, specifying the time within which an opposing party may answer.

(7) **Reply Brief**. An amicus curiae may file a reply brief only with the court's permission.

(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 whether:

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

(2) a party or its counsel contributed or pledged to contribute money intended to pay for preparing, drafting, or submitting the brief;

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

(4) a party, its counsel, or any combination of parties or their counsel has, during the 12 months before the brief was filed, contributed or pledged to contribute an amount equal to 25% or more of the total revenue of the amicus curiae for the prior fiscal year.

(c) Naming the Party or Counsel. Any disclosure required by paragraph (b) must name the party or counsel.

(d) Disclosure by the Party or Counsel. If the party or counsel knows that an amicus has failed to make the disclosure required by (b) or (c), the party or counsel must do so.

(e) 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 $100 to pay for preparing, drafting, or submitting the brief. But an amicus brief need not disclose a person who has been a member of the amicus for the prior 12 months. If an amicus has existed for less than 12 months, an amicus brief need not disclose contributing members, but must disclose the date when the amicus was created.

(f) During Consideration of Whether to Grant Rehearing.

(1) **Applicability**. Rules (a) through (e) govern amicus briefs filed during a court's consideration of whether to grant panel rehearing or rehearing en banc, except as provided in (2) and (3), and unless a local rule or order in a case provides otherwise.

(2) **Length**. An amicus brief must not exceed 2,600 words.

(3) **Time for Filing**. An amicus curiae supporting a petition for rehearing or supporting neither party must file its brief no later than 7 days after the petition is filed. An amicus curiae opposing the petition must file its brief no later than the date set by the court for a response.

Committee Note

The amendments to Rule 29 seek to provide the courts and the public with more information about an amicus curiae. Throughout its consideration of possible amendments, the Advisory Committee has carefully considered the competing interests, seeking to make sure that the disclosure requirements are narrowly tailored to further the interests of the courts and the public in disclosure while avoiding unnecessary burdens on amici. *See Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021); *McConnell v. Federal Election Com'n*, 540 U.S. 93 (2003); *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *see also Wyoming Gun Owners v. Buchanon* 83 F.4th 1224 (10th Cir 2023); *Gaspee Project v. Mederos*, 13 F.4th 79 (1st Cir. 2021).

The Committee began its work on these amendments upon learning that a bill had been introduced in Congress in 2019 that would regulate amici. In September 2020, the Clerk of the Supreme Court wrote to the Standing Committee on Rules of Practice and Procedure, attaching his correspondence with the Congressional sponsors of that bill. He noted that Appellate Rule 29 includes disclosure requirements similar to those of Supreme Court Rule 37.6, and that the Committee might wish to consider whether to amend Rule 29, which would in turn "provide helpful guidance" on whether Supreme Court Rule 37.6 should be amended.

Some have suggested that information about an amicus is unnecessary because the only thing that matters about an amicus brief is the merits of the legal arguments in that brief. At times, however, courts do consider the identity and perspective of an amicus to be relevant. For that reason, the Committee thinks that some disclosures about an amicus are important.

In the course of evaluating Rule 29, the Committee also considered other concerns that have been raised about amicus practice, including arguments that courts sometimes inappropriately rely on waived or forfeited arguments or untested factual information in amicus briefs. But the Committee decided against dealing with such concerns by rule making. For example, some arguments cannot be waived, some forfeitures can be excused, and some factual information is properly considered as subject to judicial notice or as legislative facts rather than adjudicative facts. It would be difficult to draft a rule that accurately captured what information is and is not properly considered, and different judges on a panel might disagree. In addition, a rule that sought to bar certain arguments or information from amicus briefs would likely invite unproductive motions to strike.

The careful attention to the competing interests and the need to avoid unnecessary burdens is reflected throughout these amendments. For example, the amendment treats disclosures about the relationship between a party and an amicus differently than disclosures about the relationship between a nonparty and an amicus. While the public interest in knowing about an amicus—in order to evaluate

its arguments and a court's consideration of those arguments—is relevant in both situations, there is an additional interest in disclosing the relationship between a party and an amicus: the court's interest in evaluating whether an amicus is serving as a mouthpiece for a party, thereby evading limits imposed on parties in our adversary system and misleading the court about the independence of an amicus. Moreover, the burden on an amicus of disclosing a relationship with a party is much lower than having to disclose a relationship with nonparties. Disclosing a relationship with a party requires an amicus to check its records (and perhaps make a disclosure) regarding only the limited number of persons who are parties to the case. Disclosing a relationship with a nonparty would, by contrast, require an amicus to check its records (and perhaps make a disclosure) regarding the much larger universe of all persons who are not party to the case.

To take another example, the amendment treats contributions by a nonparty that are earmarked for a particular brief differently than general contributions by a nonparty to an amicus. People may make contributions to organizations for a host of reasons, including reasons that have nothing to do with filing amicus briefs. Requiring the disclosure of non-earmarked contributions provides less useful information for those who seek to evaluate a brief and imposes far greater burdens on contributors.

Subdivision (a). The amendment to Rule 29(a)(2) adds a statement of the purpose of an amicus brief: to bring to the court's attention relevant matter not already mentioned by the parties that may be of considerable help to the court. By contrast, if an amicus curiae brief is redundant with the parties' briefs or other amicus curiae briefs, it is a burden rather than a help. The amendment also eliminates the ability of a nongovernmental amicus to file a brief based solely on the consent of the parties. Most parties follow a norm of granting consent to anyone who asks. As a result, the consent requirement fails to serve as a useful filter. Some parties might not respond to a request to consent, leaving a potential amicus needing to wait until the last minute to know whether to file a motion. Under the amendment, all nongovernmental parties must file a motion, eliminating uncertainty and providing a filter on the filing of unhelpful briefs. Rule 29(a)(3) is amended to require the motion to state why the brief is helpful and serves the purpose of an amicus brief.

The amendment to Rule 29(a)(4)(D) expands the required statement regarding the identity of an amicus and its interest in the case and requires "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 help the court." The amendment calls for this broader disclosure to help the court and the public evaluate the likely reliability and helpfulness of an amicus, particularly those with anodyne or potentially misleading names. It also requires that the amicus explain how the brief and the perspective of the amicus will further the goal of helping the court. Rule 29(a)(4)(E) is new. It requires an amicus that has existed for less than

12 months to state the date of its creation, helping identify amici that may have been created for the purpose of this litigation. Subsequent provisions are re-lettered.

Existing disclosure requirements about the relationship between the amicus and both parties and nonparties are removed from subdivision (a) and placed in separate subdivisions, one dealing with parties (subdivision (b)) and one dealing with nonparties (subdivision (e)).

Rule 29(a)(5) is amended to directly impose a word limit on amicus briefs, replacing the provision that establishes length limits for amicus briefs as a fraction of the length limits for parties. This results in removing the option to rely on a page count rather than a word count. This change enables Rule 29(a)(4)(H) (formerly 29(a)(4)(G)) to be simplified and require a certification of compliance under Rule 32(g) in all amicus briefs.

Subdivision (b). Subdivision (b) dealing with disclosure of the relationship between the amicus and a party is new, but it draws on existing Rule 29(a)(4)(e). Because of the important interest in knowing whether a party has significant influence or control of an amicus, these disclosures are more far reaching than those involving nonparties, who are addressed in (e).

Rule 29(b)(1) carries forward the existing requirement that authorship of an amicus brief by a party or its counsel must be disclosed.

Rule 29(b)(2) carries forward the existing requirement that money contributed by a party or party's counsel that was intended to fund the preparation or submission of the brief must be disclosed. But in an effort to counteract the possibility of an amicus interpreting the existing rule narrowly, the amendment explicitly refers to "preparing, drafting, or submitting the brief," thereby making clear that it applies to every stage of the process.

Subdivision (b)(3) is new. It requires disclosure of whether a party, its counsel, or any combination of parties or counsel either has a majority ownership interest in or majority control of an amicus. If a party has such control over an amicus, it is in a position to control the content of an amicus brief. If undisclosed, the court and the public may be misled about the independence of an amicus from a party, and a party may be able to effectively exceed the limitations otherwise imposed on parties.

Subdivision (b)(4) is new. It requires disclosure of whether a party, its counsel, or any combination of parties or counsel either has contributed (or pledged to contribute) 25% or more of the revenue of an amicus. The 25% figure is chosen because the Committee believes that someone who provides that high a percentage of the revenue of an amicus is likely to have substantial power to influence that amicus. Because the concern is about contributions (or pledges) made sufficiently near in time to the filing of the brief to influence the brief, contributions (or pledges)

made within 12 months before the filing of the brief must be disclosed. To minimize the burden of disclosure on the amicus, the 25% calculation is based on the total revenue of the amicus for the prior fiscal year. This means that such a calculation of the disclosure threshold needs to be done only once a year rather than each time an amicus brief is filed. And by using the prior fiscal year, an amicus can rely on its ordinary accounting process. The term "total revenue" is used because that is the term used by a tax-exempt organization on its IRS Form 990. Non-tax-exempt entities are likely to prepare an income statement which includes its total revenue. Individual amici can rely on their total income from the prior fiscal year reported on IRS Form 1040.

Subdivision (c). Subdivision (c) requires that any disclosure required by paragraph (b) name the party or counsel. This builds upon the requirement in current Rule 29(a)(4)(D)(iii) that certain persons who make earmarked contributions be identified.

Subdivision (d). Subdivision (d) is new. It operates as a backstop to the disclosure requirements of (b) and (c): If the amicus fails to make a required disclosure, and the party or counsel knows it, the party or counsel must make the disclosure.

Subdivision (e). Subdivision (e) focuses on the relationship between the amicus and a nonparty. It makes several changes to the existing Rule 29(a)(4)(e)(iii), which currently requires the disclosure of any contribution earmarked for a brief, no matter how small, by anyone other than the amicus itself, its members, or its counsel. Earmarked contributions run the risk that the amicus is being used as a paid mouthpiece by the contributor. Knowing about earmarked contributions helps courts and the public evaluate the arguments and information in the amicus brief by providing information about possible reasons for the filing other than those explained by the amicus itself.

The Committee considered requiring the disclosure of nonparties who make significant contributions to an amicus. But it decided against doing so because of the burdens it could impose on amici and their contributors, even when the reason for the contribution had nothing to do with the brief. *See Wyoming Gun Owners v. Buchanon* 83 F.4th 1224 (10th Cir 2023). Instead, it retained the focus of the existing rule on earmarked contributions.

The Committee considered eliminating the member exception because that exception allows for easy evasion: simply become a member at the time of making an earmarked contribution. But it decided against doing so because members speak through an amicus and an amicus generally speaks for its members. In addition, eliminating the member exception threatened to place an unfair burden on amici who do not budget in advance for amicus briefs (and therefore have to "pass the hat" when the need to file an amicus brief arises) compared to other amici who may file amicus

briefs more frequently (and therefore can budget in advance and fund them from general revenue). Without a member exception, the latter (generally larger) amici would not have to disclose, but the former (generally smaller) amici would have to disclose.

Instead, the amendment retains the member exception, but limits it to those who have been members of the amicus for the prior 12 months. In effect, the amendment is an anti-evasion rule that treats new members of an amicus as non-members.

This then raises the question of what to do with a newly-formed amicus organization. Rather than eliminate the member exception for such organizations, the amendment protects members from disclosure. But Rule 29(a)(4)(e) requires an amicus that has existed for less than 12 months to disclose the date of its creation. This requirement works in conjunction with the expanded disclosure requirement of Rule 29(a)(4)(D) to reveal an amicus that may have been created for purposes of particular litigation or is less established and broadly-based than its name might suggest. Unless adequately explained, a court and the public might choose to discount the views of such an amicus.

The amendment also provides a $100 threshold for the disclosure requirement. Under the existing rule, a non-member of an amicus who contributes any amount, no matter how small, that is earmarked for a particular brief must be disclosed. This can hamper crowdfunding of amicus briefs while providing little useful information to the courts or the public. Contributions of $100 or less are unlikely to run the risk that an amicus is being used as a mouthpiece for others.

Subdivision (f). Subdivision (f) retains most of the content of existing subdivision (b) and governs amicus briefs at the rehearing stage. It is revised to largely incorporate by reference the provision applicable to amicus briefs at the initial consideration of the case. Rule 29(f)(1) makes Rule 29(a) through (e) applicable, except as provided in the rest of Rule 29(f) or if a local rule or order in a particular case provides otherwise. As a result, duplicative provisions are eliminated.

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) **Purpose; When Permitted.** An amicus curiae brief that brings to the court's attention relevant matter not already mentioned by the parties may be of considerable help to the court. An amicus brief that does not serve this purpose—or that is redundant with another amicus brief—is disfavored. 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 with ~~by~~ leave of court ~~or if the brief states that all parties have consented to its filing, but a court of appeals~~. The court 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~~ A motion for leave to file must be accompanied by the proposed brief and state:

(A) the movant's interest; and

(B) the reason ~~why an amicus~~ the brief is helpful ~~desirable~~ and why ~~the matters asserted are relevant to~~ it serves the ~~disposition of the case.~~purpose set forth in (a)(2).

(4) **Contents and Form**. An amicus brief must comply with Rule 32. ~~In addition to the requirements of Rule 32,~~ The cover must ~~identify~~name the party or parties supported and indicate whether the brief supports affirmance or reversal. ~~An amicus~~The brief need not comply with Rule 28, but it 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~~, together with the pages ~~of the brief~~ where they are cited;

(D) a concise ~~statement~~description of the identity, history, experience, and interests of the amicus curiae, ~~its interest in~~together with an explanation of how the brief and the ~~case, and the source~~perspective of ~~its authority to file~~the amicus will help the court;

(E) if an amicus has existed for less than 12 months, the date the amicus was created;

(F) unless the amicus is the United States, its officer or agency, or a state, the disclosures required by (b), (c), and (e); ~~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~~G) an argument, which may be preceded by a summary ~~and which~~but need not include a statement of the applicable standard of review; and

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

(5) **Length**. Except ~~by~~with 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~~ must not ~~affect the length of an amicus brief~~exceed 6,500 words.

(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. The ~~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 only with the court's permission.

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

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

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

(2) a party or its counsel contributed or pledged to contribute money intended to pay for preparing, drafting, or submitting the brief;

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

(4) a party, its counsel, or any combination of parties or their counsel has, during the 12 months before the brief was filed, contributed or pledged to contribute an amount equal to 25% or more of the total revenue of the amicus curiae for the prior fiscal year.

(c) Naming the Party or Counsel. Any disclosure required by paragraph (b) must name the party or counsel.

(d) Disclosure by the Party or Counsel. If the party or counsel knows that an amicus has failed to make the disclosure required by (b) or (c), the party or counsel must do so.

(e) 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 $100 to pay for preparing, drafting, or submitting the brief. But an amicus brief need not disclose a person who has been a member of the amicus for the prior 12 months. If an amicus has existed for less than 12 months, an amicus brief need not disclose contributing members, but must disclose the date when the amicus was created.

(f) During Consideration of Whether to Grant Rehearing.

(1) ~~(1)~~ **Applicability**. ~~This Rule 29(b) governs~~ Rules (a) through (e) govern amicus ~~filings~~briefs filed during a court's consideration of whether to grant panel rehearing or rehearing en banc, except as provided in (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~~ (2) **Length**. ~~Rule 29(a)(4) applies to the amicus brief.~~ An amicus ~~The~~ brief must not exceed 2,600 words.

(~~5~~3) **Time for Filing**. An amicus curiae supporting ~~the~~a 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~~a response.

410 ***

411 **Rule 32(g) Certificate of Compliance.**

412 (1) **Briefs and Papers that Require a Certificate.** A brief
413 submitted under Rules 28.1(e)(2), 29(a)(5), 29(f)(2) ~~29(b)(4)~~, or
414 32(a)(7)(B)—and a paper submitted under Rules 5(c)(1),
415 21(d)(1), 27(d)(2)(A), 27(d)(2)(C), or 40(d)(3)(A)—must include
416 a certificate by the attorney, or an unrepresented party, that
417 the document complies with the type-volume limitation. The
418 person preparing the certificate may rely on the word or line
419 count of the word-processing system used to prepare the
420 document. The certificate must state the number of words—or
421 the number of lines of monospaced type—in the document.

422

423 **Committee Note**

424 Rule 32(g) is amended to conform to amendments to Rule 29.

Appendix

Length Limits Stated in the

Federal Rules of Appellate Procedure

		* * *			
Amicus briefs	29 (a)(5)	• Amicus brief during initial consideration on merits	~~One-half the length set by the Appellate Rules for a party's principal brief~~ 6500	~~One-half the length set by the Appellate Rules for a party's principal brief~~ Not applicable	~~One-half the length set by the Appellate Rules for a party's principal brief~~ Not applicable
	~~29(b)(4)~~ 29(f)(2)	• Amicus brief during consideration of whether to grant rehearing	2,600	Not applicable	Not applicable
		* * *			

TAB 6C

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: IFP Subcommittee

Re: Proposed Revision of Form 4 (19-AP-C; 20-AP-D; 21-AP-B)

Date: February 29, 2024

The Advisory Committee has been considering several suggestions about IFP practice, including the establishment of more consistent criteria for granting IFP status and the revision of FRAP Form 4 to be less intrusive. The Committee has declined to address the criteria for granting IFP status and focused its attention on the one aspect of the issue that is clearly within the purview of the Committee, Form 4. Form 4 is a form adopted through the Rules Enabling Act, not a form created by the Administrative Office.

At the fall 2022 meeting, the subcommittee presented a report and a draft revision of Form 4. That report is included below.

The Advisory Committee made several changes to the draft revision of Form 4. The form, as revised, is also included below.

The subcommittee has added a Committee Note and recommends that the revised Form 4 be published for public comment.

Committee Note

Revised Form 4 simplifies the existing Form 4, reducing the existing form to two pages. It is designed not only to reduce the burden on individuals seeking IFP status but also to provide the information that courts of appeals need and use, while omitting unnecessary information.

TAB 6D

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: IFP Subcommittee

Re: Possible Simplification of Appellate Form 4

Date: September 15, 2022

This subcommittee has been considering a suggestion submitted by Sai to establish more consistent criteria for granting IFP status and to revise Appellate Form 4 to be less intrusive. It focused its attention on the one aspect of the issue that is clearly within the purview of the Committee, Form 4. Form 4 is a form adopted through the Rules Enabling Act, not a form created by the Administrative Office.

At the Spring 2022 meeting, the subcommittee reported that it had informally gathered some information about IFP practice in the courts of appeals. Based on that information, it appears that IFP status is rarely denied because the applicant has too much wealth or income. Instead, denials are more commonly based on the absence of a non-frivolous issue on appeal. Thinking that Form 4 could be substantially simplified while still providing the courts of appeals with enough detail to decide whether to grant IFP status, the subcommittee presented a draft of a revised Form 4 for the Advisory Committee's consideration and discussion.

Since then, the subcommittee solicited reactions to the draft Form 4 from senior staff attorneys in the circuits. The subcommittee met to consider those reactions and make appropriate changes to the draft Form 4.

- The affidavit now refers to "filing" fees rather than "docket" fees, both to make it more understandable and to match the final paragraph.

- The affidavit now uses the term "relief" rather than "redress" to make it more understandable.

- The explanation of the need to present a non-frivolous issue on appeal no longer is limited to a "legal" issue because the issue on appeal might be a factual issue.

- The three questions about receipt of government aid programs available only to those who are poor are condensed into a single question. Some commenters wondered why these questions were listed first. The subcommittee thinks that a person eligible for these programs almost certainly qualifies for IFP status, so that asking this first can make processing of IFP applications more efficient.

- The question about monthly income from other sources is clarified and some examples provided.

- The word "medicine" as an example of a necessary expense is expanded to medical care.

- The open-ended question inviting "anything else that you think affects your ability to pay" is changed to "anything else that you think explains your inability to pay" for clarity and simplicity.

The subcommittee believes that most of the comments were supportive of the overall thrust of the project. One comment might be read to prefer more detail in order to catch someone with luxury expenses trying to get IFP status. The subcommittee believes that the benefits of simplification outweigh that risk, especially since anyone with luxury expenses would have to draw on reportable income or assets to fund those expenses.

There were also some comments suggesting that the form distinguish between liquid and illiquid assets. The subcommittee thinks that this adds a complication that is unnecessary for most people applying for IFP status. In addition, most people with substantial illiquid assets will have enough liquid assets to pay the filing fees. In an unusual case (say, a person with little income and scant liquid assets who lives in an inherited house) there is space on the form to explain the inability to pay the filing fees.

Some comments also asked about spousal finances. One of the major critiques of the existing Form is that it is unnecessarily intrusive to ask about spousal income and assets when that income and assets may not be available to the party seeking IFP status. At least at this point, the subcommittee thinks it better to not ask about spousal finances than to ask IFP applicants to state whether or not spousal resources are available and answer accordingly.

At this point, the subcommittee is not recommending that the Advisory Committee seek publication and public comment on this draft. After discussion by the Advisory Committee, the next step would be to confer with the Clerk of the Supreme Court, because Supreme Court Rule 39.1 calls for the use of Appellate Form 4 by applicants for IFP status in the Supreme Court.

As noted in earlier reports, in evaluating this draft, the Advisory Committee should bear in mind the governing statute. The statute, as amended by the Prison Litigation Reform Act, makes little sense. It provides, in relevant part, that:

> any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a

> person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor.

28 U.S.C. § 1915. It switches, mid-sentence, from referring to a "person" who submits an affidavit to "such prisoner" whose assets must be stated in the affidavit and then back again to the "person" who is unable to pay fees. To make sense of this provision, courts have generally read it to require any *person* seeking IFP status to submit a statement of all assets such *person* possesses, even if the person is not a prisoner.

The attached draft Form 4 does require that applicants for IFP status state their total assets. It does not, however, require applicants to separately state each asset.

TAB 6E

UNITED STATES DISTRICT COURT

for the

<_____> DISTRICT OF <_____>

<Name(s) of plaintiff(s)>,	)	
	)	
Plaintiff(s)	)	
	)	
v.	)	
	)	Case No. <Number>
<Name(s) of defendant(s)>,	)	
	)	
Defendant(s)	)	
	)	

AFFIDAVIT ACCOMPANYING MOTION
FOR PERMISSION TO APPEAL IN FORMA PAUPERIS

Affidavit in Support of Motion

I swear or affirm under penalty of perjury that, because of my poverty, I cannot prepay the filing fees of my appeal or post a bond for them. I believe I am entitled to relief. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct. (28 U.S.C. § 1746; 18 U.S.C. § 1621.)

Signed: _____ Date _____

The court may grant a motion to proceed in forma pauperis if you show that you cannot pay the filing fees and you have a non-frivolous issue on appeal. Please state your issues on appeal. (Attach additional pages if necessary.)

My issues on appeal are:

1.	What is your monthly take-home pay from work?	$_____
2.	What is your monthly income from any source other than take-home pay from work (such as unemployment benefits, alimony, child support, public assistance, pension, and social security)?	$_____
3.	How much are your monthly housing costs (such as rent and utilities)?	$_____
4.	How much are your monthly costs for other necessary expenses (such as food, medical care, childcare, and transportation)?	$_____
5.	What is the total value of all your assets (such as bank accounts, investments, market value of car or house)?	$_____
6.	How much debt do you have (such as credit cards, mortgage, and student loans)?	$_____
7.	How many people (including yourself) do you support?	
8.	Do you receive SNAP (Supplemental Nutrition Assistance Program), Medicaid, or SSI (Supplemental Security Income)?	Yes No

No matter how you answered the questions above, if you are a prisoner seeking to appeal a judgment in a civil action or proceeding, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

If there is anything else that you think explains your inability to pay the filing fees, please feel free to explain below. (Attach additional pages if necessary.)

TAB 6F

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Intervention Subcommittee

Re: Possible rule on intervention (22-AP-G; 23-AP-C)

Date: March 12, 2024

The intervention subcommittee continues to work on a possible amendment dealing with intervention on appeal. It is not yet proposing an amendment and has not decided that it will propose one. It does not seem that the issue is going away. But that doesn't necessarily mean that we will be able to craft a rule that is a sufficient improvement without risking too many unintended consequences. At this point, however, we are trying to do so.

What follows is a working draft, with some notes to help guide discussion.

Rule 7.1 Intervention on Appeal	It is not clear where a new rule should be located. Its placement might depend, in part, on its scope. Current Rule 15(d) provides for a motion to intervene in a proceeding to review or enforce an agency order. Should a new rule apply only to appeals from lower courts, leaving in place existing practice regarding direct review of agency action? Should a new rule be limited to civil cases? If the scope of a new rule is limited along these lines, should there be a provision or committee note making clear that existing practices in other areas are left in place, to avoid an implication that a new rule covers the field and prohibits intervention in cases not covered by the new rule?

a) **Motion to Intervene.** The preferred method for a nonparty to be heard is by filing an amicus brief under Rule 29. Intervention on appeal is reserved for exceptional cases. A person may move to intervene on appeal by filing a motion in accordance with Rule 27. The motion must	
(1) be timely filed;	The subcommittee thinks that it makes sense to a have a timeliness requirement in subsection (a) that is focused on the timeliness of the motion to intervene in terms of the appeal itself. Because of the many different events that might trigger the need to intervene, the subcommittee has not attempted to set a more precise timeframe. The current working draft borrows "timely" from FRCP 24. Would the use of the same term as in the FRCP tend to be confusing or clarifying?
(2) show that the movant meets the requirements of (b); and (3) specify and explain the movant's legal interest required by (c).	
(b) Criteria. A court of appeals may permit a movant to intervene on appeal who	FRCP 24 distinguishes between intervention as of right and permissive intervention. Intervention as of right under FRCP 24(a) is not as absolute as it may seem, because it remains subject to a timeliness requirement. And permissive intervention under FRCP 24(b) requires the permission of the court.

	The subcommittee considered creating a parallel structure, with both intervention as of right and permissive intervention, but thinks that it is better not to do so. Instead, working draft avoids the terms "as of right" and "permissive," and treats all intervention on appeal as subject to the discretion of the court of appeals. As discussed below, that discretion may be constrained by some statutes.
(1) demonstrates a compelling reason why intervention was not sought at a prior stage of the litigation or, if it was sought previously, provides a compelling explanation of how circumstances have changed; (2) has a legal interest as described in (c);	The subcommittee thinks that it makes sense to have a separate timeliness requirement in subdivision (b), this one focused on timeliness in relation to the proceedings at a prior stage of the litigation.
(3) is so situated that disposing of the appeal in the movant's absence may as a practical matter impair or impede the movant's ability to protect that interest;	This language is drawn from FRCP 24(a) dealing with intervention as of right and equivalent language in FRCP 19(a) dealing with persons who are required to be joined if feasible. Does such a provision belong in an appellate rule? On appeal, there will be a particular order or judgment that binds the particular parties and is under review. If it is deleted, does it make it too easy to qualify for intervention?

	It does seem important to allow someone who is a required party under FRCP 19 but was ignored in the district court to be able to intervene at least for the purpose of seeking a remand to consider its interests. Perhaps this concern would be better addressed directly with a specific provision in (c).
(4) shows that existing parties will not adequately protect that interest; (5) shows that submission of an amicus brief would be insufficient to protect that interest; (6) shows that existing parties will not be unfairly prejudiced by permitting intervention; and (7) in any civil action of which the district courts have original jurisdiction founded solely on section 1332 of title 28, shows that intervention would be consistent with the jurisdictional requirements of section 1367(b) of title 28.	
(c) Legal Interests. The following legal interests support intervention on appeal:	The point of this subdivision is to insist that a proposed intervenor have a legally protected interest to vindicate in the case, not merely some more generalized interest in how the appeal is decided.

	Merely having such an interest, however, does not mean that intervention must be granted. The criteria in subdivision (b) must also be met, and even then, the court of appeals has discretion. At the last meeting, some members of the Advisory Committee found the prior version of (c) to be difficult to parse. This draft is an attempt to make it easier to follow. Is it easier to follow?
(1) a claim by the intervenor to a property interest in the property that is the subject of the action;	The kinds of claims described in (1) and (2) are moved to the top because they are the classic kind of interest that one might seek to protect by intervening.
(2) a claim by the intervenor that is being litigated on behalf of the proposed intervenor by a party acting in a representative capacity;	The interests of those whose rights are being litigated by a representative, such as when a trustee is litigating on behalf of beneficiaries or a named representative is litigating on behalf of a class, have long been considered a legal basis for intervention.
(3) a claim by an intervenor that can be currently asserted against an existing party;	If a proposed intervenor has a live claim against an existing party, that is a legally-protected interest. Should this interest—and the interest described in (4)—be limited to claims related to the subject of the current appeal? Or is that unnecessary, considering that the criteria of (b) (1) and (3) through (7) must be met, and even then the court has discretion to deny intervention?

	(4) a defense by an intervenor to a claim by an existing party that could be currently asserted against the intervenor;	It would seem that if an existing party has a live claim against a proposed intervenor, but the existing party has not yet asserted the claim, the proposed intervenor has a legally-protected interest. That represents the classic case for a declaratory judgment: a would-be defendant (say, an insurance company), rather than wait to be sued (say, by someone claiming to be a beneficiary), goes to court first. Perhaps this should be deleted, on the theory that any such intervention should have been sought below. But if the criteria of subdivision (b) are met—including the compelling reason or explanation required by (b)(1)—should intervention for such a person be flatly foreclosed? Perhaps the provision is too broad when applied to the government as a party. If so, should it be limited to private parties? Or should it not be so limited, leaving the government to rely on other criteria to defeat intervention when appropriate?
	(5) a claim by an intervenor that could be asserted against an existing party if the current case resulted in a judgment sought by an existing party;	This provision allows for the assertion of a contingent claim, loosely analogous to an impleader claim under FRCP 14. The idea is that if the judgment sought in this case gives rise to a claim by a

	proposed intervenor against an existing party, it might be more efficient to hear the competing claims in a single case. Again, meeting this interest would not itself mandate intervention. The court of appeals would continue to have discretion under the criteria in subdivision (b). This provision might be most useful in cases involving review of administrative action, although its usefulness is not limited to such cases.[1] If a new rule does not apply to

[1]

> [I]magine that A is suing B for an injunction that would require B to behave in a particular way, but C believes that this behavior would violate C's rights in such a way as to give C a claim for relief against B. Even if that claim is not currently ripe (because B does not want to behave in the way that allegedly would violate C's rights), C's potential claim against B might still support intervention; if the court were to enter the injunction that A is seeking and if B were to comply with it, C would have a ripe claim for relief against B at that point, and the "interest" underlying that claim might be enough to support intervention now. . . .
>
> Suppose that a federal agency conducts a rulemaking process, during which A and B disagree about the content of the rule that the agency should promulgate; A supports Option #1 and B supports Option #2. Ultimately, the agency selects Option #1, and B sues the United States under the cause of action for judicial review that the Administrative Procedure Act has been understood to supply. To decide whether Rule 24(a) entitles A to intervene, courts could ask whether A would have a cause of action for judicial review if the agency were to do what B is seeking. To be sure, A does not *currently* have such a cause of action; the agency did what A wanted, and A wants the court to uphold the agency's rule. But if the court were to set aside the rule and force the agency to select Option #2 instead, the Administrative Procedure Act might then enable A to sue the United States for judicial review of the agency's revised rule. Rather than making these suits proceed sequentially, courts could conclude that A is eligible to intervene in the current litigation.

Caleb Nelson, *Intervention*, 106 Va. L. Rev. 271, 389 (2020).

	such cases, perhaps it could be deleted. There is no proposal of a further provision concerning a contingent claim by an existing party against a proposed intervenor. That seems a contingency too far, because it is contingent not only on the outcome of the appeal, but also the further contingency of an existing party seeking to bring a claim against the proposed intervenor. That is, if an intervenor is saying, "If one of the existing parties wins the judgment it is seeking, I will have a claim against a party and I want to assert it now," intervention might well be warranted. But if an intervenor is saying, "If one of the existing parties wins the judgment it is seeking, a party will have a claim against me, and if that party sues me, I have a defense," intervention should not be permitted.
(6) being a person who should have been joined if feasible under FRCP 19;	Is it best to say this directly as the kind of legal interest that supports intervention? Perhaps so, if (b)(3) is deleted.
(7) But the precedential effect of a decision, standing alone, is not a sufficient legal interest.	Given the restrictive account of what legal interests support intervention, is this necessary? Is it worth it for emphasis?
(d) Governments, Agencies, and Officials. (1) The United States, a State, or a tribal government may move to intervene to defend any law it has enacted or action	There are statutes that provide for a right to intervene in the court of appeals. E.g., 35 U.S.C. § 143 ("The Director [of the United States Patent

	it or one of its agencies or officers has taken. (2) An agency or officer of the United States, of a State or of a tribal government may also move to intervene to defend any law it has enacted or action it or one of its agencies or officers has taken, if that agency or officer is authorized by the applicable law to defend the law or action.	and Trademark Office] shall have the right to intervene in an appeal from a decision entered by the Patent Trial and Appeal Board in a derivation proceeding under section 135 or in an inter partes or post-grant review under chapter 31 or 32."); 28 U.S.C. § 2403 (in any case "in a court of the United States . . . wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality"). The working draft uses the word "may," reflecting that courts applying these statutes typically require timeliness. The working draft includes tribal governments.
	(3) The United States may move to intervene to defend its foreign relations interests.	
	(4) The United States, a State, or a tribal government may also move to intervene under a, b, and c.	The point is to make clear that the special provisions for government intervention are not exclusive, so that governments can also protect their proprietary rights in the same way that any private litigant can.
	(5) A motion under (d)(1) through (d)(3) need not comply with (a)(2), (a)(3), (b), or (c).	When the special provisions for government intervention apply, the motion to intervene

	must be timely. But the other requirements do not. Should any other requirements also apply to the government?
(e) Disposition of Motion. The court may grant the motion, deny the motion, or transfer the motion to the district court. If the court grants the motion, the intervenor becomes a party for all purposes, unless the court orders otherwise. Denial of a motion to intervene does not preclude the filing of an amicus brief under Rule 29.	The subcommittee thinks that the default should be that intervention is for all purposes. This both underscores the distinction between an amicus and a party. It also means that a court need not delineate the scope of intervention any time it grants a motion to intervene. The court can, however, if it chooses, limit the scope of intervention. If a party wants to intervene for a limited purpose, it should so specify.

Are there other legal interests that should be included? One possibility is a legal interest in access to the filings or proceedings, such as when a media company seeks intervention to move to unseal.

Would the project benefit from empirical research to try to determine the kinds of situations in which intervention on appeal is sought? The subcommittee surmises that many motions to intervene on appeal are decided by orders that never get reported in Lexis or Westlaw.

TAB 7

TAB 7A

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett

Re: Comments on Amicus Disclosures (23-AP-I; 23-AP-K; 24-AP-A)

Date: March 6, 2024

Senator Whitehouse and Representative Johnson have submitted two comments on amicus disclosures. Both comments follow this memo.

Professor David DeMatteo has submitted an article about expert information included in amicus briefs for consideration as the Advisory Committee considers amendments to FRAP 29. His cover letter, as well as the abstract, table of contents, and introduction follow this memo. The full article can be found at https://www.uscourts.gov/sites/default/files/24-ap-a_suggestion_from_david_dematteo_-_rule_29_0.pdf

Because no proposal has been published for public comment, these submissions have been docketed as new suggestions.

I recommend that these submissions be referred to the amicus subcommittee.

TAB 7B

October 26, 2023

Honorable John D. Bates
Chair, Judicial Conference Committee on Rules of Practice and Procedure
U.S. District Court for the District of Columbia
333 Constitutional Avenue N.W.
Washington, D.C. 20001

Honorable Jay S. Bybee
Chair, Advisory Committee on Appellate Rules
Lloyd D. George U.S. Courthouse
333 Las Vegas Boulevard South
Las Vegas, Nevada 89101

Dear Judge Bates and Judge Bybee:

We are grateful to hear of action on our request, first referred to this body three years ago, that the federal judiciary strengthen its rules governing the disclosure of who funds amicus curiae briefs—a worsening problem as front-group amici increasingly appear in coordinated squadrons and flotillas.

The problem with current interpretations of Rule 29 of the Federal Rules of Appellate Procedure and the Supreme Court's Rule 37.6 is illustrated in *New York State Rifle & Pistol Association v. Bruen*, decided by the Supreme Court last year. The National Rifle Association (NRA) appeared as an amicus supporting the petitioners without disclosing any connections to the petitioners or other amici.[1] Investigative reporting later revealed that at least twelve *Bruen* amici had funding connections to the NRA,[2] and that the NRA funded the underlying litigation at the Supreme Court.[3]

Even what we know so far—that one organization funded the litigation, appeared as an amicus, and funded multiple other amici—merits concern, indeed merits disclosure. The director of the

1 Brief for Amicus Curiae NRA Civil Rights Defense Fund in Support of Petitioners, *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022).
2 Will Van Sant, *The NRA's Shadowy Supreme Court Lobbying Campaign*, Politico Mag. (Aug. 5, 2022), https://www.politico.com/interactives/2022/nra-supreme-court-gun-lobbying.
3 *N.Y. State Rifle & Pistol Ass'n v. Nigrelli*, No. 1:18-cv-134, 2023 WL 6200195, at *6 n. 8 (N.D.N.Y. Sept. 22, 2023). These records show that the NRA Institute of Legislative Action was billed for litigation costs at the Supreme Court. Tax records for the related NRA Civil Rights Defense Fund, which appeared as an amicus in *Bruen*, show that the Fund regularly reimburses the NRA Institute of Legislative Action for litigation initially paid for by the Institute. See NRA Watch, *NRA Civil Rights Defense Fund 2021 Form 990* 27-29, https://nrawatch.org/filing/nra-civil-rights-defense-fund-2021-form-990. Reporting last year shows that the Fund also provided initial litigation funding in *Bruen*. Van Sant, *supra* note 2.

NRA state affiliate credited this effort for persuading the Court to grant *certiorari*.[4] When these coordinated political projects succeed, and are later exposed, it erodes public confidence in both the process and the outcome.

Proper transparency would help root out this misconduct, by providing judges, parties and the public with much-needed information about who is actually present in the courtroom and how they connect to other parties and amici. As you pursue reforms to enhance this transparency, we offer two thoughts on pitfalls to avoid.

The operations generating these flotillas of false-front amici will obviously continue to try to obfuscate their connections. Two predictable ways are: (1) strategic structuring of donations through multiple groups to keep each under the Committee's proposed 25% gross annual revenue threshold, and (2) using intermediary groups to stymie inquiry into the ultimate source of donations.

In the first scenario, consider a group such as Marble Freedom Trust, which operates a $1.6 billion fund on behalf of Republican political operative Leonard Leo, and whose advocacy network regularly files amicus briefs in the Supreme Court. Marble Freedom Trust could structure funding to an amicus through four of Leo's groups that each fund 24.9% of the amicus, and—with minimal other outside funding—stay below the reporting level, even where Marble Freedom Trust was responsible for 99.6% of the amicus group's annual revenue. The rule should put the onus on amici to disclose such structured and coordinated funding and affiliations.

Second is what might be called the "superPAC problem." SuperPACs are obliged to disclose only their immediate, not their actual, donors. This has led to the proliferation of identity-laundering entities such as 501(c)(4) organizations. Only the intermediary is disclosed, not the true donor, defeating the purpose of the exercise.

Congress has addressed the problem of shell intermediaries in campaign and illicit finance contexts, with bills like the DISCLOSE Act and the Corporate Transparency Act, which are designed to trace an ultimate beneficial owner or donor through multiple layers of shell groups. We commend those examples to you.

4 Gun Owners Radio, *What does 'bear arms' mean? NYSRPA v Bruen*, YouTube (Jan. 29, 2022), https://www.youtube.com/watch?v=6U30tKH3J_I (at 6:11-6:20).

Again, we thank you for the progress the Judicial Conference is making to clean up the front-group amicus problem and, as Judge Patricia Millett put it, reveal the "real power behind the throne."[5] An honest and effective judicial process requires no less.

Sincerely,

SHELDON WHITEHOUSE
Chairman, Senate Judiciary Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights

HENRY C. "HANK" JOHNSON, JR.
Ranking Member, House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet

5 Nate Raymond, *U.S. judiciary panel expresses support for amicus brief financial disclosures*, Reuters (Jan. 4, 2022), https://www.reuters.com/legal/litigation/us-judiciary-panel-expresses-support-amicus-brief-financial-disclosures-2022-01-04/.

TAB 7C

United States Senate
WASHINGTON, DC 20510

December 14, 2023

Honorable John D. Bates
Chair, Judicial Conference Committee on Rules of Practice and Procedure
U.S. District Court for the District of Columbia
333 Constitutional Avenue N.W.
Washington, D.C. 20001

Honorable Jay S. Bybee
Chair, Advisory Committee on Appellate Rules
Lloyd D. George U.S. Courthouse
333 Las Vegas Boulevard South
Las Vegas, Nevada 89101

Dear Judge Bates and Judge Bybee:

We write today to bring to your attention a recent Politico article further exposing the need for greater transparency regarding amicus brief funding. As noted in the article, many amici that have filed briefs in recent, high-profile Supreme Court cases share funding connections to common, ideological donors—in this instance, Leonard Leo and his affiliated organizations. We have in the past documented additional examples of these types of connections, including in our brief in *Moore v. Harper*, which we submitted to the Advisory Committee last year.

As the Advisory Committee continues to consider updates to Rule 29 to require greater disclosure of the funders of amicus briefs, we urge it to take into account the impact that these and other examples have on public confidence in the judiciary.

Sincerely,

SHELDON WHITEHOUSE
Chairman, Senate Judiciary Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights

HENRY C. "HANK" JOHNSON, JR.
Ranking Member, House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet

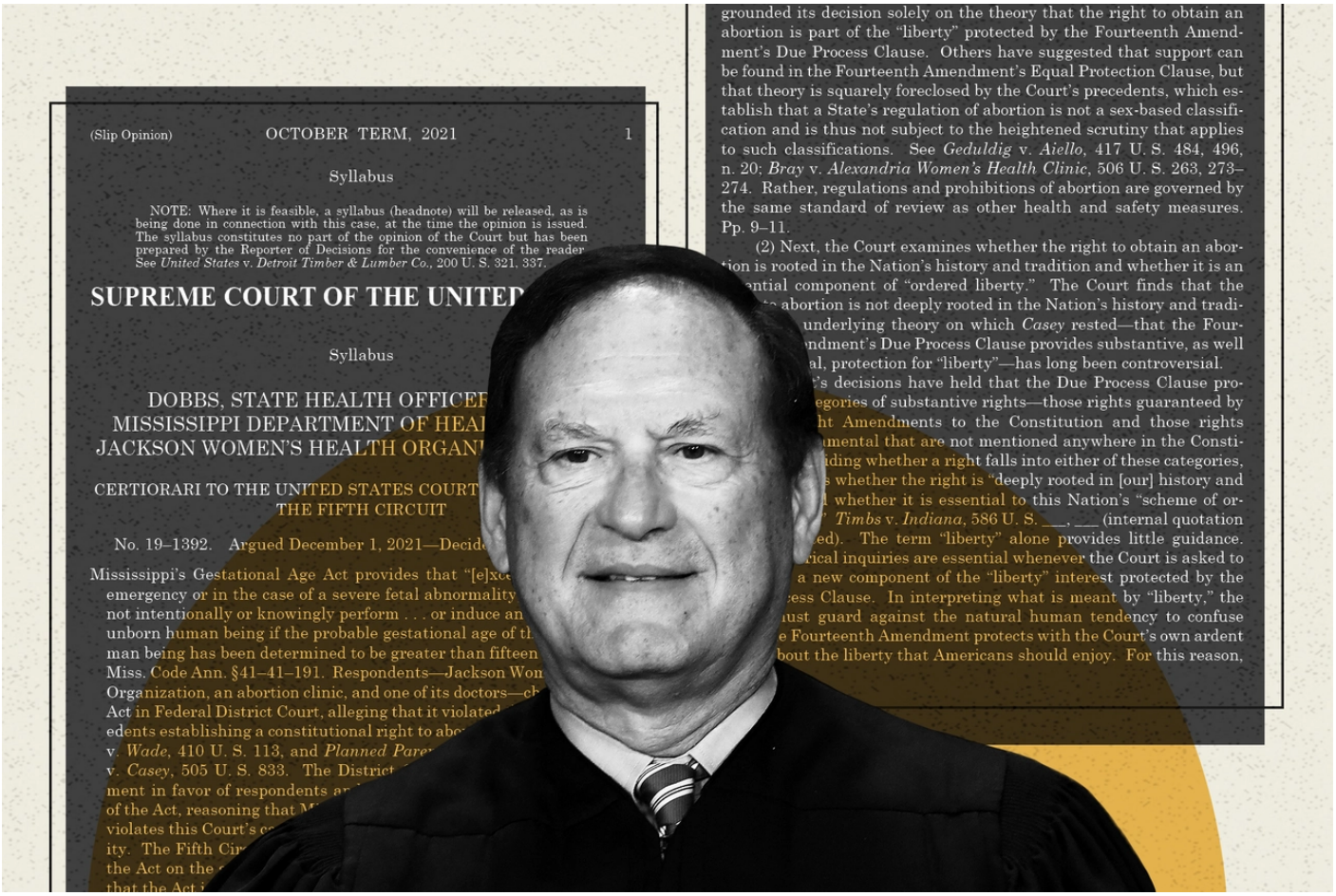
Enclosure

POLITICO

POLITICO INVESTIGATION

'Plain historical falsehoods': How amicus briefs bolstered Supreme Court conservatives

A POLITICO review indicates most conservative briefs in high-profile cases have links to a small cadre of activists aligned with Leonard Leo.



POLITICO illustration/Photo by Getty Images

By **HEIDI PRZYBYLA**
12/03/2023 07:00 AM EST

Princeton Professor Robert P. George, a leader of the conservative legal movement and confidant of the judicial activist and Donald Trump ally

Leonard Leo, made the case for overturning *Roe v. Wade* in an amicus brief a year before the Supreme Court issued its watershed ruling.

Roe, George claimed, had been decided based on "plain historical falsehoods." For instance, for centuries dating to English common law, he asserted, abortion has been considered a crime or "a kind of inchoate felony for felony-murder purposes."

The argument was echoed in dozens of amicus briefs supporting Mississippi's restrictive abortion law in *Dobbs v. Jackson Women's Health Organization,* the Supreme Court case that struck down the constitutional right to abortion in 2022. Seven months before the decision, the argument was featured in an article on the web page of the conservative legal network, the Federalist

In his majority opinion, Justice Samuel Alito used the same quote from Henry de Bracton, the medieval English jurist, that George cited in his amicus brief to help demonstrate that "English cases dating all the way back to the 13th century corroborate the treatises' statements that abortion was a crime."

George, however, is not a historian. Major organizations representing historians strongly disagree with him.

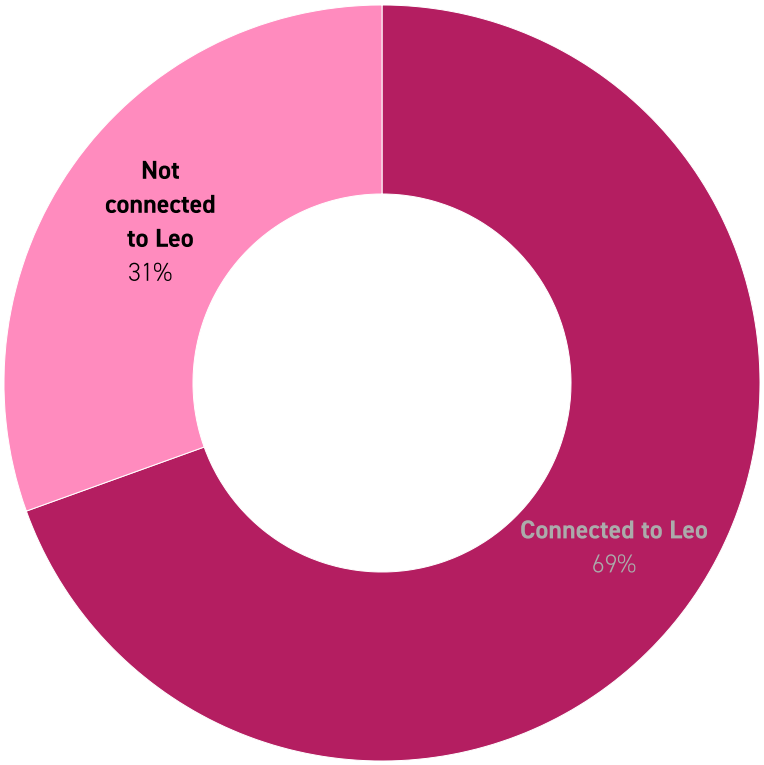
That this questionable assertion is now enshrined in the court's ruling is "a flawed and troubling precedent," the Organization of American Historians, which represents 6,000 history scholars and experts, and the American Historical Association, the largest membership association of professional historians in the world, said in a statement. It is also a prime example of how a tight circle of conservative legal activists have built a highly effective thought chamber around the court's conservative flank over the past decade.

A POLITICO review of tax filings, financial statements and other public documents found that Leo and his network of nonprofit groups are either directly or indirectly connected to a majority of amicus briefs filed on behalf of conservative parties in seven of the highest-profile rulings the court has issued over the past two years.

It is the first comprehensive review of amicus briefs that have streamed into the court since Trump nominated Justice Amy Coney Barrett in 2020, solidifying the court's conservative majority. POLITICO's review found multiple instances of language used in the amicus briefs appearing in the court's opinions.

Leonard Leo and his network are changing the nation's legal and cultural landscape

The percentage of conservative amicus briefs in seven Supreme Court cases over the past two years that are connected to Leo and his network.



POLITICO classified groups as connected to Leo's network as organizations where Leo is an executive or board member with direct influence over decision-making, or that are run by those with a connection to Leo. This includes individuals

The picture that emerges is of an exceedingly small universe of mostly Christian conservative activists developing and disseminating theories to change the nation's legal and cultural landscape. It also casts new light on Leo's outsized role in the conservative legal movement, where he simultaneously advised Trump on Supreme Court nominations, paid for media campaigns promoting the nominees and sought to influence court decision-making on a range of cases.

Adam Kennedy, Leo's spokesperson, said Leo has "no comment at this time."

259 amicus briefs for the conservative side in the seven cases, Leo was either a board member, official or financial backer through his network of the group that filed the brief. Another 55 percent were from groups run by individuals who share board memberships with Leo, worked for entities funded by his network or were among a close-knit circle of legal experts that includes chapter heads who serve under Leo at the Federalist Society.

Leonard Leo (top left, bottom right), seen with Supreme Court Justices Neil Gorsuch (top right) in 2017 and Brett Kavanaugh (bottom left) in 2019. With Leo's network having attained power on the right, its many amicus briefs appear to be gaining attention. | Sait Serkan Gurbuz/AP; T.J. Kirkpatrick/The New York Times via Redux Pictures

George, in an emailed response, defended his claim that abortion was a crime, saying the historians have been "comprehensively refuted," including by John Keown, a leading English scholar of Christian ethics at Georgetown University and Joseph Dellapenna, a now-retired law professor who also submitted a brief.

Like George's view of abortion as a crime throughout history, arguments in amicus briefs often find their way into the justices' opinions. In major cases involving cultural flashpoints of abortion, affirmative action and LGBTQ+ rights POLITICO found information cited in amicus briefs connected to Leo's network in the court's opinions.

Dating from Rome

Amicus briefs date to the Roman empire as vehicles for neutral parties to make suggestions based on law or fact. In pre-18th Century England, the amicus was a neutral lawyer in the courtroom. Around the turn of the 20th century in America, there was a shift to amicus briefs becoming vehicles for parties who felt a stake in the case but weren't among the official litigants. Still, in the century that followed, amicus briefs only rarely influenced cases.

But now, with Leo's network having attained power on the right, some legal experts bemoan them as ways for activists to push for more ideologically pure or sweeping judicial decisions.

Justices appointed by both Democrats and Republicans over the past decade have come to rely on amicus briefs, including those funded by advocacy groups, for "fact-finding," says Allison Orr Larsen, a constitutional law expert at William and Mary Law School who's been tracking the trend for nearly a decade.

"There's no real vetting process for who can file these amicus briefs," said Larsen, and the justices often "accept these historical narratives at face value." While it's impossible to gauge the precise impact, "what I can prove is they're being used by the court," she says.

The Supreme Court building is seen in 1942. In the 20th century, amicus briefs only rarely influenced cases; justices weren't even obliged to read them. | Max Desfor/AP

A former Supreme Court clerk, Larsen has called for reforms including disclosure of special interests behind "neutral-sounding organizations" which, in reality, are representing a broader political movement.

For instance, Leo and George are board directors at the Ethics and Public Policy Center, which filed amicus briefs in support of the restrictive Mississippi abortion law in the *Dobbs* decision and in the case in which the court found a

Colorado website designer could refuse to create wedding websites for same-sex couples. They are also both on the board of the Becket Fund for Religious Liberty, which also filed briefs in those cases.

Combined, the entities have taken in millions of dollars from Leo's primary aligned dark money group, the 85 Fund, including $1.4 million to the Ethics and Public Policy Center in 2021. Leo himself received the Canterbury Medal, Becket's highest honor, in 2017.

In the *Dobbs* case, Becket's brief posited that "religious liberty conflicts would likely decrease post-*Roe*."

Abortion as a Crime

In July of 2022, a few weeks after the *Dobbs* decision was announced, historical organizations issued a statement saying that abortion was not considered a crime according to the modern definition of the word and citing a "long legal tradition" — from the common law to the mid-1800s – of tolerating termination of pregnancy before a woman could feel fetal movement.

"The court adopted a flawed interpretation of abortion criminalization that has been pressed by anti-abortion advocates for more than thirty years," they wrote.

A trio of scholars of medieval history also denounced Alito's argument as misrepresenting the penalties involved related to abortion. The Latin word "crimen" was more akin to a sin that would be "absolved through penance" before the Church — and not a felony, said Sara McDougall, a scholar of medieval law, gender and justice at City University of New York Graduate Center. Further, the meaning of "abortion" often involved "beating a pregnant woman" and was so broad it covered infanticide, she said.

"There's not one felony prosecution for abortion in 13th century England. The church sometimes (but not always) imposed penance — but usually when the intent was to conceal sexual infidelity," said McDougall, who was one of the

three medieval scholars. Indeed, this medieval doctrine persisted for hundreds of years until Pope Pius IX proclaimed in 1869 that life began at conception, they wrote.

In his response, George said the three medievalists "lamentably conceal what is in the public record," by ignoring what the definition was at the time of a "formed" fetus. They "fail to engage at all with the compelling evidence that abortion was unlawful" and "subject to criminal sanction after quickening," which was after 42 days from conception, he said.

This artist sketch depicts Center for Reproductive Rights Litigation Director Julie Rikelman speaking to the Supreme Court during oral arguments in Dobbs v. Jackson, on Dec. 1, 2021, in Washington. | Dana Verkouteren via AP

While debates over when life begins date to ancient Greece, the definition George uses in an expanded version of his brief that he provided to POLITICO — that a child is an "immortal soul" after 42 days — came from the author of an early forerunner to the encyclopedia (c. 1240) who was a member of the Franciscan order and frequent lecturer on the Bible. It is not clear how, without

modern ultrasound technology, a fetus' gestational stage could have been determined in the 1300s.

The case that abortion was a historical crime wasn't part of the anti-abortion push until it was introduced by Dellapenna during an anti-abortion conference in the early 1980s, says Mary Ruth Ziegler, a legal historian who authored a book on the history of *Roe*. Dellapenna was a law professor at Villanova University and not a historian. Moreover, she said: "This was not a disinterested historian doing the research. This is someone at an anti-abortion event."

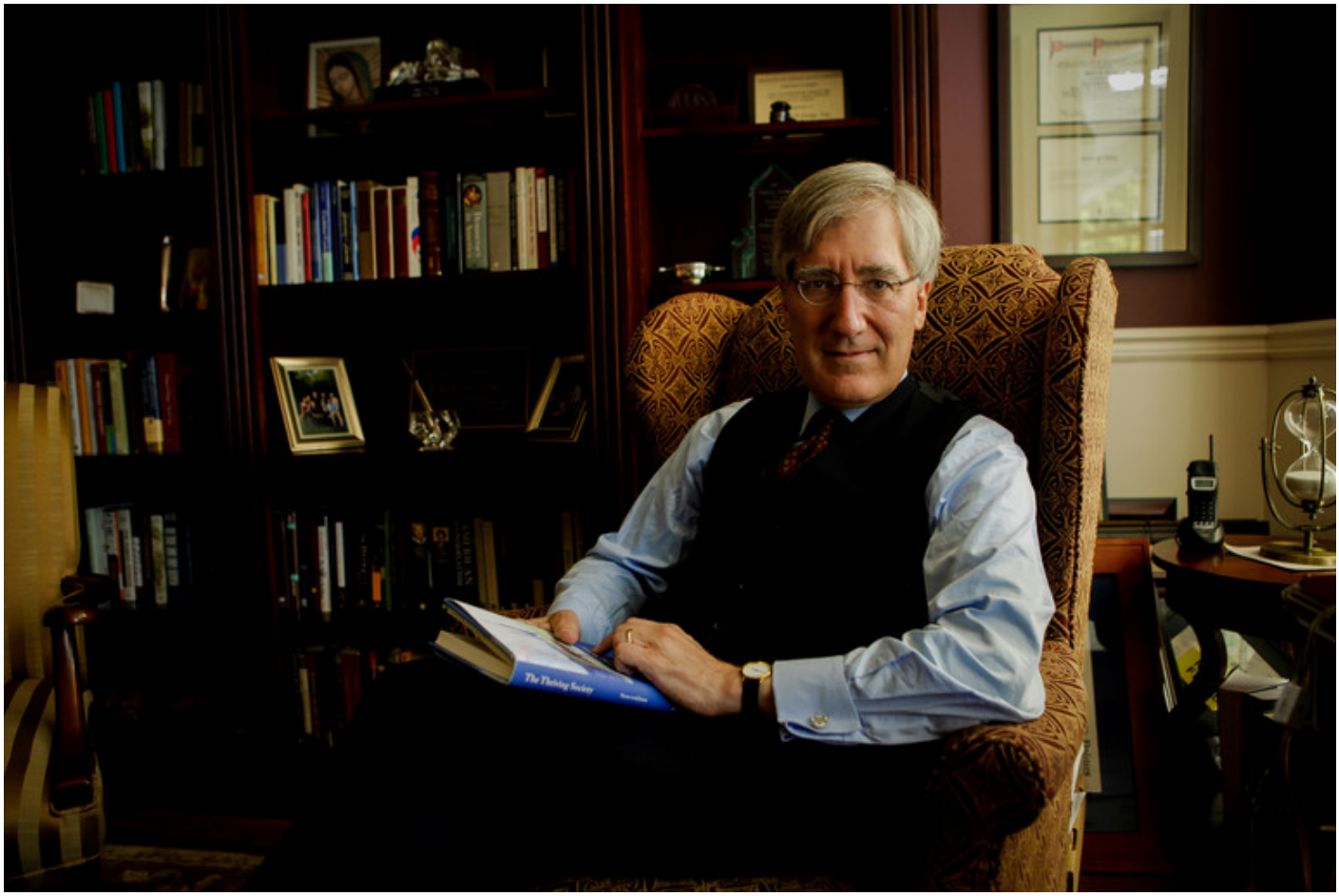
Over time, many others in the anti-abortion community seized on Dellapenna's work, including George, who "repurposed it" to argue that abortion itself is unconstitutional, said Ziegler.

In response, George called it "amusing" that his critics among historians "try to immunize themselves from critique by claiming guild authority" while noting that his sources are themselves historians.

"The trouble for them," he said of the historical associations, is "the sources are available to us, just as they are to them. So we can see what the sources say, and compare it with what they claim the sources say."

George's friendship with Leo dates to the 1990s. The two share similar beliefs on religion, politics and even personal hobbies. Both are avid wine collectors. Each is also among a handful of recent recipients of the John Paul II New Evangelization Award, given by the Catholic Information Center in Washington to those who "demonstrate an exemplary commitment to proclaiming Christ to the world."

When it comes to abortion, George's scholarship appears throughout the federal court system, particularly among judges with deep ties to the Federalist Society.



Princeton professor Robert P. George sits in his office in 2015. George, a close friend and collaborator of Leo, made the case for overturning Roe v. Wade in an amicus brief a year before the Supreme Court issued its watershed ruling. | Chris Goodney/Bloomberg via Getty Images

In April, Judge Matthew J. Kacsmaryk in Texas cited George's 2008 book, "Embryo: A Defense of Human Life," in the first footnote of his preliminary ruling invalidating the Food and Drug Administration's approval of the abortion pill, mifepristone. Kacsmaryk used George's work to defend his use of the terms "unborn human" and "unborn child" — most often used by anti-abortion activists — instead of "fetus," which is the standard term used by jurists.

"Jurists often use the word 'fetus' to inaccurately identify unborn humans in unscientific ways. The word 'fetus' refers to a specific gestational stage of development, as opposed to the zygote, blastocyst or embryo stages," reads the first footnote of the decision, citing George.

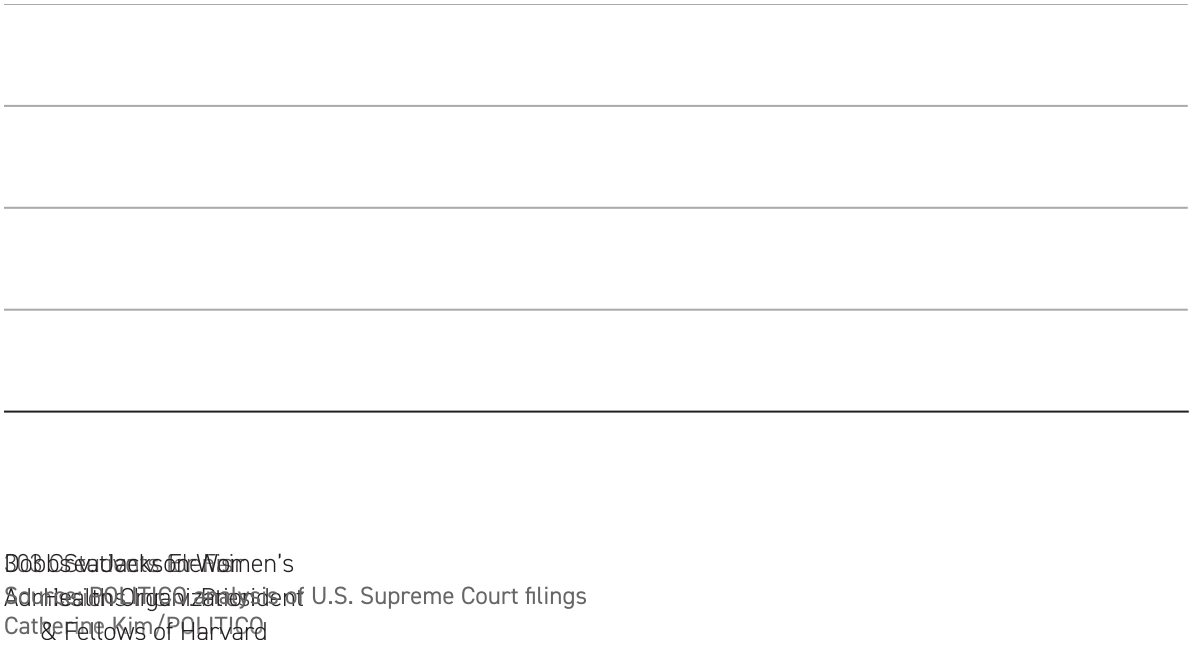
Affirmative Action

The longest-standing agenda item of the conservative legal movement aside from abortion was affirmative action.

In June, when the court rejected affirmative action at colleges and universities across the nation, there were at least three instances in which Justice Clarence Thomas used the same language or citations from amicus briefs of filers connected to Leo, whose friendship and past business relationship with Thomas's wife, Virginia Thomas, who is known as Ginni, have been reported.

Leo and his network filed a large portion of conservative briefs in major Su Court cases

Percentage of conservative briefs connected to Leo that were filed for select Supreme Court cases



Thomas read from the bench his concurring opinion barring such race-conscious laws, including quoting from the Virginia Bill of Rights of 1776. It asserts that "all men are (already) by nature equally free and independent and have certain inherent rights," he said.

The quote and reference to Virginia's Bill of Rights also appeared in an amicus brief filed by John Eastman, a former Thomas law clerk who has a long history of support from Leo. Indeed, roughly eight in ten of all briefs filed in the case, *Students for Fair Admissions v. Harvard*, are connected to Leo's network.

Eastman is best known as the accused mastermind of the legal strategy Trump used to try and overthrow the 2020 election, and is now co-defendant with Trump in the election-interference case in Georgia. Both Leo and Ginni Thomas donated to Eastman's unsuccessful 2010 campaign for state attorney general of California. Eastman, in February of 2012, co-authored the first-ever brief that Leo's primary activist group, the Judicial Education Project, filed before the Supreme Court.

Affirmative action advocates rally outside the Supreme Court on Oct. 31, 2022, as justices heard oral arguments on two cases on whether colleges and universities can continue to consider race as a factor in admissions decisions. | Francis Chung/POLITICO

John Eastman speaks to media outside the Fulton County Jail in Atlanta, on Aug. 22, 2023. Eastman, a former law clerk for Justice Clarence Thomas, has a long history of support from Leo. | Arvin Temkar/Atlanta Journal-Constitution via AP

Thomas also cites the work of some of the same scholars mentioned in briefs by former attorney general Edwin Meese III, who served with Leo on the Federalist Society board and worked with him on judicial nominations during the George W. Bush administration.

Same-sex weddings and free speech

Just weeks before the affirmative action decision was announced, the court delivered a blow to LGBTQ+ rights in deciding a web designer with religious objections to same-sex marriages can't be legally obliged to create speech she opposes. The justices were divided 6-3 between Republican and Democratic appointees.

A Christian nonprofit aligned with Leo's network, the Alliance Defending Freedom, represented the Colorado-based plaintiff. One issue before the justices was whether the case constituted an actual dispute between the designer and the Colorado Civil Rights Commission or was generated simply to undermine LGBTQ+ rights.

ADF is funded by Leo-aligned DonorsTrust, among the biggest beneficiaries of Leo's network of nonprofits.

In at least two instances in Justice Neil Gorsuch's majority opinion, he used the same language or citations from amicus briefs submitted by groups in Leo's network, all of which endorsed the view of an appeals court judge in the case, Timothy M. Tymkovich, that "taken to its logical end," allowing Colorado to require that web designers produce content related to same-sex weddings would permit the government to "regulate the messages communicated by all artists." In his opinion, Gorsuch cites the same quote, arguing the result would be "unprecedented."

Alliance Defending Freedom lawyer Kristen Waggoner speaks after the Supreme Court heard oral arguments on 303 Creative LLC v. Elenis on Dec. 5, 2022. ADF is funded by Leo-aligned Donors Trust, among the biggest beneficiaries of Leo's network of nonprofits. | Anna Moneymaker/Getty Images

The briefs included one from a group of First Amendment scholars including George and Helen M. Alvare, a law professor at George Mason University's Antonin Scalia Law School, which in 2016 received a $30 million gift brokered by Leo. Among seven briefs endorsed by people or groups connected to Leo was Turning Point USA, which received $2.75 million from Leo's 85 Fund in 2020.

The overall concentration of conservative amicus briefs in the LGBTQ+ rights case tied to Leo's network is among the highest, at about 85 percent, of any of the seven cases reviewed. Many were filed by Catholic or Christian nonprofits in support of the plaintiff, a designer whose company is called 303 Creative.

The two pillars of Leo's network, The 85 Fund and the Concord Fund, gave $7.8 million between July of 2019 and 2021 to organizations filing briefs on behalf of 303 Creative LLC.

The Concord Fund is a rebranded group, previously called the Judicial Crisis Network, which organized tens of millions of dollars for campaigns promoting the nominations of the conservative justices. The 85 Fund is the new name of the Judicial Education Project, a tax-exempt charitable group that has filed numerous briefs before the court.

A burgeoning tool

Amicus briefs are not only tools of conservatives. The numbers of amicus briefs on both sides of major cases grew substantially after 2010, which happened to be when the court's *Citizens United* ruling ushered in a new era of "dark money" groups like the Leo-aligned JEP.

The volume of amicus briefs seeking to influence the court has only increased since then, as both Democrat and Republican-nominated justices have come to

borrow from them in their opinions, according to a study published in 2020 in The National Law Journal.

In her dissenting opinion in the affirmative action case, liberal Justice Ketanji Brown Jackson drew criticism for quoting misleading information cited in an amicus brief by the Association of American Medical Colleges about the mortality rate for Florida newborns.

Across the seven cases and hundreds of briefs reviewed by POLITICO — in addition to abortion, LGBTQ+ rights and affirmative action, the cases covered student loans, environmental protection, voting rights and the independent state legislature theory — the conservative parties had a slight advantage, accounting for 50 percent of the amici curiae. That compares to 46 percent in support of the liberal parties and about 4 percent filed in support of neither party.

While there is an amalgam of Democrat-aligned groups directing money to influence the court, such as Protect Democracy, Demand Justice and the National Democratic Redistricting Commission, which is focused on voting and democracy, they are decentralized and mostly revolve around specific issues.

"We don't have a Federal Reserve or a Central Bank to go to. It doesn't exist. You're quantifying two wildly different ecosystems," said Robert Raben, a former assistant attorney general at the Department of Justice under President Bill Clinton and counsel to the House Judiciary Committee.

Given the opaque nature of Leo's network, it's difficult to tally up just how much money has been spent on conservative legal advocacy linked to him. Yet just the two leading groups in his funding network, The Concord Fund and The 85 Fund, spent at least $21.5 million between 2011 and 2021 on groups advocating for conservative rulings.

Tax-exempt nonprofit groups must provide the names of their officers and board members on their annual IRS forms. In 15 percent of the briefs reviewed, Leo is a member of leadership, for instance a board member, trustee or

executive representing the filers — or the filers received payments from one of

Expanding the circle to include executives who've previously worked for a Leo-aligned group, shared board memberships with him, led Federalist Society chapters or have other professional ties to him, Leo's network is connected to 180 amicus briefs, or a majority.

Since Leo's handpicked justices solidified the court's conservative supermajority in 2020, they are agreeing to hear cases advanced by his allies and ruling in favor of many of his Christian conservative priorities. | Mark Peterson/Redux Pictures

Many of these professional ties are through the Center for National Policy, whose members have included Leo himself, Ginni Thomas, former Republican Sen. Jim DeMint of South Carolina and former Vice President Mike Pence.

A number of the groups associated with these individuals have also received funds from DonorsTrust, which is the biggest beneficiary of Leo's aligned Judicial Education Project, having taken in at least $83 million since 2010.

While POLITICO's analysis relies heavily on annual forms filed to the IRS, its approximations may underrepresent Leo's influence over opinions presented to the court. That's because the IRS does not require nonprofit groups to list members of advisory boards, and groups filing as churches don't have to disclose their leadership. Leo's organizations also route tens of millions of dollars through anonymous donor-advised funds like DonorsTrust, making it unclear where it is going.

The campaign to fund and promote amicus briefs is but one facet of Leo's broader advocacy architecture built around state and federal courts.

But it's of special relevance at this moment in the court's history. Since Leo's handpicked justices solidified the court's conservative supermajority in 2020, they are agreeing to hear cases advanced by his allies and ruling in favor of many of his Christian conservative priorities.

"In law reasons are everything. Rationale is our currency. It matters that they're using the briefs to justify themselves," said Larsen, who wrote a 2014 research report titled The Trouble with Amicus Facts.

"They're looking to amicus briefs to support their historical narrative," she said.

FILED UNDER: ABORTION, AFFIRMATIVE ACTION, FEDERALIST SOCIETY, DONALD TRUMP,

TAB 7D

DREXEL UNIVERSITY
Thomas R. Kline
School of Law

David DeMatteo, JD, PhD
Professor of Psychology & Professor of Law
Director, JD/PhD Program in Law & Psychology

January 13, 2024

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, DC 20544

Re: FRAP 29

Dear Secretary Byron:

I'm writing to bring your attention to the attached article, "When *Amicus Curiae* Briefs are *Inimicus Curiae* Briefs: *Amicus Curiae* Briefs and the Bypassing of Admissibility Standards," which was recently published in American University Law Review. The article focuses on an aspect of *amicus curiae* briefs that has received little attention but that raises fundamental concerns – i.e., *amicus curiae* briefs often include expert information that has not been subjected to the same procedural safeguards as expert evidence admitted at trial. Among other things, the article (a) describes how *amicus curiae* briefs bypass traditional admissibility standards for expert information, and (b) offers suggestions to regulate the use of *amicus curiae* briefs in an effort to prevent the submission of *amicus curiae* briefs in certain contexts, change how courts view amicus curiae briefs, and/or minimize the likelihood that *amicus curiae* briefs contain inaccurate or misleading information. As the Advisory Committee continues to consider amendments to FRAP 29, I hope the attached article will be considered. Thank you.

Sincerely,

David DeMatteo, JD, PhD
Professor of Law & Professor of Psychology
Drexel University

3320 Market Street, Suite 400, Philadelphia, PA 19104 | Tel: 215.571.4707 | Fax: 215.571.4712
drexel.edu/law | david.dematteo@drexel.edu

ARTICLES

WHEN *AMICUS CURIAE* BRIEFS ARE *INIMICUS CURIAE* BRIEFS: *AMICUS CURIAE* BRIEFS AND THE BYPASSING OF ADMISSIBILITY STANDARDS

DAVID DEMATTEO* & KELLIE WILTSIE**

Amicus curiae *briefs are being submitted at historically high levels by a range of individuals and entities, and there is compelling evidence that these briefs are highly influential in judicial decision-making, including in the Supreme Court of the United States. Although* amicus curiae *briefs have been an ingrained aspect of the U.S. legal system for hundred-plus years, various legal scholars, researchers, commentators, and judges, including Supreme Court Justices, have raised concerns about their use, including that* amicus curiae *briefs contain redundant information and often function as advocacy tools. This Article addresses an aspect of* amicus curiae *briefs that has received little attention but that raises fundamental concerns—i.e.,* amicus curiae *briefs often include expert information that has not been subject to the same procedural safeguards as expert evidence admitted at trial. Given the documented persuasiveness of*

* David DeMatteo, JD, PhD, is a Professor of Law at the Thomas R. Kline School of Law at Drexel University, a Professor of Psychology in the Department of Psychological and Brain Sciences at Drexel University, and Director of Drexel University's JD/PhD Program in Law and Psychology. Professor DeMatteo received a BA in Psychology (1995) from Rutgers University, an MA in Clinical Psychology (1999) from MCP Hahnemann University, a JD (2001) from Villanova University School of Law, and a PhD in Clinical Psychology (2002) from MCP Hahnemann University.

** Kellie Wiltsie, MS, JD, received a BS in Criminal Justice (2018) and a BS in National Security (2018) from the University of New Haven, an MS in Psychology (2022) from Drexel University, and a JD (2022) from the Thomas R. Kline School of Law at Drexel University. Ms. Wiltsie anticipates receiving a PhD in Clinical Psychology from Drexel University in June 2025.

amicus curiae *briefs in judicial decision-making, the inclusion of unvetted and potentially inaccurate, misleading, or mischaracterized expert information is a significant concern. This Article: (a) discusses the historical development, governing rules, and current use and influence of* amicus curiae *briefs; (b) distinguishes between lay evidence and expert evidence, with a focus on the evidentiary rules that govern the admissibility of expert information; (c) describes how* amicus curiae *briefs bypass traditional admissibility standards for expert information; and (d) offers suggestions to regulate the use of* amicus curiae *briefs in an effort to prevent the submission of* amicus curiae *briefs in certain contexts, change how courts view* amicus curiae *briefs, and minimize the likelihood that* amicus curiae *briefs contain inaccurate or misleading expert information.*

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INTRODUCTION

The Supreme Court of the United States has a lengthy history of relying on *amicus curiae* briefs when determining whether to accept a case for review or deciding the merits of a case.[1] These "friend of the court" briefs have become an ingrained and arguably essential component of Supreme Court decision-making over the past seventy-plus years, with one study reporting that *amicus curiae* briefs were submitted in 98% of the cases before the Supreme Court in a recent term.[2] Given the increasing substantive complexity of some cases and

1. *See* Paul M. Collins, Jr., Pamela C. Corley & Jesse Hamner, *Me Too? An Investigation of Repetition in U.S. Supreme Court Amicus Curiae Briefs*, 97 JUDICATURE 228, 228–29 (2014) (discussing the role of *amicus curiae* briefs in certiorari decisions and the outcome of litigation in appellate courts). Appellate courts at both federal and state levels permit the filing of *amicus curiae* briefs. *See* Paul M. Collins, Jr., *The Use of Amicus Briefs*, 14 ANN. REV. L. & SOC. SCI. 219, 224 (2018) (analyzing the use of *amicus curiae* briefs in federal appellate courts at both certiorari and merits stages); Victor E. Flango, Donald C. Bross & Sarah Corbally, *Amicus Curiae Briefs: The Court's Perspective*, 27 JUST. SYS. J. 180, 183–85, 189 (2006) (considering the use and utility of *amicus curiae* briefs filed in state courts of last resort); Sylvia H. Walbolt & Joseph H. Lang, Jr., *Amicus Briefs: Friend or Foe of Florida Courts?*, 32 STETSON L. REV. 269, 298–307 (2003) (exploring the tendency of *amicus curiae* briefs submitted in Florida state courts to influence court decisions when used or receive some acknowledgement when not used by the courts). Although much less common, some trial courts at both state and federal levels also permit the filing of *amicus curiae* briefs. *See* Stephen G. Masciocchi, *What Amici Curiae Can and Cannot Do with Amicus Briefs*, COLO. LAW., Apr. 2017, at 23, 23 (noting that although the Federal Rules of Civil Procedure are silent on the filing of *amicus curiae* briefs, federal district court judges in Colorado accept and even solicit *amicus curiae* briefs); Eugene Temchenko, *Discovering the Truth Behind an Amicus Brief*, 94 N.D. L. REV. 95, 99–100 (2019) (observing that federal district courts permit filing of *amicus curiae* briefs, adopting a standard of "usefulness" to determine whether to allow appearance of *amicus curiae*). Despite the frequent use of *amicus curiae* briefs in state and federal courts at all levels, this Article will focus primarily on the use of *amicus curiae* briefs filed in the U.S. Supreme Court.

2. *See, e.g.*, Allison Orr Larsen & Neil Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1902 (2016) (discussing the increasing frequency with which the Supreme Court receives *amicus curiae* briefs). In their comprehensive article, Larsen and Devins noted that the Supreme Court currently receives approximately 800 *amicus curiae* briefs per year. *Id.* Various commentators and scholars have discussed the proliferation of *amicus curiae* briefs over the past seventy-plus years. *See, e.g.*, Peter Bils, Lawrence S. Rothenberg & Bradley C. Smith, *The Amicus Game*, 82 J. POL. 1113, 1113 (2020) (examining the recent proliferation of *amicus curiae* briefs filed in the Supreme Court); Aaron-Andrew P. Bruhl & Adam Feldman, *Separating Amicus Wheat from Chaff*, 106 GEO. L.J. ONLINE 135, 135 (2018) (discussing the Supreme Court's reliance on *amicus curiae* briefs); Bruce J. Ennis, *Effective Amicus Briefs*, 33 CATH. U. L. REV. 603, 603–04 (1984)

the varied public and private interests that are often at stake,[3] *amicus curiae* briefs provide an opportunity for interested non-parties to the litigation to, *inter alia*, provide their subject matter expertise to the court, state their interest in the case, amplify or supplement legal

(noting the dramatic growth in *amicus curiae* briefs in the Supreme Court from the mid-1960s to 1980s); Thomas G. Hansford & Kristen Johnson, *The Supply of Amicus Curiae Briefs in the Market for Information at the U.S. Supreme Court*, 35 JUST. SYS. J. 362, 373–74, 380 (2014) (analyzing the factors increasing the growth rate of *amicus curiae* brief filings in the Supreme Court); Fowler V. Harper & Edwin D. Etherington, *Lobbyists Before the Court*, 101 U. PA. L. REV. 1172, 1172 (1953) (flagging an increase in *amicus curiae* briefs during the 1948 Supreme Court term, in which seventy-five briefs were filed in fifty-seven cases); Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 751–57 (2000) (reporting data regarding prevalence of *amicus curiae* briefs filed in the Supreme Court during the latter half of Twentieth Century); Richard L. Pacelle, Jr., John M. Scheb, II, Hemant K. Sharma & David H. Scott, *Assessing the Influence of* Amicus Curiae *Briefs on the Roberts Court*, 99 SOC. SCI. Q. 1253, 1254–55 (2018) (providing an analysis of the prevalence of *amicus curiae* briefs filed during the first ten terms of the Roberts Court from 2005 through 2014); George C. Piper, Note, *Amicus Curiae Participation—At the Court's Discretion*, 55 KY. L.J. 864, 864–65 (1967) (noting historical trend towards greater *amicus* participation in federal appellate courts); Ryan Salzman, Christopher J. Williams & Bryan T. Calvin, *The Determinants of the Number of Amicus Briefs Filed Before the U.S. Supreme Court, 1953–2001*, 32 JUST. SYS. J. 293, 301, 305–07 (2011) (analyzing the prevalence and trends of filing of *amicus curiae* briefs in the Supreme Court during the latter half of Twentieth Century and discussing the types of cases that may attract more *amici* participation). Although it is not a focus of this Article, it is interesting to note that the use of *amicus curiae* briefs has also increased in several countries outside of North America, including in several developing countries in Africa, Asia, Eastern Europe, and Latin America. *See* Shai Farber, *The Amicus Curiae Phenomenon – Theory, Causes and Meanings*, 29 TRANSNAT'L L. & CONTEMP. PROBS. 1, 5 (2019) (discussing recent increase in the adoption of *amicus curiae* briefs in legal systems across several continents). Farber attributes the increased use of *amicus curiae* briefs in other countries primarily to changes in the role of courts, including recognition by courts of their social role and their involvement in social change. *Id.* at 19–20.

3. *See* Flango et al., *supra* note 1, at 181 (examining the use of *amicus curiae* briefs as a mechanism for providing opportunities for non-parties with an interest in the litigation to offer their views to the deciding court). In 1954, Justice Hugo Black of the U.S. Supreme Court spoke in favor of liberalizing the rules that governed the filing of *amicus curiae* briefs in the Supreme Court:

> I have never favored the almost insuperable obstacles our rules put in the way of briefs sought to be filed by persons other than the actual litigants. Most of the cases before this Court involve matters that affect far more people than the immediate record parties. I think the public interest and judicial administration would be better served by relaxing rather than tightening the rule against *amicus curiae* briefs.

Order Adopting Revised Rules of the Supreme Court of the United States, 346 U.S. 945, 947 (1954) (statement of Black, J.).

arguments made by the parties to the litigation, or inform the court of the potential implications of the court's decision.[4] Indeed, some scholars have referred to the use of *amicus curiae* briefs as "the clearest form of democratic participation by outside actors in the Supreme Court."[5]

Although *amicus curiae* briefs have several potential benefits,[6] their use raises a number of noteworthy concerns.[7] Some scholars and judges have noted, for example, that *amicus curiae* briefs often provide needless repetition of legal arguments made by the parties to the litigation.[8] Other concerns regarding *amicus curiae* briefs focus on the

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4. *See, e.g.*, Flango et al., *supra* note 1, at 181–82 (discussing various functions and goals of *amicus curiae* briefs filed in state high courts); Brandon D. Harper, Comment, *The Effectiveness of State-Filed Amicus Briefs at the United States Supreme Court*, 16 U. PA. J. CONST. L. 1503, 1505 (2014) (noting that various *amicus curiae* briefs filed in the Supreme Court enhance discourse through new perspectives and ideas); Patricia Marin, Catherine L. Horn, Karen Miksch, Liliana M. Garces & John T. Yun, *Uses of Extra-Legal Sources in* Amicus Curiae *Briefs Submitted in* Fisher v. University of Texas at Austin, EDUC. POL'Y ANALYSIS ARCHIVES, Mar. 19, 2018, at 7 (highlighting the policy discussions that extra-legal information in *amicus curiae* briefs create); Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 REV. LITIG. 669, 674 (2008) (noting *amicus curiae* briefs are typically filed to protect interests of individuals or entities who are not part of the legal proceedings but whose interests may be jeopardized by the litigation).

5. Salzman et al., *supra* note 2, at 294; *see* Ruben J. Garcia, *A Democratic Theory of Amicus Advocacy*, 35 FLA. STATE U. L. REV. 315, 317 (2008) (highlighting the importance of *amicus curiae* briefs in the practice of law generally and in the democratic judicial system more specifically).

6. *See* Salzman et al., *supra* note 2, at 294–95 (discussing the impact of *amicus curiae* briefs on judicial behavior, such as guiding Justices' decisions to cast votes and write separate opinions); *see also* Masciocchi, *supra* note 1, at 23–34 (discussing the many roles of *amicus curiae* briefs in the U.S. legal system, including their capacity to examine novel legal perspectives and fill in information and evidentiary gaps).

7. *See* Paul M. Collins, Jr., *Lobbyists Before the U.S. Supreme Court: Investigating the Influence of Amicus Curiae Briefs*, 60 POL. RSCH. Q. 55, 55, 57 (2007) (describing *amicus curiae* briefs as "adversarial" tools that frequently urge courts to adopt a particular policy outcome); Harper, *supra* note 4, at 1505 (noting *amicus curiae* briefs may be seen as lobbying a court for a particular outcome from a particular ideological perspective); Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91, 94–95 (1993) (highlighting that *amicus curiae* briefs are not subject to the same procedural safeguards as expert evidence offered during a trial); Gary Simms, *Amicus Briefs: "Friends" with Unfriendly Facts*, PLAINTIFF'S MAG., Dec. 2014, at 1, 1 (noting the party against whom an *amicus curiae* brief is filed has no meaningful opportunity to respond).

8. *See, e.g.*, Bruhl & Feldman, *supra* note 2, at 135 (discussing the burden that the

potential ideological alliance between *amici* and litigants, with *amicus curiae* briefs essentially functioning as an advocacy or lobbying tool rather than as a brief intended to objectively inform a court.[9] Some scholars have also expressed concern that *amicus curiae* briefs, particularly ones that include scientific or technical data, may mislead courts for partisan purposes if they contain a cherry-picked, distorted, inaccurate, or misstated description of scientific or technical findings; such misrepresentations of scientific or technical data can have unintended consequences (or perhaps intended in some contexts) on a court's decision in a case.[10]

There is, however, another aspect of *amicus curiae* briefs—one that has received no more than passing attention from scholars and courts over the past seventy-five-plus years—that raises fundamental concerns about the use of these briefs—i.e., *amicus curiae* briefs often include scientific, technical, or other expert information that has not been subject to the same procedural safeguards as expert evidence admitted at trial.[11] For expert evidence to be introduced at a trial, a proffered

large influx of repetitive *amicus curiae* briefs force upon the Supreme Court); Collins et al., *supra* note 1, at 229 (raising concerns regarding duplicative legal arguments made in *amicus curiae* briefs that undermine their utility rather than complement the litigants' briefs); Walbolt & Lang, *supra* note 1, at 269 (emphasizing the importance of *amicus curiae* briefs in appellate courts when their legal arguments are proper or artful). In an often-quoted passage, Judge Posner of the U.S. Court of Appeals for the Seventh Circuit stated: "The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief. Such amicus briefs should not be allowed. They are an abuse." Ryan v. Commodity Futures Trading Comm'n, 125 F.3d 1062, 1063 (7th Cir. 1997). In *Ryan*, Judge Posner also stated that *amicus curiae* briefs should not simply "duplicate the arguments made in the litigants' briefs" because the "term 'amicus curiae' means friend of the court, not friend of a party." *Id.*

9. *See* Harper, *supra* note 4, at 1505 (raising concerns that *amicus curiae* briefs are often filed by ideological allies of one of the parties to the litigation); Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694, 697 (1963) (discussing gradual shift of *amicus curiae* briefs in U.S. courts from neutrality to advocacy).

10. *See* Rustad & Koenig, *supra* note 7, at 94 (illustrating *amici* on both sides of *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.* colored social science findings in an effort to advance their own interests).

11. *Id.* at 94–95 (noting *amicus curiae* briefs are not subject to the same safeguards, such as initial vetting and cross-examination, as expert witnesses who present expert scientific evidence at trial). The safeguards attendant to the presentation of scientific evidence at trial will be discussed later in this Article. *Amicus curiae* briefs that contain science or legislative facts (as opposed to purely legal arguments) are often referred

expert must be recognized as an expert by the court,[12] which involves a rigorous review of the proffered expert's education, qualifications, and experience, and the expert's proffered evidence must meet a stringent admissibility standard that assesses the validity and reliability of the evidence; proffered expert evidence that does not satisfy the admissibility standard is not admitted into the court proceedings.[13] Yet, *amicus curiae* briefs can include the same expert information that would have had to satisfy the stringent admissibility standard for expert testimony presented at trial, but with no check on the validity or reliability of the expert information and no formal vetting of the person or entity that submitted the *amicus curiae* brief.[14] The absence of any check on the validity and reliability of the expert information

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to as Brandeis briefs. *See* Gray L. Dorsey, *Brandeis Briefs as Jurisprudence Source Material*, 51 LAW LIB. J. 16, 17–18 (1958) (discussing the emergence of Brandeis briefs in the early Twentieth Century). The original Brandeis brief was submitted by attorney Louis Brandeis, who represented the State of Oregon in *Muller v. Oregon*. *Id.* at 17–18 (citing Muller v. Oregon, 208 U.S. 412 (1908)). The issue in *Muller* was whether women could be required to work more than ten hours per day, which would violate a state labor law intended to protect women from abusive working conditions. *Muller*, 208 U.S. at 416–17. Rather than focusing on legal issues, the brief submitted by Brandeis documented the harmful effects on women (and their children) when they are required to work long hours. Dorsey, *supra* note 11, at 18. Brandeis's brief in *Muller* ushered in a new era of submitting briefs that focused on science (particularly social science) to effectuate legal change. *Id.* at 19–20 (listing cases in which Brandeis briefs were prepared). After a successful career as a practicing attorney, Mr. Brandeis later became a Justice on the U.S. Supreme Court (1916–1939). Simms, *supra* note 7, at 2.

12. *See* FED. R. EVID. 702 (noting proffered experts must be qualified by virtue of "knowledge, skill, experience, training, or education" before they are permitted to offer an opinion in court).

13. In U.S. courts, the two primary admissibility standards for expert evidence are the *Frye* standard and the *Daubert* standard. In *Frye v. United States*, the U.S. Court of Appeals for the District of Columbia Circuit articulated the so-called "general acceptance" test, which stated that the thing from which scientific evidence is deduced "must be sufficiently established to have gained general acceptance in the particular field in which it belongs." 293 F. 1013, 1014 (D.C. Cir. 1923). In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Supreme Court held that Federal Rule of Evidence 702, not *Frye*, was the appropriate admissibility standard in U.S. federal courts. 509 U.S. 579, 597–98 (1993). The *Frye* standard and *Daubert* standard are discussed in detail later in this Article.

14. *See* Rustad & Koenig, *supra* note 7, at 128, 143–51 (examining the use of inaccurate science or distorted descriptions of accurate science in *amicus curiae* briefs).

opens the possibility that the *amicus curiae* brief might contain inaccurate or misleading information.[15]

Amicus curiae briefs occupy a unique place in appellate court litigation because, among other things, they are not bound by the rules of evidence that typically govern the information, including expert information, which is provided to a judicial decision-maker.[16] One commentator noted that the use of *amicus curiae* briefs "runs afoul of almost every other norm or rule regarding the use of evidence at trial or on appeal."[17] The absence of procedural safeguards that traditionally regulate expert information presented to a court raises significant concerns about the use of *amicus curiae* briefs, and those concerns are magnified by the documented persuasiveness of *amicus curiae* briefs on judicial decision-making.[18] Rather than functioning as a genuine *amicus*, or friend of the court, some *amicus curiae* briefs have been described as "inimical to sound judicial decision-making,"[19] or what we term *inimicus curiae* briefs.

Given the increasing rate at which *amicus curiae* briefs are being filed in the U.S. Supreme Court,[20] and the documented persuasiveness of

15. *See id.* at 152 (advocating for safeguards that provide "more guidance to determine whether the amici are distorting findings, citing unreliable data or drawing questionable normative arguments from incomplete data").

16. *See* Helen A. Anderson, *Frenemies of the Court: The Many Faces of Amicus Curiae*, 49 U. RICHMOND. L. REV. 361, 361–62 (2015) (discussing the absence of limitations on *amici curiae*). "[A]mici curiae—nonparties who are nevertheless advocates, who are not bound by rules of standing and justiciability, or even rules of evidence, and who can present the court with new information and arguments—occupy a unique place in the appellate courts." *Id.* Anderson's succinct statement captures a primary concern of using *amicus curiae* briefs.

17. Simms, *supra* note 7, at 1.

18. *See infra* notes 69–82 and accompanying text for a discussion about the persuasiveness of *amicus curiae* briefs on court decisions. As this Article will discuss, there is substantial and growing evidence that *amicus curiae* briefs are highly influential on judicial decision-making.

19. Rustad & Koenig, *supra* note 7, at 95. Rustad and Koenig analyze the inclusion of potentially inaccurate science or distorted descriptions of accurate science in *amicus curiae* briefs. *Id.* at 94–95.

20. *See, e.g.*, Kearney & Merrill, *supra* note 2, at 749 (highlighting the 800% increase in *amicus curiae* filings that occurred in the last fifty years of the Twentieth Century); Pacelle et al., *supra* note 2, at 1253 (discussing the striking increase of *amicus curiae* briefs submitted to the Supreme Court from the 1960s to the present); Walbolt & Lang, *supra* note 1, at 281–82 (discussing dramatic increase in the prevalence of *amicus curiae* briefs in the latter half of Twentieth Century). As is evident by the aforementioned sources, the substantial increase in *amicus curiae* briefs submitted to the Supreme Court has been the topic of conversation for many years.

these briefs on judicial decision-making at the highest level of the U.S. court system,[21] the inclusion of unchecked and potentially biased, inaccurate, or mischaracterized expert information in *amicus curiae* briefs raises concerns about the Supreme Court's continued reliance on these briefs when deciding whether to accept a case for review or when deciding the merits of a case. Unfortunately, this concern has received little meaningful attention from legal scholars, commentators, and courts. This lack of attention has enabled *amici* to continue to provide expert information to courts that may not actually assist the court in making a better-informed decision.

Part I of this Article provides an overview of *amicus curiae* briefs, including their historical development, the rules that govern *amicus curiae* participation in U.S. courts, and the influence of *amicus curiae* briefs on the U.S. Supreme Court.[22] Part II provides a detailed discussion of the admissibility rules that govern lay evidence and expert evidence in federal courts, along with a discussion of the persuasiveness of expert testimony on judicial decision-making.[23] Part III.A describes the fundamental concern with *amicus curiae* briefs—i.e., the bypassing of traditional admissibility standards for expert information.[24] Finally, Part III.B concludes this Article by offering several suggestions for regulating the use of *amicus curiae* briefs in an effort to prevent the submission of *amicus curiae* briefs in certain contexts, change how courts view *amicus curiae* briefs, and minimize the likelihood that *amicus curiae* briefs contain inaccurate or misleading expert information.[25]

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21. *See, e.g.*, Collins, *supra* note 7, at 65–66 (discussing the results of empirical research that strongly supported the idea that *amicus curiae* briefs have an impact on the "ideological direction" of the Supreme Court's decision-making process); Catherine L. Horn, Patricia Marin, Liliana M. Garces, Karen Miksch & John T. Yun, *Shaping Educational Policy Through the Courts: The Use of Social Science Research in* Amicus *Briefs in* Fisher I, 34 EDUC. POL'Y 449, 452, 457 (2020) (analyzing the nature and credibility of the social science research used in the ninety-two amicus briefs filed to address the merits of *Fisher I*); Pacelle et al., *supra* note 2, at 1256–57, 1260–61 (finding that "moderate" Supreme Court Justices, such as Justices Breyer and Kennedy, "exhibit[ed] the greatest influence by *amicus* briefs" during the 2005 through 2014 Supreme Court terms).

22. *See infra* Section I.

23. *See infra* Section II.

24. *See infra* Section III.A.

25. *See infra* Section III.B.

TAB 7E

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett

Re: PACER access (23-AP-J)

Date: March 6, 2024

Andrew Straw suggests that "all documents open to the public on PACER should be accessible for free by anyone," and that "[a]long with free PACER access should go assigning a unique URL to every document so that references to these documents can be made in filings with the URLs embedded."

It is doubtful that acting on this suggestion is within the Advisory Committee's jurisdiction. "Since PACER's inception, the Judicial Conference has charged fees for its use because Congress has never appropriated funds to cover the cost of PACER operations. Although the federal judiciary is an independent branch of government, it depends largely on appropriations of taxpayer dollars from Congress in order to function. Annual appropriations for the judiciary cover judge and staff salaries, federal defender services, courthouse security, and juror payments, among other things. But the judiciary can also self-fund certain services and operations by charging fees to the public for using them. PACER has operated as one of these self-funded services." *Nat'l Veterans Legal Servs. Program v. United States*, 968 F.3d 1340, 1344 (Fed. Cir. 2020) (citations omitted).

I suggest that this is not a matter for rule making and therefore that the suggestion be removed from the agenda.

TAB 7F

From: Andrew Straw
To: RulesCommittee Secretary
Cc: Andrew Straw
Subject: FRCP & FRAP Rule Suggestions Re Service and PACER and Court Document Unique URL Links
Date: Wednesday, November 15, 2023 3:47:18 AM
Importance: High

RE: FRCP & FRAP Rule Suggestions Re Service and PACER and Court Document Unique URL Links

Dear Rules Committee Secretary,

I am a disabled member of the bar of the U.S. Court of Appeals for the Fourth Circuit. I am also in poverty and often receive *IFP* status to proceed with my own lawsuits for myself. This poverty even when I am a lawyer is largely due to discrimination I experience from government due to my Camp LeJeune illnesses.

I write to suggest changes to the service rules under **FRCP** and **FRAP** as well as a suggestion to change the rules to allow for URL linking of court documents and access for free.

EMAIL SERVICE ADDRESS FOR USA

My first suggestion is that U.S. DOJ and all federal agencies be required to have **a service email address** that will accept filings from courts under CM/ECF and service from the public regarding any lawsuit against the United States.

There is no reason ever to require any court participant to use paper or the mails to do service.

Summons and complaints should be served not by a plaintiff but by the Court to the DOJ email address. This will streamline all cases wherein the United States is a defendant.

Every court should be required, moreover, to either allow *pro se* individuals to efile with CM/ECF or provide an email address to which *pro se* filings can be made.

If no DOJ lawyer appears in a case with the United States as defendant, any filing to the Court must be served by CM/ECF to the general service address at U.S. DOJ.

URL LINKS FOR DOCUMENTS IN FEDERAL COURT CASES

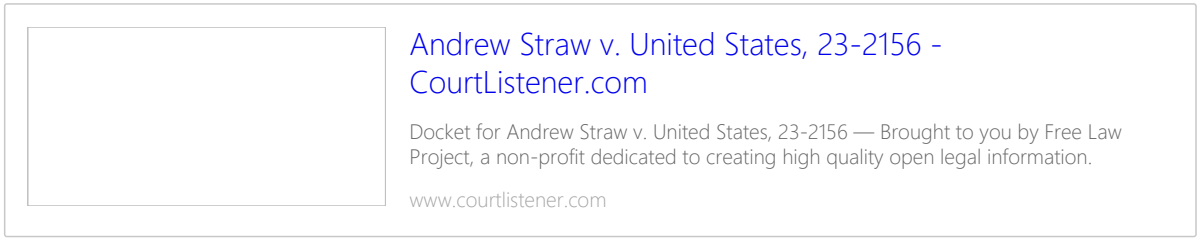
Further, all documents open to the public on PACER should be accessible for free by anyone.

Along with free PACER access should go assigning a unique URL to every document so that references to these documents can be made in filings with the URLs embedded. This makes it easy for both the Court and litigants to refer to other documents without having to dig around and waste time. A **URL link** is the absolute easiest way to refer to another court document.

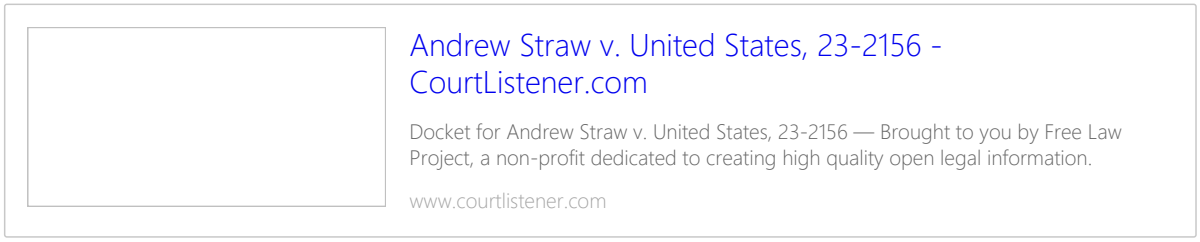
While PACER does not allow this at this time, I use CourtListener.com to refer to documents because that FREE nonprofit service allows a person to view a case docket at the federal level for free and link directly to any document that was filed in the case, so long as someone has viewed the document before on PACER and made it available.

You can see examples of this in my Camp LeJeune lawsuit and appeal:

https://www.courtlistener.com/docket/67939552/andrew-straw-v-united-states/



https://www.courtlistener.com/docket/67939552/andrew-straw-v-united-states/



You can see from my brief in the appeal how I make references to docket entries with a link to the very court-stamped documents available for free in this Court Listener service.

https://storage.courtlistener.com/recap/gov.uscourts.ca4.173243/gov.uscourts.ca4.173243.7.0.pdf

If it is too hard for PACER to provide this document URL service, PACER should provide its full database of documents to **Court Listener**, which will host and provide the documents at no cost either to the government or any litigant.

Court Listener is how PACER should be run.

Thank you for considering these updates to FRCP and FRAP regarding service, as well as PACER improvements and document URL links.

Sincerely,

Andrew U. D. Straw

TAB 7G

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett

Re: FRAP 15

Date: March 6, 2024

Judge Randolph has suggested that FRAP 15 be amended in a way similar to the way in which FRAP 4 was amended in 1993. Prior to that amendment, premature notices of appeal from district courts under FRAP 4 would self-destruct if a party filed certain post-judgment motions in the district court, requiring the filing of a new notice of appeal. Something similar happens on review of agency actions under FRAP 15, under what is known as the "incurably premature" doctrine.

Judge Randolph writes that this doctrine "deserves reconsideration, either by our court en banc or through an amendment to Rule 15 of the Federal Rules of Appellate Procedure." *Nat'l Ass'n of Immigration Judges v. Fed. Labor Relations Auth.*, 77 F.4th 1132, 1139 (D.C. Cir. 2023) (Randolph, J., concurring). He explains that, under that doctrine:

> if a petition for judicial review of agency action is rendered non-final by the filing of a motion for agency reconsideration, the petition will be deemed "incurably premature." That is, the petition will not ripen or become valid to confer appellate jurisdiction even after the agency disposes of the reconsideration motion. If the party aggrieved by agency action fails to file another petition for review after the agency acts on the reconsideration motion, our court must dismiss the party's original petition for judicial review.
>
> In the past, a similar regime controlled appeals from judgments of the district courts. Like petitions seeking judicial review of agency action, appeals from district court judgments – with a few exceptions – had to be from "final decisions." Rule 4(a) of the Federal Rules of Appellate Procedure had provided that if a litigant files a notice of appeal before a post-judgment motion was made or while a post-judgment motion was pending, the court of appeals lacked jurisdiction unless the litigant timely filed a new notice of appeal after the district court acted on the post-judgment motion. . . .
>
> In 1993, appellate Rule 4(a)(4) was amended to eliminate this "particular wrinkle." Since then, if "a party files a notice of appeal" before the district court disposes of a post-judgment motion, "the notice becomes effective to appeal a judgment or order, in whole or in part,

when the order disposing of the last such remaining motion is entered." Fed. R. App. P. 4(a)(4)(B)(I).

> The case for reform of our "incurably premature" doctrine is even stronger than reasons for amending Rule 4(a)(4) in 1993. Both dealt with "final decisions" and both set a "trap for the unwary." But at least the pre-1993 requirement that a new notice of appeal had to be filed was set forth in the Federal Rules of Appellate Procedure, although the rule was "complicated" and "buried in Rule 4 of the appellate rules, which anyway are less familiar than the rules of [civil] procedure." In contrast, the "incurably premature" doctrine is nowhere to be found in the appellate rules, including where one would expect to find such a requirement – that is, in either Rule 15 itself, which is entitled "Petition for Review or Appeal of Agency Action; Docketing Statement," or in our Circuit Rule 15. . . .
>
> A petition for review filed during the pendency of a motion for reconsideration could automatically be stayed, and then automatically become effective after – but only after – the agency rules on the pending reconsideration motion. That is the approach now embodied in Rule 4 of the Federal Rules of Appellate Procedure.

Nat'l Ass'n of Immigration Judges, 77 F.4th at 1139-40 (citations omitted).

I suggest the appointment of a subcommittee to consider this suggestion.

TAB 7H

77 F.4th 1132
United States Court of Appeals, District of Columbia Circuit.

NATIONAL ASSOCIATION OF IMMIGRATION JUDGES, INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS JUDICIAL COUNCIL 2, Petitioner
v.
FEDERAL LABOR RELATIONS AUTHORITY, Respondent

No. 22-1028
|
Argued November 17, 2022
|
Decided August 11, 2023

Per Curiam:

For over four decades, immigration judges employed by the Executive Office for Immigration Review have collectively bargained through a certified union. Four years ago, that office asked the Federal Labor Relations Authority to determine that immigration judges are management officials barred from inclusion in a bargaining unit. The Authority agreed. Following an unsuccessful reconsideration motion, and with a second reconsideration motion still pending before the Authority, the union petitioned this court for review of both the Authority's initial decision and its decision denying reconsideration. The union contends that, in issuing those decisions, the Authority violated the union's substantive and procedural due process rights.

We do not reach the merits of those arguments. Because the union filed its petition for review in our court at a time when its second reconsideration motion remained pending before the Authority, the union's petition was incurably premature. We therefore dismiss the petition for lack of jurisdiction.

* * *

Randolph, Senior Circuit Judge, concurring:

I agree that the law of our circuit requires dismissal of the National Association of Immigration Judges' (NAIJ's) petition for review because it was "incurably premature," and because NAIJ failed to file a new petition for judicial review after the agency denied its request for reconsideration.

I write because the "incurably premature" doctrine, announced in *TeleSTAR, Inc. v. FCC*, 888 F.2d 132 (D.C. Cir. 1989) (per curiam), deserves reconsideration, either by

our court *en banc* or through an amendment to Rule 15 of the Federal Rules of Appellate Procedure.

TeleSTAR announced a new rule for administrative law cases on direct review, a rule it made prospective only. After *TeleSTAR*, if a petition for judicial review of agency action is rendered non-final by the filing of a motion for agency reconsideration,[1] the petition will be deemed "incurably premature." That is, the petition will not ripen or become valid to confer appellate jurisdiction even after the agency disposes of the reconsideration motion. *See id.* at 134. If the party aggrieved by agency action fails to file another petition for review after the agency acts on the reconsideration motion, our court must dismiss the party's original petition for judicial review. *See, e.g.*, *Snohomish Cnty., Washington v. Surface Transp. Bd.*, 954 F.3d 290, 298 (D.C. Cir. 2020); *Flat Wireless, LLC v. FCC*, 944 F.3d 927, 933 (D.C. Cir. 2019); *Clifton Power Corp. v. FERC*, 294 F.3d 108, 111 (D.C. Cir. 2002).

The theory is that the agency's action will turn into a "final" action subject to judicial review only at the moment the agency decides the reconsideration motion and starts the clock running for the filing a new petition for review.[2]

In the past, a similar regime controlled appeals from judgments of the district courts. Like petitions seeking judicial review of agency action, appeals from district court judgments – with a few exceptions – had to be from "final decisions." 28 U.S.C. § 1291. Rule 4(a) of the Federal Rules of Appellate Procedure had provided that if a litigant files a notice of appeal before a post-judgment motion was made or while a post-judgment motion was pending, the court of appeals lacked jurisdiction unless the litigant timely filed a new notice of appeal after the district court acted on the post-judgment motion. *See* Fed. R. App. P. 4(a) (1979); Fed. R. App. P. 4(a) advisory committee's note to 1993 amendment.

In a typically forceful opinion, Judge Richard Posner wrote that "this particular wrinkle in the appellate rules is a trap for the unwary into which many appellants ... have fallen, with dire consequences since there is no way they can reinstate their appeal if the second notice of appeal is untimely. The mistake these litigants make is thoroughly understandable. ... The idea that the first notice of appeal lapses rather than merely being suspended is not intuitive." *Averhart v. Arrendondo*, 773 F.2d 919, 920 (7th Cir. 1985); *see also Harcon Barge Co. v. D & G Boat Rentals, Inc.*, 746 F.2d 278, 281 (5th Cir. 1984) ("The harsh result of this mandated rigid application of this

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[1] *See, e.g.*, *United Transportation Union v. ICC*, 871 F.2d 1114, 1118 (D.C. Cir. 1989).

[2] Another twist is that "the filing of an untimely petition for agency reconsideration does not render incurably premature an otherwise valid petition for judicial review." *Gorman v. Nat'l Transp. Safety Bd.*, 558 F.3d 580, 587 (D.C. Cir. 2009).

seemingly functionless provision of the rule is, in our view, that we must dismiss this appeal.").

In 1993, appellate Rule 4(a)(4) was amended to eliminate this "particular wrinkle." Since then, if "a party files a notice of appeal" before the district court disposes of a post-judgment motion, "the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered." Fed. R. App. P. 4(a)(4)(B)(I).

The case for reform of our "incurably premature" doctrine is even stronger than reasons for amending Rule 4(a)(4) in 1993. Both dealt with "final decisions" and both set a "trap for the unwary." But at least the pre-1993 requirement that a new notice of appeal had to be filed was set forth in the Federal Rules of Appellate Procedure, although the rule was "complicated" and "buried in Rule 4 of the appellate rules, which anyway are less familiar than the rules of [civil] procedure." *Averhart*, 773 F.2d at 920. In contrast, the "incurably premature" doctrine is nowhere to be found in the appellate rules, including where one would expect to find such a requirement – that is, in either Rule 15 itself, which is entitled "Petition for Review or Appeal of Agency Action; Docketing Statement," or in our Circuit Rule 15.

It is no answer to say that the incurably premature doctrine saves the court from the "pointless waste of judicial energy" required "to process any petition for review before the agency has acted on the request for reconsideration." *TeleSTAR*, 888 F.2d at 134. If this is a concern, there is a far simpler solution. A petition for review filed during the pendency of a motion for reconsideration could automatically be stayed, and then automatically become effective after – but only after – the agency rules on the pending reconsideration motion. That is the approach now embodied in Rule 4 of the Federal Rules of Appellate Procedure. As the First Circuit has acknowledged, "holding [a] petition in abeyance serve[s] equally the interests of judicial economy" as does dismissing premature petitions outright. *Craker v. DEA*, 714 F.3d 17, 25–26 (1st Cir. 2013).

TAB 8

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.

December 2023	2, 4	Rules for Future Emergencies
	26, 45	Add Juneteenth as holiday

TAB 9

TAB 9A

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett, Reporter

Re: Improving Appendices

Date: March 6, 2024

The minutes of the April 2018 meeting of the Committee reflect that a subcommittee had previously been formed to investigate the problem of appendices being too long and including much irrelevant information. At that meeting, the Committee decided that, with changing technology, the problem might be solved by electronic appendices and briefs that cite to the electronic record of the district court.

Accordingly, the Committee decided to remove this matter from the agenda but revisit the matter in three years.

In the spring of 2021, the Committee discussed the issue, focusing on the range of practices across the circuits and the likely resistance to any change until there is no need to designate items for inclusion in an appendix because briefs could simply link to the electronic record. The Committee agreed to revisit the issue again in another three years. The relevant minutes follow this memo.

Three more years have now elapsed. I suggest that the question for the Committee is largely the same as it was three years ago, that is, whether to:

1) Re-form a subcommittee to address the issue;

2) Wait still longer to return to the issue; or

3) Remove the issue from the agenda.

TAB 9B

to Civil Rule 60 that would require Rule 60 motions to be made within 28 days to toll the time to appeal and deleting the 28-day provision from Appellate Rule 4(a)(4).

The Reporter recommended that this suggestion be removed from the agenda. Some time limits run from the date of service, but other time limits run from some other event. The extra three-day provision applies only to the former. The time to file motions that toll the time to appeal runs from the date of entry of the judgment, not the date of service. Changing any of the deadlines that run from entry of judgment to deadlines that run from service would be a major shift and require considerable reworking of various rules, and there does not seem to be reason to do so. The provision in Rule 4(a)(4) for Rule 60 motions is not designed to encourage Rule 60 motions to be brought within 28 days of judgment, but to treat Rule 60 motions filed within 28 days of judgment like other post-judgment motions.

The Committee agreed unanimously to remove this suggestion from the agenda.

C. IFP Forms (21-AP-B)

The Reporter introduced Sai's response to the IFP subcommittee's September 2020 report; the response has been docketed as a new suggestion. (Agenda book page 233). The Reporter suggested that it be referred to the IFP subcommittee, and this was done without objection.

VIII. Old Business

The Reporter stated that in April of 2018 the Committee had decided to table consideration of possible changes to appendices but revisit the matter in three years. (Agenda book page 245). The concern was that appendices were too long and included much irrelevant information. The hope was that technology would solve the problem. He suggested that the Committee had three options at this point: 1) Re-form a subcommittee to address the issue; 2) Wait longer to return to the issue, perhaps on the theory that it is better addressed once a new post-pandemic normal is reached; or 3) Remove the issue from the agenda.

An academic member reported that the frustration that practicing lawyers have with appendices has been raised on Twitter. Mr. Byron stated that he had advocated change in this area in the past but been dissuaded by the prior Clerk's representative on the Committee. Ms. Dwyer stated that the circuits have struggled with this for years. Some judges want an electronic brief; others want paper. The practice in the Fifth Circuit may be best. There, the district court produces an enormous PDF that is placed on a site at the court of appeals; parties are required to cite to that location with hyperlinks. It requires lots of cooperation by district courts.

In response to a question by a judge member, Ms. Dwyer said that the PDF is searchable.

A judge member stated that he loves electronic briefs with hyperlinks. It's a lot easier to carry his iPad than 45 pounds of paper. He has bench memos prepared with hyperlinks to the record. Older judges resist, but it's a matter of time.

Mr. Byron raised a slightly different issue: procedures for designating and producing the appendix. Well before electronic filing, practice in the Fifth Circuit involved a literal box of papers with deferred designation of the appendix. In the Sixth Circuit, citation is directly to the district court electronic record. There is a disuniformity problem; there will be resistance to changing from one's own way of doing things until we can abandon designation and simply use the electronic record. A technological fix can let us abandon the old ways. He suggested revisiting the issue in another three years.

Ms. Dwyer added that upgrades to ECF are being discussed. The practical problem is wild over-designation. The designation task should not be given to the lowest paid person in the office.

A judge member stated that in the Eleventh Circuit there is a full electronic record on appeal. One problem is getting the district courts to scan everything; things are missing, such as trial exhibits. And the different approaches by judges is not only age-based. Two new judges want paper versions.

A judge member stated that the transition to electronic records has been seamless in the Sixth Circuit. Judges who want paper were given printers and told to print.

Mr. Byron suggested that this should be considered with CACM, IT, and district judges.

The Committee agreed to revisit the issue again in another three years.

IX. Review of Impact and Effectiveness of Recent Rule Changes

The issue we have been watching is whether courts of appeals are still requiring proof of service despite the 2019 amendment to Rule 25(d) to no longer require proof of service for documents that are electronically filed. Mr. Byron stated that it is still happening. We will get a list from Mr. Byron of which courts continue to do so and figure out a course of action.

X. New Business

No member of the Committee presented any new business.