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

MEMORANDUM

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

FROM: Judge Jay Bybee Chair
Advisory Committee on Appellate Rules

RE: Report of the Advisory Committee on Appellate Rules

DATE: December 8, 2021

I. Introduction

The Advisory Committee on the Appellate Rules met on Thursday, October 7, 2021, via Teams. The draft minutes from the meeting are attached to this report.

The Committee seeks approval for publication of a consolidation of Rule 35 and Rule 40, dealing with rehearing, along with confirming amendments to Rule 32 and the Appendix of Length Limits. (Part II of this report.)

Other matters under consideration (Part III of this report) are:

- amendments to Rule 2 and Rule 4 that have been published for public comment;
- expanding disclosures by amici curiae;
- specifying standards for recusals based on amicus filings;
- regularizing the criteria for granting in forma pauperis status and revising Form 4;
- in conjunction with other Advisory Committees, expanding electronic filing by pro se litigants;
- in conjunction with other Advisory Committees, making the deadline for electronic filing earlier than midnight;
- in conjunction with the Civil Rules Committee, amendments to Civil Rules 42 and 54 to respond to the Supreme Court's decision in *Hall v. Hall*, 138 S. Ct. 1118 (2018), which held that consolidated actions retain their separate identity for purposes of appeal; and
- a new suggestion regarding costs on appeal.

The Committee also considered two items and removed them from its agenda (Part IV of this report):

- a proposed amendment to Rule 4 to permit the relation forward of notices of appeal; and
- a new suggestion that rules be adopted imposing a time frame for the courts of appeals to decide habeas matters.

II. Action Item for Approval for Publication

Consolidation of Rules 35 and 40—Rehearing (18-AP-A)

For several years, the Advisory Committee has been considering a comprehensive revision of Rules 35 and 40. (June 2018 Standing Committee Agenda Book starting at page 84). Rule 35 addresses hearing and rehearing en banc, and Rule 40 addresses panel rehearing.

Under the current Rules, a lawyer must consider both Rule 35 and Rule 40 when petitioning for rehearing. Litigants frequently request both panel rehearing and rehearing en banc, and while a litigant seeking only panel rehearing need only rely on Rule 40, it would be necessary even in that instance to check both Rules. Reconciling the differences between the two current rules while combining petitions for panel rehearing and rehearing en banc in one rule would provide clear guidance.

At the June 2021 meeting of the Standing Committee, the Advisory Committee sought permission to publish a proposed amendment that abrogates Rule 35 and unites the two rules under Rule 40. The Committee sought to achieve the clarity and user-friendliness of unification while avoiding unnecessary changes. Members of the Standing Committee expressed support but raised concerns about some of the provisions. In many instances, the only defense offered was that the provision at issue already appeared in the existing rules and that the Advisory Committee was trying to minimize changes. The Standing Committee decided to remand the matter to the Advisory Committee with instructions to take a freer hand in clarifying and simplifying the language of the existing rules. Having done so, the Advisory Committee now seeks publication of a revised version of the proposal. (See Appendix for the full text.)

The fundamental feature of the proposed amendment remains the same. It revises Rule 40 to govern all petitions for rehearing (and the rare initial hearing en banc), but in keeping with a suggestion at the June Standing Committee meeting, Rule 35 is described as transferred to Rule 40 rather than abrogated. So, too, the fundamental structure remains the same.

- Rule 40(a) provides that a party may petition for panel rehearing, rehearing en banc, or both. It also states the general requirement of filing a single document.

- Rule 40(b) sets forth the required content for each kind of petition for rehearing, drawn from existing Rule 35(b)(1) and existing Rule 40(a)(2).

- Rule 40(c) describes when rehearing en banc may be ordered and the applicable voting protocols, drawn from existing Rule 35(a) and (f). It also reiterates clearly that a court may act sua sponte.

- Rule 40(d) brings together in one place uniform provisions governing matters such as the time to file, form, and length, drawn from existing Rule 35(b), (c), (d), and existing Rule 40(a), (b), and (d). It adds that any amendment to a decision restarts the clock for seeking rehearing.

- Rule 40(e) clarifies for litigants some of the actions a court that grants rehearing might take by clarifying the language of existing Rule 40(a)(4) and extending these provisions to rehearing en banc.

- Rule 40(f) provides that a petition for rehearing en banc does not limit a panel's authority to take action described in Rule 40(e).

- Rule 40(g) deals with initial hearing en banc, drawn from existing Rule 35.

The Standing Committee raised several particular concerns about language in the current rule that was carried over in the proposed amendment presented in June.

One concern was that the provision governing the required content of a petition for rehearing en banc lumps together (1) conflict with a Supreme Court decision and (2) conflict with a decision of the court to which the petition is addressed, while leaving ambiguous whether the required statement that "consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions" applies to both situations. Some thought that the only sensible reading is that the uniformity statement applies only to the intra-circuit conflict situation. *See* current Rule 35(b)(1)(A).

The provision governing the required content of a petition for rehearing en banc also lumps together (1) questions of exceptional importance and (2) inter-circuit conflict, treating the latter as an example of the former. *See* current Rule 35(b)(1)(B).

Another concern was a mismatch between the statements required in a petition for rehearing en banc and the circumstances which justify rehearing en banc. While the former specifically includes conflict with the Supreme Court, the latter does not—unless one treats conflict with the Supreme Court as a situation requiring consideration by the en banc court to secure and maintain uniformity of the court's decisions. *See* current Rule 35(a).

In addition, a member of the Standing Committee suggested that the time to seek initial hearing en banc should be earlier than the due date of the appellee's brief. *See* current Rule 35(c).

The Advisory Committee changed the proposed amendment to address these concerns.

First, four separate grounds for seeking rehearing en banc are now listed separately, so that a petition for rehearing en banc would have to begin with a statement that:

> (A) the panel decision conflicts with a decision of the court to which the petition is addressed (with citation to the conflicting case or cases) and the full court's consideration is therefore necessary to secure or maintain uniformity of the court's decisions;
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> (B) the panel decision conflicts with a decision of the United States Supreme Court (with citation to the conflicting case or cases);
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> (C) the panel decision conflicts with an authoritative decision of another United States court of appeals (with citation to the conflicting case or cases); or
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> (D) the proceeding involves one or more questions of exceptional importance, each concisely stated.

Proposed Rule 40(b)(2). That is, intra-circuit conflicts, conflicts with the Supreme Court, inter-circuit conflicts, and questions of exceptional importance are treated as separate grounds for seeking rehearing en banc.

Second, to align the grounds for granting rehearing en banc with the grounds for seeking rehearing en banc, the provision governing when rehearing en banc may be ordered simply cross-references the provision governing the grounds on which it may be sought: "Ordinarily, rehearing en banc will not be ordered unless one of the criteria in Rule 40(b)(2)(A)–(D) is met."

Freed from a perceived imperative to minimize changes, the current proposal has also been more extensively polished by the style consultants.

In addition, the proposal includes conforming amendments to Rule 32(g) and the Appendix of Length Limits.

III. Other Matters Under Consideration

A. Proposed Amendments to Rules 2 and 4—CARES Act

Proposed amendments to Rule 2 and Rule 4, developed in close coordination with other Advisory Committee and input from the Standing Committee, were published for public comment. The Advisory Committee considered all comments that were received prior to its meeting and did not think that any of those comments warranted further discussion by the Advisory Committee. It will review any additional comments at its spring meeting.

B. Amicus Disclosures—FRAP 29 (21-AP-C)

In May of 2019, a bill was introduced in Congress that would institute a registration and disclosure system for amici curiae like the one that applies to lobbyists. Senator Sheldon Whitehouse introduced S. 1411, the Assessing Monetary Influence in the Courts of the United States Act (the AMICUS Act). An identical bill, H.R. 3993, sponsored by Representative Henry Johnson, Jr., was introduced in the House. Under the bill, the registration and disclosure requirements would apply to those who filed three or more amicus briefs per year but would not be tied to a specific amicus brief. Fines would be imposed on those who knowingly fail to comply.

In October 2019, the Advisory Committee appointed a subcommittee to address amicus disclosures. In February of 2021, after correspondence with the Clerk of the Supreme Court, Senator Whitehouse and Congressman Johnson wrote to Judge Bates requesting the establishment of a working group to address the disclosure requirements for organizations that file amicus briefs. Judge Bates was able to respond that the Advisory Committee on the Federal Rules of Appellate Procedure had already established a subcommittee to do so.

Appellate Rule 29(a)(4)(E) currently requires that most amicus briefs include a statement that indicates whether:

> (i) a party's counsel authored the brief in whole or in part;
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> (ii) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and
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> (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.

At the June meeting of the Standing Committee, the Advisory Committee reported that it had begun careful exploration of whether additional disclosures should be required. It noted then and still believes that changes to the disclosure requirements of Rule 29 are within the purview of the rulemaking process under the Rules Enabling Act, but public registration and fines are not, and that any change to Rule 29 should not be limited to those who file multiple amicus briefs. It also continues to resist treating amicus briefs as akin to lobbying. Lobbying is done in private, while an amicus filing is made in public and can be responded to.

The question of amicus disclosures involves important and complicated issues. One concern is that amicus briefs filed without sufficient disclosures can enable parties to evade the page limits on briefs or produce a brief that appears independent

of the parties but is not. Another concern is that, without sufficient disclosures, one person or a small number of people with deep pockets can fund multiple amicus briefs and give the misleading impression of a broad consensus. There are also broader concerns about the influence of "dark money" on the amicus process. Any disclosure requirement must also consider First Amendment rights of those who do not wish to disclose themselves. *See, e.g., Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2372 (2021); *McIntyre v. Ohio Elections Comm'n*, 514 U.S 334 (1995); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

The Advisory Committee is considering disclosure regarding the relationship of an amicus to a *party* separately from disclosure regarding the relationship of an amicus to a *nonparty*.

Regarding parties, one thing is easy. It is possible to construe the phrase "preparing or submitting" in Rule 29(a)(4)(E) so narrowly as to encompass only the costs of formatting, printing, and delivering the specific brief. To clarify what is generally if not universally understood, Rule 29(a)(4)(E)(ii) [and (iii)] could be amended to apply to money intended to "fund drafting, preparing, or submitting the brief." In addition, Rule 29(a)(4)(E)(iii) could be amended to make clear that this disclosure requirement regarding the relationship between an amicus and a party applies even where a party is a member of an amicus. That could be done by adding a proviso in Rule 29(a)(4)(E)(iii) to the exception to disclosure for members of an amicus: "except for the amicus, its counsel, and its members who are not parties or counsel to parties."

The current disclosure requirement is limited to contributions earmarked for a particular brief. Recognizing the fungibility of money, Rule 29 might also be amended to cover contributions by parties to an amicus that are not earmarked for a particular amicus brief. The Advisory Committee considered two ways of doing so, one formulated as a rule, the other formulated as a standard.

One way would be to require disclosure of whether a party (or its counsel) has an ownership interest in the amicus curiae exceeding a certain percentage or made contributions exceeding a certain percentage of the annual revenue of the amicus curiae. An amendment along these lines might add a provision requiring disclosure if a party (or its counsel):

> has a 10% or greater ownership interest in the amicus curiae, or contributed 10% or more of the gross annual revenue of the amicus curiae during the twelve-month period preceding the filing of the amicus brief, not including amounts unrelated to the amicus curiae's amicus activities that were received in the form of investments or in commercial transactions in the ordinary course of the business of the amicus curiae;

The 10% figure is borrowed from Rule 26.1 dealing with corporate disclosures. The Advisory Committee acknowledges that the purpose of Rule 26.1 is quite different. The Advisory Committee is by no means committed to the idea that this is the right percentage; it simply offers a convenient place to start.

A second way would be to articulate a standard that requires disclosure if a party (or its counsel) possesses a sufficient ownership interest in, or has made sufficient contributions to, the amicus curiae that a reasonable person would conclude that a party (or its counsel) had a significant influence over the amicus curiae with respect to the brief.

While the Advisory Committee has not yet decided whether to recommend additional disclosures regarding the relationship between an amicus and a party, it does think that a rule-based approach is preferable to a standard-based approach.

Disclosures regarding the relationship between an amicus and a nonparty present more difficult issues. While the relationship between an amicus and a party might lead a judge to discount an amicus brief, that concern is much more attenuated when the relationship between an amicus and a nonparty is involved. But it is not non-existent. If Mark Zuckerberg is giving 15% of the revenue of an amicus in a case involving section 230 of the Communications Decency Act, that might be worth knowing.

It is important to note that existing Rule 29 already requires some disclosure of the relationship between an amicus and a nonparty. Rule 29(a)(4)(E)(iii) requires the disclosure of any person who contributed money that was intended to fund preparing or submitting the brief—except for the amicus curiae itself, its members, or its counsel.

The reason for this existing required disclosure is not entirely clear. The Advisory Committee at the time explained that it "may help judges to assess whether the amicus itself considers the issue important enough to sustain the cost and effort of filing an amicus brief." One way to understand this required disclosure—particularly considering its exception for members of the amicus—is that it is targeted at revealing when an amicus is simply the puppet or paid mouthpiece of someone else rather than truly speaking for itself and its members.

But again, money is fungible, so a nonparty may have considerable influence on an amicus without earmarking money for a particular brief. For that reason, it might be appropriate to have a similar disclosure requirement, and amend Rule 29(a)(4)(E)(iii) to require the disclosure of any person who:

> has a 10% or greater ownership interest in the amicus curiae, or contributed 10% or more of the gross annual revenue of the amicus curiae during the twelve-month period preceding the filing of the amicus brief, not including amounts unrelated to the amicus curiae's amicus activities that are received in the form of investments or in commercial transactions in the ordinary course of the business of the amicus curiae.

If the disclosure requirements were increased in this way, it would also be necessary to consider whether to retain the exception for members of the amicus. On the one hand, there are important privacy interests in protecting membership lists and an amicus can be viewed as properly speaking for its members. On the other hand, only members who contribute a sufficiently high percentage of the revenue of the amicus would be disclosed—not the entire membership list—and an exception for members could make for easy evasion of any contribution disclosure requirement: the contribution need only be characterized as a membership fee.

The Advisory Committee has not decided whether to recommend any amendment of the amicus disclosure requirements, regarding either the relationship of the amicus to a party or the relationship of the amicus to a nonparty.

Nor has it reached any conclusion regarding the constitutionality of the amendments under consideration. The following summary of the Supreme Court's decision in *Americans for Prosperity Foundation*, 141 S. Ct. 2372, may be useful:

> *Americans for Prosperity* held California's charitable disclosure requirement to be facially unconstitutional. California had required charities that solicit contributions in California to disclose the identities of their major donors (donors who have contributed more than $5,000 or more than 2% of an organization's total contributions in a year) to the Attorney General.
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> To evaluate the constitutionality of the California disclosure requirement, the Court applied "exacting scrutiny," meaning that "there must be a substantial relation between the disclosure requirement and a sufficiently important governmental interest." 141 S. Ct. at 2383 (opinion of Roberts, C.J.) (cleaned up).[1] "While exacting scrutiny does not require that disclosure regimes be the least restrictive means of

[1] Of the six justices in the majority, three—Roberts, Kavanaugh, and Barrett—would have held that exacting scrutiny, rather than strict scrutiny, applies to all First Amendment challenges to compelled disclosure. Justice Thomas would have held that strict scrutiny applied, and Justices Alito and Gorsuch declined to decide because, in their view, California's law failed under either test. The dissenters addressed the California law under the exacting scrutiny standard and would have held it met that standard.

> achieving their ends, it does require that they be narrowly tailored to the government's asserted interest." *Id.* at 2383 (opinion of the Court). Moreover, the Court concluded that the narrow tailoring requirement is not limited to "laws that impose severe burdens," but is designed to minimize any unnecessary burden. *Id.* at 2385.
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> The Court then found that California's disclosure regime did not satisfy the narrow tailoring requirement. *Id.* It accepted that "California has an important interest in preventing wrongdoing by charitable organizations." *Id.* at 2385-86. But it found "a dramatic mismatch" between that interest and the state's disclosure requirements. *Id.* at 2386. While California required every charity to disclose the names, addresses, and total contributions of their top donors, ranging from a few people to hundreds, it rarely if ever used this information to investigate or combat fraud. *Id.* Moreover, the state "had not even considered alternatives to the current disclosure requirement" that might be less burdensome. *Id.* The Court rejected arguments that the disclosure was not in fact particularly burdensome, finding that the disclosure requirement created "an unnecessary risk of chilling," "indiscriminately sweeping up the information of *every* major donor with reason to remain anonymous." *Id.* at 2388.

There are at least four significant differences between the possible amendments to Rule 29 discussed above and the California statute involved in *Americans for Prosperity*.

First, Rule 29 applies only to those seeking to influence a court by submitting an amicus brief, while the California statute applied broadly to charities soliciting funds in California. There can be little doubt that more disclosure requirements can be imposed on those who file briefs with a court than on charitable organizations generally.

Second, both Rule 29 and the Supreme Court Rules already require both parties and non-parties who make contributions "intended to fund the preparation or submission" of an amicus brief to have their identities publicly disclosed in the brief. Presumably the Court viewed those requirements as constitutional when it imposed them.

Third, disclosures required by Rule 29 appear in a publicly available brief, while the disclosures mandated by California law were supposed to be treated confidentially. The Court observed that "disclosure requirements can chill association even if there is no disclosure to the general public," and "while assurances of

confidentiality may reduce the burden of disclosure to the State, they do not eliminate it." 141 S. Ct. at 2388 (cleaned up).

Fourth, a 10% ownership or contribution threshold is higher than the 2% threshold involved (at least in some cases) in the California statute and will often be higher than the $5000 threshold in the California statute.

Any proposed amendments to Rule 29 would have to be based on careful identification of the governmental interest being served and be narrowly tailored to serve that interest. The analysis of required disclosure concerning the relationship between an amicus and a party may well be different than the analysis of required disclosure concerning the relationship between an amicus and a nonparty.

C. Amicus Briefs and Recusal—Rule 29 (20-AP-G)

In 2018, Rule 29 was amended to empower a court of appeals to prohibit the filing of an amicus brief or strike an amicus brief if that brief would result in a judge's disqualification. The Rule, however, does not provide any standards for when an amicus brief triggers disqualification. Dean Alan Morrison has suggested that the Advisory Committee, or perhaps the Administrative Office or the Federal Judicial Center, study the issue and recommend guidelines for adoption.

The matter was referred to the subcommittee dealing with the AMICUS Act and Rule 29, but the subcommittee's focus thus far has been on the issue of disclosure.

D. IFP Status Standards—Form 4 (19-AP-C; 20-AP-D; 21-AP-B)

The Advisory Committee is continuing to consider suggestions to regularize the criteria for granting IFP status and to revise Form 4 of the Federal Rules of Appellate Procedure. It is gathering information about how the courts of appeals handle IFP applications, including what standards are used and what information from Form 4 is actually useful. Results from a survey were received immediately before the October meeting and will be reviewed by the relevant subcommittee.

E. Electronic Filing by Pro Se Litigants (20- AP-C; 21-AP-E)

The issue of electronic filing by pro se litigants has come up repeatedly. The last time the Advisory Committee considered the issue, it decided to await consideration by the Civil Rules Committee. Because Bankruptcy, Civil, and now Appellate are confronting this question, Judge Bates has convened the reporters to discuss the way to proceed. The reporters will coordinate and welcome feedback.

F. Deadline For Electronic Filing (with other Advisory Committees) (19-AP-E)

The joint subcommittee considering whether the deadline for electronic filing should be moved to some time prior to midnight continues to gather information. The Federal Judicial Center is analyzing data on the time of day when filings are made, but a planned survey remains on hold due to the pandemic.

G. Finality in Consolidated Cases after *Hall* (with Civil Rules Committee)

The joint subcommittee dealing with finality in consolidated cases continues its work. Any amendment would likely be made to the Civil Rules, particularly Rule 42 and Rule 54(b), not the Appellate Rules.

The Supreme Court in *Hall v. Hall*, 138 S. Ct. 1118 (2018), decided that consolidated actions retain their separate identity for purposes of appeal. If one such action reaches final judgment it is appealable, even though other consolidated cases remain pending. This decision creates the risk that some will lose their appellate rights because they did not realize that their time to appeal had begun to run, and it creates the risk of inefficiency in the courts of appeals because multiple appeals are taken at different times from a proceeding that a district judge thought similar enough to warrant consolidation.

Research by the Federal Judicial Center did not reveal significant problems. However, problems may remain hidden, either because no one notices the issue or because by the time the issue is discovered it is too late to do anything about it. The joint subcommittee will continue to monitor the situation and consider whether to propose any amendments.

H. Costs on Appeal—Rule 39 (21-AP-D)

This past term, the Supreme Court held that Federal Rule of Appellate Procedure 39 does not permit a district court to alter a court of appeals' allocation of costs. *City of San Antonio v. Hotels.com*, 141 S. Ct. 1628 (2021). Those costs are usually modest, but Rule 39(e)(3) includes as taxable costs the premium paid for a bond to preserve rights pending appeal (traditionally known as a supersedeas bond), and the cost of securing such a bond can be high.

The Supreme Court stated that the current rules could specify more clearly the procedure that a party should follow to bring their arguments about costs to the court of appeals. Accordingly, the Advisory Committee created a subcommittee to explore the issue. The subcommittee might also consider whether a district court, in deciding

whether to approve a bond, is concerned with the premium paid for the bond, and whether the premium for the bond should be a taxable cost at all.

IV. Items Removed from the Advisory Committee Agenda

A. Relation Forward of Notices of Appeal (20-AP-A)

The Advisory Committee continued to consider a suggestion to deal with premature notices of appeal. In many situations, existing Rule 4(a)(2)—which provides that a notice of appeal filed after the announcement of a decision but before its entry is treated as if it were filed immediately after its entry—works appropriately to save premature notices of appeal. But there are other premature notices of appeal that are not saved. The Advisory Committee considered this problem about a decade ago but did not find an appropriate solution, apparently because of a concern with inviting more premature notices of appeal.

At the June 2021 meeting of the Standing Committee, the Advisory Committee reported that it had not been able to come up with a good solution. It did not (and does not) want to allow any premature notice of appeal to become effective once a judgment or appealable order is filed because it fears that this would cause more problems than it solves by inviting premature notices of appeal. Nevertheless, the Advisory Committee was not ready to take the matter off the agenda.

The Advisory Committee looked more closely at conflicting decisions in the courts of appeals regarding relation forward of notices of appeal taken from orders that could have been, but were not, certified under Civil Rule 54(b).

It explored the possibility of resolving the conflict by an amendment. But there is not only a split regarding whether relation forward is allowed, but also a split among the courts that permit relation forward regarding whether that result is based on an interpretation of Rule 4(a)(2) or is instead based on earlier case law. An amendment resolving the split would also face the difficulty of dealing with that underlying question. Plus, the problem is in considerable measure one of the parties' own making: one party files a premature notice of appeal and the other party does nothing about it but continues to litigate the case in the district court.

The Advisory Committee also considered the possibility of (1) limiting Rule 4(a)(2) to its classic, core situation where an appealable decision is announced but, before it is entered on the docket, a notice of appeal is filed, while (2) permitting a court the discretion in other situations to allow relation forward, looking to factors such as whether allowing relation back would prejudice the appellee, how obviously premature the notice of appeal was, and whether the appellee did anything to put the

appellant on notice of the problem. But this approach would override a lot of case law and subject parties to the court's discretion.

The Advisory Committee also looked more closely at the current rule's different treatment of post-trial motions in civil and criminal cases. While there may or may not be a persuasive reason for the different treatment, there does not appear to be a problem calling for a solution.

The Advisory Committee therefore reached the same conclusion it had reached in the past and removed the item from its agenda.

B. Time Frame to Rule on Habeas Corpus (21-AP-F)

The Advisory Committee considered a suggestion that rules be adopted imposing a time frame for the courts of appeals to decide habeas matters. The Committee agreed to remove the item from the agenda.