# ADVISORY COMMITTEE
# ON
# APPELLATE RULES

**March 30, 2022**

ADVISORY COMMITTEE ON APPELLATE RULES
Meeting of March 30, 2022
San Diego, CA

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# TAB 1A

# RULES COMMITTEES — CHAIRS AND REPORTERS

## Committee on Rules of Practice and Procedure
## (Standing Committee)

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

## Advisory Committee on Appellate Rules

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

## Advisory Committee on Bankruptcy Rules

| Chair | Reporter |
|---|---|
| Honorable Dennis R. Dow<br>United States Bankruptcy Court<br>Kansas City, MO | Professor S. Elizabeth Gibson<br>University of North Carolina at Chapel Hill<br>Chapel Hill, NC |
| | **Associate Reporter** |
| | Professor Laura B. Bartell<br>Wayne State University Law School<br>Detroit, MI |

## Advisory Committee on Civil Rules

| Chair | Reporter |
|---|---|
| Honorable Robert M. Dow, Jr.<br>United States District Court<br>Chicago, IL | Professor Edward H. Cooper<br>University of Michigan Law School<br>Ann Arbor, MI |
| | **Associate Reporter** |
| | Professor Richard L. Marcus<br>University of California<br>Hastings College of Law<br>San Francisco, CA |

## Advisory Committee on Criminal Rules

| Chair | Reporter |
|---|---|
| Honorable Raymond M. Kethledge<br>United States Court of Appeals<br>Ann Arbor, MI | Professor Sara Sun Beale<br>Duke University School of Law<br>Durham, NC |
| | **Associate Reporter** |
| | Professor Nancy J. King<br>Vanderbilt University Law School<br>Nashville, TN |

## Advisory Committee on Evidence Rules

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

## ADVISORY COMMITTEE ON APPELLATE RULES

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

### Members

| | |
|---|---|
| Honorable Leondra R. Kruger<br>Supreme Court of California<br>San Francisco, CA | Honorable Carl J. Nichols<br>United States District Court<br>Washington, DC |
| Honorable Elizabeth Prelogar<br>Solicitor General (ex officio)<br>United States Department of Justice<br>Washington, DC | Professor Stephen E. Sachs<br>Harvard Law School<br>Cambridge, MA |
| Danielle Spinelli, Esq.<br>Wilmer Cutler Pickering Hale and Dorr LLP<br>Washington DC | Honorable Paul J. Watford<br>United States Court of Appeals<br>Pasadena, CA |
| Honorable Richard C. Wesley<br>United States Court of Appeals<br>Geneseo, NY | Lisa B. Wright, Esq.<br>Office of the Federal Public Defender<br>Washington, DC |

### Liaisons

| | |
|---|---|
| Honorable Bernice B. Donald<br>(*Bankruptcy*)<br>United States Court of Appeals<br>Memphis, TN | Honorable Frank M. Hull<br>(*Standing*)<br>United States Court of Appeals<br>Atlanta, GA |

### 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<br>Chair | C | Ninth Circuit | 2017<br>Member:<br>2020<br>Chair: | ----<br>2023 |
| Leondra R. Kruger | JUST | California | 2021 | 2024 |
| Carl J. Nichols | D | District of Columbia | 2021 | 2024 |
| Elizabeth Prelogar* | DOJ | Washington, DC | ---- | Open |
| Stephen E. Sachs | ACAD | Massachusetts | 2016 | 2022 |
| Danielle Spinelli | ESQ | Washington, DC | 2017 | 2023 |
| Paul J. Watford | C | Ninth Circuit | 2018 | 2024 |
| Richard C. Wesley | C | Second Circuit | 2020 | 2023 |
| Lisa B. Wright | ESQ | Assistant Federal Public Defender (Appellate) (DC) | 2019 | 2022 |
| Edward Hartnett<br>Reporter | ACAD | New Jersey | 2018 | 2023 |

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## RULES COMMITTEE LIAISON MEMBERS

| | |
|---|---|
| Liaisons for the Advisory Committee on Appellate Rules | Hon. Frank M. Hull<br>*(Standing)*<br><br>Hon. Bernice B. Donald<br>*(Bankruptcy)* |
| Liaison for the Advisory Committee on Bankruptcy Rules | Hon. William J. Kayatta, Jr.<br>*(Standing)* |
| Liaisons for the Advisory Committee on Civil Rules | Peter D. Keisler, Esq.<br>*(Standing)*<br><br>Hon. Catherine P. McEwen<br>*(Bankruptcy)* |
| Liaison for the Advisory Committee on Criminal Rules | Hon. Jesse M. Furman<br>*(Standing)* |
| Liaisons for the Advisory Committee on Evidence Rules | Hon. Robert J. Conrad, Jr.<br>(*Criminal*)<br><br>Hon. Carolyn B. Kuhl<br>*(Standing)*<br><br>Hon. Sara Lioi<br>*(Civil)* |

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***(Standing)***

# TAB 1B

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

| | FRAP Item | Proposal | Source | Current Status |
|---|---|---|---|---|
| 4 | None assigned | Rules for Future Emergencies<br>Rules 2 and 4 | Congress<br>(CARES Act) | Initial consideration and subcommittee formed 4/20<br>Discussed at 10/20 meeting<br>Draft approved for submission to Standing Committee 4/21<br>Draft approved for publication by Standing Committee 6/21<br>Discussed at 10/21 meeting |
| | | | | |
| 2 | 18-AP-A | Rules 35 and 40 –<br>Comprehensive review | Department of<br>Justice | Discussed at 4/18 meeting and subcommittee formed<br>Discussed at 10/18 meeting<br>Discussed at 4/19 meeting<br>Discussed at 10/19 meeting<br>Discussed at 4/20 meeting<br>Discussed at 10/20 meeting<br>Draft approved for submission to Standing Committee 4/21<br>Remanded by Standing Committee 6/21<br>Draft approved for resubmission to Standing Committee 10/21<br>Draft approved for publication by Standing Committee 1/22 |
| | | | | |
| 1 | 19-AP-E | Electronic Filing Deadlines | Hon. Michael<br>Chagares | Discussed at 6/19 meeting of Standing Committee and joint committee formed<br>Discussed at 10/19 meeting<br>Discussed at 4/20 meeting<br>Discussed at 10/20 meeting<br>Discussed at 4/21 meeting<br>Discussed at 10/21 meeting |
| 1 | 19-AP-C | IFP Standards | Sai | Initial consideration 10/19<br>Discussed at 4/20 meeting and subcommittee formed<br>Discussed at 10/20 meeting<br>Discussed at 4/21 meeting<br>Discussed at 10/21 meeting |
| 1 | 20-AP-D | IFP Forms | Sai | Initial consideration 10/20 and referred to IFP subcommittee<br>Discussed at 4/21 meeting<br>Discussed at 10/21 meeting |
| 1 | 20-AP-G | Amicus Briefs and Recusal | Alan Morrison | Initial consideration and referred to Amicus subcommittee 4/21<br>Discussed at 10/21 meeting |
| 1 | 21-AP-B | IFP Forms | Sai | Initial consideration and referred to IFP subcommittee 4/21<br>Discussed at 10/21 meeting |

| | FRAP Item | Proposal | Source | Current Status |
|---|---|---|---|---|
| 1 | 21-AP-C | Amicus Disclosures | Senator Whitehouse & Representative Johnson | Issue noted and subcommittee formed 10/19<br>Initial consideration of suggestion 4/21<br>Discussed at 10/21 meeting |
| 1 | 21-AP-D | Costs on Appeal | Alan Morrison | Initial consideration of suggestion and subcommittee formed 10/21 |
| 1 | 21-AP-E | Electronic Filing by Pro Se Litigants | Sai | Initial consideration of suggestion and referred to reporters 10/21 |
| 1 | 20-AP-C | Pro Se Electronic Filing | Usha Jain | Initial consideration 10/20 and tabled pending consideration by Civil Rules Committee<br>Referred to reporters 10/21 |
| 1 | None assigned | Add Juneteenth to Rule 26 | Congress | Initial consideration 4/22 |
| 1 | 21-AP-G | Comment on 21-AP-C | Chamber of Commerce | Initial consideration 4/22 |
| 1 | 21-AP-H | Comment on 21-AP-C | Senator Whitehouse & Representative Johnson | Initial consideration 4/22 |
| 1 | 22-AP-A | Comment on 21-AP-C | Senator Whitehouse & Representative Johnson | Initial consideration 4/22 |
| | | | | |
| 0 | None assigned | Review of rules regarding appendices | Committee | Discussed at 11/17 meeting and a subcommittee formed to review<br>Discussed at 4/18 meeting and removed from agenda<br>Will reconsider in 4/21<br>Discussed at 4/21 meeting and postponed until 4/24 |
| 0 | 19-AP-B | Decisions on Unbriefed Grounds | AAAL | Initial consideration 10/19 and subcommittee formed<br>Discussed at 4/20 meeting and to be considered in 4/23 |
| 0 | 20-AP-A | Relation Forward of Notices of Appeal | Bryan Lammon | Initial consideration and subcommittee formed 4/20<br>Discussed at 10/20 meeting<br>Discussed at 4/21 meeting<br>Discussed at 10/21 meeting and removed from agenda |
| 0 | 20-AP-E | Rule 3 | Sai | Initial consideration 10/20 and referred to Relation Forward subcommittee<br>Discussed at 4/21 meeting<br>Discussed at 10/21 meeting and removed from agenda |

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

# TAB 1C

**Effective December 1, 2021**

REA History:

- No contrary action by Congress
- Adopted by Supreme Court and transmitted to Congress (Apr 2021)
- Approved by Judicial Conference (Sept 2020) and transmitted to Supreme Court (Oct 2020)

| Rule | Summary of Proposal | Related or Coordinated Amendments |
|---|---|---|
| AP 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. | AP 6, Forms 1 and 2 |
| AP 6 | Amendment conforms the rule to amended Rule 3. | AP 3, Forms 1 and 2 |
| AP 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. | AP 3, 6 |
| BK 2005 | Subdivision (c) amended to replace the reference to 18 U.S.C. § 3146(a) and (b) (which was repealed in 1984) with a reference to 18 U.S.C. § 3142. | |
| BK 3007 | Amendment clarifies that credit unions may be served with an objection claim under the general process set forth in Rule 3007(a)(2)(A) by first-class mail sent to the person designated on the proof of claim. | |
| BK 7007.1 | Amendment conforms the rule to recent amendments to Rule 8012 and Appellate Rule 26.1. | AP 26.1, BK 8012 |
| BK 9036 | Amendment requires high-volume paper notice recipients (initially designated as recipients of more than 100 court papers notices in calendar month) to sign up for electronic service and noticing, unless the recipient designates a physical mailing address if so authorized by statute. | |

**Effective (no earlier than) December 1, 2022**

Current Step in REA Process:

- Transmitted to Supreme Court (Oct 2021)

REA History:

- Approved by Judicial Conference (Sept 2021 unless otherwise noted)
- Approved by Standing Committee (June 2021 unless otherwise noted)
- Published for public comment (Aug 2020 – Feb 2021 unless otherwise noted)

| Rule | Summary of Proposal | Related or Coordinated Amendments |
|---|---|---|
| AP 25 | The proposed amendment to Rule 25 extends the privacy protections afforded in Social Security benefit cases to Railroad Retirement Act benefit cases. | |
| AP 42 | The proposed amendment to Rule 42 clarifies the distinction between situations where dismissal is mandated by stipulation of the parties and other situations. (These proposed amendments were published Aug 2019 – Feb 2020). | |
| BK 3002 | The proposed amendment would allow an extension of time to file proofs of claim for both domestic and foreign creditors if "the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim." | |
| BK 5005 | The proposed changes would allow papers to be transmitted to the U.S. trustee by electronic means rather than by mail, and would eliminate the requirement that the filed statement evidencing transmittal be verified. | |
| BK 7004 | The proposed amendments add a new Rule 7004(*i*) clarifying that service can be made under Rule 7004(b)(3) or Rule 7004(h) by position or title rather than specific name and, if the recipient is named, that the name need not be correct if service is made to the proper address and position or title. | |
| BK 8023 | The proposed amendments conform the rule to pending amendments to Appellate Rule 42(b) that would make dismissal of an appeal mandatory upon agreement by the parties. | AP 42(b) |
| BK Restyled Rules (Parts I & II) | The proposed rules, approximately 1/3 of current bankruptcy rules, are restyled to provide greater clarity, consistency, and conciseness without changing practice and procedure. The remaining bankruptcy rules will be similarly restyled and published for comment in 2021 and 2022, with the full set of restyled rules expected to go into effect no earlier than December 1, 2024. | |
| SBRA Rules (BK 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2 (new), 3018, 3019) | The SBRA Rules would make necessary rule changes in response to the Small Business Reorganization Act of 2019. The SBRA Rules are based on Interim Bankruptcy Rules adopted by the courts as local rules in February 2020 in order to implement the SBRA which when into effect February 19, 2020. | |

**Effective (no earlier than) December 1, 2022**

Current Step in REA Process:

- Transmitted to Supreme Court (Oct 2021)

REA History:

- Approved by Judicial Conference (Sept 2021 unless otherwise noted)
- Approved by Standing Committee (June 2021 unless otherwise noted)
- Published for public comment (Aug 2020 – Feb 2021 unless otherwise noted)

| Rule | Summary of Proposal | Related or Coordinated Amendments |
|---|---|---|
| SBRA Forms (Official Forms 101, 122B, 201, 309E-1, 309E-2, 309F-1, 309F-2, 314, 315, 425A) | The SBRA Forms make necessary changes in response to the Small Business Reorganization Act of 2019. All but the proposed change to Form 122B were approved on an expedited basis with limited public review in 2019 and became effective February 19, 2020, the effective date of the SBRA. They were published along with the SBRA Rules in order to give the public a full opportunity to comment. The proposed change to Form 122B was approved at all stages after the public comment period closed in February 2021, and when into effect December 1, 2021. There were no comments on the remaining SBRA forms and they remain in effect as approved in 2019. | |
| CV 7.1 | An amendment to subdivision (a) was published for public comment in Aug 2019 – Feb 2020. As a result of comments received during the public comment period, a technical conforming amendment was made to subdivision (b). The conforming amendment to subdivision (b) was not published for public comment. The proposed amendments to (a) and (b) were approved by the Standing Committee in Jan 2021, and approved by the Judicial Conference in Mar 2021.<br><br>The proposed amendment to Rule 7.1(a)(1) would require the filing of a disclosure statement by a nongovernmental corporation that seeks to intervene. This change would conform the rule to the recent amendments to FRAP 26.1 (effective Dec 2019) and Bankruptcy Rule 8012 (effective Dec 2020). The proposed amendment to Rule 7.1(a)(2) would create a new disclosure aimed at facilitating the early determination of whether diversity jurisdiction exists under 28 U.S.C. § 1332(a), or whether complete diversity is defeated by the citizenship of a nonparty individual or entity because that citizenship is attributed to a party. | AP 26.1 and BK 8012 |
| CV Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g) | Proposed set of uniform procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g). | |
| CR 16 | Proposed amendment addresses the lack of timing and specificity in the current rule with regard to expert witness disclosures, while maintaining reciprocal structure of the current rule. | |

**Effective (no earlier than) December 1, 2023**

Current Step in REA Process:

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

| 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 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). | CV 87 (Emergency CV 6(b)(2)) |
| BK 3002.1 and five new related Official Forms | The proposed rule amendment and the five related forms (410C13-1N, 410C13-1R, 410C13-10C, 410C13-10NC, and 410C13-10R) are designed to increase disclosure concerning the ongoing payment status of a debtor's mortgage and of claims secured by a debtor's home in chapter 13 case. | |
| 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 Restyled Rules (Parts III-VI) | The second set, approximately 1/3 of current Bankruptcy Rules, 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 anticipated third set (Parts VII-IX) are expected to be published in 2022, with the full set of restyled rules expected to go into effect no earlier than December 1, 2024. | |
| Official Form 101 | Updates are made to lines 2 and 4 of the form to clarify how the debtor should report the names of related separate legal entities that are not filing the petition. If approved by the Advisory Committee, the Standing Committee, and the Judicial Conference, the proposed change to Form 101 will go into effect December 1, 2022. | |
| Official Forms 309E1 and 309E2 | Form 309E1, line 7 and Form 309E2, line 8, are amended to clarify which deadline applies for filing complaints to deny the debtor a discharge and which applies for filing complaints seeking to except a particular debt from discharge. If approved by the Advisory Committee, the Standing Committee, and the Judicial Conference, the proposed change to Forms 309E1 and 309E2 will go into effect December 1, 2022. | |
| 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 | |

**Effective (no earlier than) December 1, 2023**

Current Step in REA Process:

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

| Rule | Summary of Proposal | Related or Coordinated Amendments |
|---|---|---|
| | 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 62 (New) | Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency. | AP 2, BK 9038, and CV 87 |
| EV 106 | The proposed amendment would allow a completing statement to be admissible over a hearsay objection and cover unrecorded oral statements. | |
| EV 615 | The proposed amendment limits an exclusion order to the exclusion of witnesses from the courtroom. A new subdivision would provide that the court has discretion to issue further orders to "(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and (2) prohibit excluded witnesses from accessing trial testimony." Finally, the proposed amendment clarifies that the existing provision that allows an entity-party to designate "an officer or employee" to be exempt from exclusion is limited to one officer or employee. | |
| EV 702 | The proposed amendment would amend Rule 702(d) to require the court to find that "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." In addition, the proposed amendment would explicitly add the preponderance of the evidence standard to Rule 702(b)–(d). | |

**Effective (no earlier than) December 1, 2024**

Current Step in REA Process:

- To be published for public comment (Aug 2022 – Feb 2023)

REA History:

- Approved by Standing Committee (January 2022 unless otherwise noted)

| Rule | Summary of Proposal | Related or Coordinated Amendments |
|---|---|---|
| AP 32 | Conforming proposed amendment to (g) to reflect the consolidation of Rules 35 and 40. | Rules 35 and 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. | Rule 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. | Rule 35 |
| Appendix: Length Limits Stated in the Federal Rules of Appellate Procedure | Conforming proposed amendments would reflect the 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. | Rules 35 and 40. |
| 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)." | |
| CV 12 | The proposed amendment would clarify that a federal statute setting a different time should govern as to all subparts of the rule, not just to subpart (a). | |

# TAB 1D

**Legislation that Directly or Effectively Amends the Federal Rules**
**117th Congress**
**(January 3, 2021 – January 3, 2023)**

| Name | Sponsor/ Co-Sponsor(s) | Affected Rule | Text, Summary, and Committee Report | Actions |
|---|---|---|---|---|
| **Protect the Gig Economy Act of 2021** | **H.R. 41**<br>*Sponsor:*<br>Biggs (R-AZ) | CV 23 | **Bill Text:**<br>https://www.congress.gov/117/bills/hr41/BILLS-117hr41ih.pdf<br><br>**Summary (authored by CRS):**<br>This bill limits the certification of a class action lawsuit by prohibiting in such a lawsuit an allegation that employees were misclassified as independent contractors. | • 1/4/21: Introduced in House; referred to Judiciary Committee<br>• 3/1/21: Referred to the Subcommittee on Courts, Intellectual Property, and the Internet |
| **Injunctive Authority Clarification Act of 2021** | **H.R. 43**<br>*Sponsor:*<br>Biggs (R-AZ) | CV | **Bill Text:**<br>https://www.congress.gov/117/bills/hr43/BILLS-117hr43ih.pdf<br><br>**Summary (authored by CRS):**<br>This bill prohibits federal courts from issuing injunctive orders that bar enforcement of a federal law or policy against a nonparty, unless the nonparty is represented by a party in a class action lawsuit. | • 1/4/21: Introduced in House; referred to Judiciary Committee<br>• 3/1/21: Referred to the Subcommittee on Courts, Intellectual Property, and the Internet |
| **Mutual Fund Litigation Reform Act** | **H.R. 699**<br>*Sponsor:*<br>Emmer (R-MN) | CV 8 & 9 | **Bill Text:**<br>https://www.congress.gov/117/bills/hr699/BILLS-117hr699ih.pdf<br><br>**Summary:**<br>This bill provides a heightened pleading standard for actions alleging breach of fiduciary duty under the Investment Company Act of 1940, requiring that "all facts establishing a breach of fiduciary duty" be "state[d] with particularity." | • 2/2/21: Introduced in House; referred to Judiciary Committee and Financial Services Committee<br>• 3/22/21: Referred to the Subcommittee on Courts, Intellectual Property, and the Internet |

**Legislation that Directly or Effectively Amends the Federal Rules**
**117th Congress**
**(January 3, 2021 – January 3, 2023)**

| Name | Sponsor/ Co-Sponsor(s) | Affected Rule | Text, Summary, and Committee Report | Actions |
|---|---|---|---|---|
| **PROTECT Asbestos Victims Act of 2021** | **S. 574**<br>*Sponsor:*<br>Tillis (R-NC)<br><br>*Co-sponsors:*<br>Cornyn (R-TX)<br>Grassley (R-IA) | BK | **Bill Text:**<br>https://www.congress.gov/117/bills/s574/BILLS-117s574is.pdf<br><br>**Summary:**<br>Would amend 11 USC § 524(g) "to promote the investigation of fraudulent claims against [asbestosis trusts] …" and would allow outside parties to make information demands on the administrators of such trusts regarding payment to claimants. If enacted in its current form S. 574 may require an amendment to Rule 9035. The bill would give the United States Trustee a number of investigative powers with respect to asbestosis trusts set up under § 524 even in the districts in Alabama and North Caroline. Rule 9035 on the other hand, reflects the current law Bankruptcy Administrators take on US trustee functions in AL and NC and states that the UST has no authority in those districts. | • 3/3/2021: Introduced in Senate; referred to Judiciary Committee |
| **Sunshine in the Courtroom Act of 2021** | **S.818**<br>*Sponsor:*<br>Grassley (R-IA)<br><br>*Co-sponsors*:<br>Blumenthal (D-CT)<br>Cornyn (R-TX)<br>Durbin (D-IL)<br>Klobuchar (D-MN)<br>Leahy (D-VT)<br>Markey (D-MA) | CR 53 | **Bill Text:**<br>https://www.congress.gov/117/bills/s818/BILLS-117s818is.pdf<br><br>**Summary:**<br>This is described as a bill "[t]o provide for media coverage of Federal court proceedings." The bill would allow presiding judges in the district courts and courts of appeals to "permit the photographing, electronic recording, broadcasting, or televising to the public of any court proceeding over which that judge provides." The Judicial Conference would be tasked with promulgating guidelines.<br><br>This would impact what is allowed under Federal Rule of Criminal Procedure 53 which says that "[e]xcept as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom." | • 3/18/21: Introduced in Senate; referred to Judiciary Committee<br>• 6/24/21: Scheduled for mark-up; letter being prepared to express opposition by the Judicial Conference and the Rules Committees<br>• 6/24/21: Ordered to be reported without amendment favorably by Judiciary Committee |

| Name | Sponsor/ Co-Sponsor(s) | Affected Rule | Text, Summary, and Committee Report | Actions |
|---|---|---|---|---|
| **Litigation Funding Transparency Act of 2021** | **S. 840**<br>*Sponsor:*<br>Grassley (R-IA)<br><br>*Co-sponsors:*<br>Cornyn (R-TX)<br>Sasse (R-NE)<br>Tillis (R-NC)<br><br>**H.R. 2025**<br>*Sponsor:*<br>Issa (R-CA) | | **Bill Text:**<br>https://www.congress.gov/117/bills/s840/BILLS-117s840is.pdf [Senate]<br><br>https://www.congress.gov/117/bills/hr2025/BILLS-117hr2025ih.pdf [House]<br><br>**Summary:**<br>Requires disclosure and oversight of TPLF agreements in MDL's and in "any class action." | • 3/18/21: Introduced in Senate and House; referred to Judiciary Committees<br>• 5/3/21: Letter received from Sen. Grassley and Rep. Issa<br>• 5/10/21: Response letter sent to Sen. Grassley from Rep. Issa from Judge Bates<br>• 10/19/21: Referred by House Judiciary Committee to Subcommittee on Courts, Intellectual Property, and the Internet |
| **Justice in Forensic Algorithms Act of 2021** | **H.R. 2438**<br>*Sponsor:*<br>Takano (D-CA)<br><br>*Co-sponsor:*<br>Evans (D-PA) | EV 702 | **Bill Text:**<br>https://www.congress.gov/117/bills/hr2438/BILLS-117hr2438ih.pdf<br><br>**Summary:**<br>A bill "[t]o prohibit the use of trade secrets privileges to prevent defense access to evidence in criminal proceedings, provide for the establishment of Computational Forensic Algorithm Testing Standards and a Computational Forensic Algorithm Testing Program, and for other purposes."<br><br>Section 2 of the bill contains the following two subdivisions that implicate Rules:<br><br>"(b) PROTECTION OF TRADE SECRETS.—<br>(1) There shall be no trade secret evidentiary privilege to withhold relevant evidence in criminal proceedings in the United States courts.<br>(2) Nothing in this section may be construed to alter the standard operation of the Federal Rules of Criminal Procedure, or the Federal Rules of | • 4/8/21: Introduced in House; referred to Judiciary Committee and to Committee on Science, Space, and Technology<br>• 10/19/21: Referred by Judiciary Committee to Subcommittee on Crime, Terrorism, and Homeland Security |

| Name | Sponsor/ Co-Sponsor(s) | Affected Rule | Text, Summary, and Committee Report | Actions |
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| | | | Evidence, as such rules would function in the absence of an evidentiary privilege."<br><br>"(g) INADMISSIBILITY OF CERTAIN EVIDENCE.—In any criminal case, evidence that is the result of analysis by computational forensic software is admissible only if—<br>(1) the computational forensic software used has been submitted to the Computational Forensic Algorithm Testing Program of the Director of the National Institute of Standards and Technology and there have been no material changes to that software since it was last tested; and<br>(2) the developers and users of the computational forensic software agree to waive any and all legal claims against the defense or any member of its team for the purposes of the defense analyzing or testing the computational forensic software." | |
| **Juneteenth National Independence Day Act** | **S. 475** | AP 26; BK 9006; CV 6; CR 45 | Established Juneteenth National Independence Day (June 19) as a legal public holiday | • 6/17/21: Became Public Law No: 117-17 |
| **Bankruptcy Venue Reform Act of 2021** | **H.R. 4193**<br>*Sponsor*:<br>Lofgren (D-CA)<br><br>*Co-Sponsors:*<br>Buck (R-CO)<br>Perlmutter (D-CO)<br>Neguse (D-CO)<br>Cooper (D-TN)<br>Thompson (D-CA)<br>Burgess (R-TX)<br>Bishop (R-NC)<br><br>**S. 2827**<br>*Sponsor:*<br>Cornyn (R-TX)<br><br>*Co-sponsor:*<br>Warren (D-MA) | BK | **Bill Text:**<br>https://www.congress.gov/bill/117th-congress/house-bill/4193/text?r=453 [House]<br><br>https://www.congress.gov/117/bills/s2827/BILLS-117s2827is.pdf [Senate]<br><br>**Summary:**<br>Modifies venue requirements relating to Bankruptcy proceedings. Senate version includes a limitation absent from the House version giving "no effect" for purposes of establishing venue to certain mergers, dissolutions, spinoffs, and divisive mergers of entities.<br><br>Would require the Supreme Court to prescribe rules, under § 2075, to allow an attorney to appear on behalf of a governmental unit and intervene without charge or meeting local rule requirements in Bankruptcy Cases and arising under or related to proceeding before bankruptcy and district courts and BAPS. | • 6/28/21: H.R. 4193 introduced in House; referred to Judiciary Committee<br>• 9/23/21: S. 2827 introduced in Senate; referred to Judiciary Committee |

| Name | Sponsor/ Co-Sponsor(s) | Affected Rule | Text, Summary, and Committee Report | Actions |
|---|---|---|---|---|
| **Nondebtor Release Prohibition Act of 2021** | **S. 2497**<br>*Sponsor*:<br>Warren (D-MA) | BK | **Bill Text:**<br>https://www.congress.gov/bill/117th-congress/senate-bill/2497/text?r=195<br><br>**Summary:**<br>Would prevent individuals who have not filed for bankruptcy from obtaining releases from lawsuits brought by private parties, states, and others in bankruptcy by:<br>• Prohibiting the court from discharging, releasing, terminating or modifying the liability of and claim or cause of action against any entity other than the debtor or estate.<br>• Prohibiting the court from permanently enjoining the commencement or continuation of any action with respect to an entity other than the debtor or estate. | • 7/28/21: Introduced in Senate, Referred to Judiciary Committee |
| **Protecting Our Democracy Act** | **H.R. 5314**<br>*Sponsor:*<br>Schiff (D-CA)<br><br>*Co-Sponsors:*<br>[168 co-sponsors]<br><br>**S. 2921**<br>*Sponsor:*<br>Klobuchar [D-MN]<br><br>*Co-Sponsors:*<br>Blumenthal [D-CT]<br>Coons [D-DE]<br>Feinstein [D-CA]<br>Hirono [D-HI]<br>Merkley [D-OR]<br>Sanders [I-VT]<br>Warren [D-MA]<br>Wyden [D-OR] | CR 6; CV | **Bill Text:**<br>https://www.congress.gov/bill/117th-congress/house-bill/5314/text [House]<br><br>https://www.congress.gov/117/bills/s2921/BILLS-117s2921is.pdf [Senate]<br><br>**Summary:**<br>Various provisions of this bill amend existing rules, or direct the Judicial Conference to promulgate additional rules, including:<br>• Prohibiting any interpretation of Criminal Rule 6(e) that would prohibit disclosure to Congress of certain grand jury materials related to individuals pardoned by the President<br>• Requiring the Judicial Conference to promulgate rules "to ensure the expeditious treatment of" actions to enforce Congressional subpoenas. The bill requires that the rules be transmitted within 6 months of the effective date of the bill. | • 9/21/21: H.R. 5314 introduced in House; referred to numerous committees, including House Judiciary Committee<br>• 9/30/21: S. 2921 introduced in Senate; referred to Committee on Homeland Security and Governmental Affairs<br>• 12/9/21: H.R. 5314 debated and amended in House under provisions of H. Res. 838<br>• 12/9/21: H.R. 5314 passed by House<br>• 12/13/21: House bill received in Senate |

## Legislation that Directly or Effectively Amends the Federal Rules
## 117th Congress
**(January 3, 2021 – January 3, 2023)**

| Name | Sponsor/ Co-Sponsor(s) | Affected Rule | Text, Summary, and Committee Report | Actions |
|---|---|---|---|---|
| **Congressional Subpoena Compliance and Enforcement Act** | **H.R. 6079**<br>*Sponsor:*<br>Dean (D-PA)<br><br>*Co-Sponsors:*<br>Nadler (D-NY)<br>Schiff (D-CA) | CV | **Bill Text:**<br>https://www.congress.gov/117/bills/hr6079/BILLS-117hr6079ih.pdf<br><br>**Summary:**<br>The bill directs the Judicial Conference to promulgate rules "to ensure the expeditious treatment of" actions to enforce Congressional subpoenas. The bill requires that the rules be transmitted within 6 months of the effective date of the bill. | • 11/26/21: Introduced in House; referred to Judiciary Committee |

# TAB 2

# TAB 2A

**MINUTES**
**COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**
January 4, 2022

The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee) met by videoconference on January 4, 2022. The following members were in attendance:

Judge John D. Bates, Chair
Elizabeth J. Cabraser, Esq.
Judge Jesse M. Furman
Robert J. Giuffra, Jr., Esq.
Judge Frank Mays Hull
Judge William J. Kayatta, Jr.
Peter D. Keisler, Esq.
Judge Carolyn B. Kuhl
Professor Troy A. McKenzie
Judge Patricia A. Millett
Hon. Lisa O. Monaco, Esq.*
Judge Gene E.K. Pratter
Kosta Stojilkovic, Esq.
Judge Jennifer G. Zipps

Professor Catherine T. Struve attended as reporter to the Standing Committee.

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 Dennis R. Dow, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Laura B. Bartell,
Associate Reporter

Advisory Committee on Criminal Rules –
Judge Raymond M. Kethledge, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King,
Associate Reporter

Advisory Committee on Civil Rules –
Judge Robert M. Dow, Jr., Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus,
Associate Reporter

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

Others providing support to the Standing Committee included: Professors Daniel R. Coquillette, Bryan A. Garner, and Joseph Kimble, consultants to the Standing Committee; Bridget Healy, Rules Committee Staff Acting Chief Counsel; Julie Wilson and Scott Myers, Rules Committee Staff Counsel; Brittany Bunting and Shelly Cox, Rules Committee Staff; Burton S. DeWitt, Law Clerk to the Standing Committee; Judge John S. Cooke, Director of the Federal

* Prior to the lunch break, 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. Deputy Attorney General Monaco represented DOJ after the lunch break. Andrew Goldsmith was also present on behalf of the DOJ.

Judicial Center (FJC); Emery G. Lee, Senior Research Associate at the FJC; and Dr. Tim Reagan, Senior Research Associate at the FJC.

## OPENING BUSINESS

Judge Bates called the virtual meeting to order and welcomed everyone. He welcomed new Standing Committee members Elizabeth Cabraser and Professor Troy McKenzie. He also noted that Deputy Attorney General Lisa O. Monaco would attend the afternoon session of the meeting and thanked the other Department of Justice (DOJ) representatives for joining. In addition, Judge Bates thanked the members of the public who were in attendance for their interest in the rulemaking process.

Judge Bates next acknowledged Julie Wilson, who would be leaving the Administrative Office of the U.S. Courts (AO) at the end of January. Judge Bates thanked Ms. Wilson for her years of tremendous service to the rules committees. Professor Struve seconded Judge Bates's sentiments on behalf of the reporters. The reporters and Advisory Committee Chairs expanded on these thanks at later points during the meeting.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the minutes of the June 22, 2021 meeting.**

Bridget Healy reviewed the status of proposed rules and forms amendments currently proceeding through each stage of the Rules Enabling Act (REA) process and referred members to the tracking chart beginning on page 56 of the agenda book. The chart lists rule amendments that went into effect on December 1, 2021. It sets out proposed amendments and proposed new rules that were recently approved by the Judicial Conference. Those proposed amendments and new rules were transmitted to the Supreme Court and will go into effect on December 1, 2022, provided they are adopted by the Supreme Court and Congress takes no action to the contrary. The chart also includes proposed amendments and new rules that are at earlier stages of the REA process.

Judge Bates noted that some public comments had been received on proposed emergency rules developed in response to the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), and that he expected more comments to be received by the close of the public comment period in February. These comments will be reviewed and discussed by the relevant Advisory Committees at their spring meetings.

## JOINT COMMITTEE BUSINESS

*Electronic Filing by Self-Represented Litigants*

Judge Bates introduced this agenda item, which concerns the Advisory Committees' consideration of several suggestions regarding electronic filing by "pro se" (or self-represented) litigants. Noting that he had asked Professor Struve to convene the committee reporters in order to

coordinate their consideration of those suggestions, he invited Professor Struve to provide an update on those discussions.

Professor Struve thanked the commenters whose suggestions had brought this item back onto the rules committees' docket. She stated that at the group's first virtual meeting (in December 2021), the Advisory Committee reporters and researchers from the FJC had discussed how to formulate a research agenda on this topic. The goal is to share ideas on research questions, even though the four Advisory Committees in question may not necessarily reach identical views or formulate identical proposals for rule amendments.

Judge Bates highlighted the fact that the FJC researchers were being asked to devote time to this project and asked the Standing Committee if any members had any comments or concerns with utilizing the FJC's assistance. No members expressed any concern. Judge Bates also thanked Judge Kuhl for a thoughtful suggestion concerning terminology. Judge Kuhl reported that the state courts see a very high number of self-represented litigants, and that the courts are trying to phase out the use of Latin phrases (such as "pro se") that can be harder for lay people to understand. Judge Bates observed that the Advisory Committee chairs and reporters would take this point into account.

*Juneteenth National Independence Day*

Judge Bates introduced this agenda item, which concerns the proposal to amend the rules' definition of "legal holiday" to explicitly list Juneteenth National Independence Day. He noted that three of the four relevant Advisory Committees had already approved proposed amendments to add the new holiday to the list of legal holidays in their respective time-computation rules, and that the fourth Advisory Committee expects to do so at its spring 2022 meeting. Those proposals will come to the Standing Committee for consideration at its June 2022 meeting and will likely constitute technical amendments that can be forwarded for final approval without publication and comment.

## REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Bybee and Professor Hartnett provided the report of the Advisory Committee on Appellate Rules, which met via videoconference on October 7, 2021. The Advisory Committee presented an action item along with multiple information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 100.

*Action Item*

*Publication of Proposed Amendment to Rules 35 and 40, and Conforming Amendments to Rule 32 and the Appendix of Length Limits*. In this action item, the Advisory Committee sought approval for publication of a package of proposed amendments that would consolidate the contents of Rule 35 into Rule 40 and that would make conforming changes to Rule 32 and to the Appendix of Length Limits. Judge Bybee explained that the Advisory Committee had been considering comprehensive amendments to Rules 35 and 40 for some time. Rule 35 addresses hearings and rehearings en banc, and Rule 40 addresses panel rehearings. The proposed amendments would

transfer to Rule 40 the contents of Rule 35 so that the provisions regarding panel rehearing and en banc hearing or rehearing could be found in a single rule, Rule 40. Judge Bybee stated that as a result of discussion at the last Standing Committee meeting, the Advisory Committee acted with a freer hand to revise Rule 40 to clarify and simplify the rule. The result is a more linear rule that was unanimously approved by the Advisory Committee. Judge Bybee thanked the style consultants for their work on the proposed amended rule.

Judge Bates asked about the order of the subparts in Rule 40(b)(2). When listing potential reasons for rehearing en banc, would it not make more sense to list, first, instances when the panel decision conflicts with a decision of the Supreme Court, and then, instances when the decision creates a conflict within the circuit, and finally, instances when the decision creates a conflict with another court? Judge Bybee stated that the Advisory Committee considered the order when drafting the rule. The main reason behind the proposed structure is that an initial consideration for a court of appeals is to maintain consistency within its own docket. Hence, the Advisory Committee chose to list intra-circuit inconsistencies first (in 40(b)(2)(A)). Professor Hartnett agreed with Judge Bybee and added that subparagraph 40(b)(2)(A) is different because it addresses a situation that does not provide grounds for the Supreme Court to grant certiorari.

Judge Bates turned the discussion to proposed amended Rule 40(d)(1), which sets the presumptive deadline for filing a rehearing petition but provides for the alteration of that deadline "by order or local rule." He asked whether any circuits have local rules that alter that deadline and he questioned whether such local rulemaking was desirable. Professor Hartnett stated that this feature was carried over from current Rules 35(c) and 40(a)(1). A judge member noted that the 14-day limit to file a petition for rehearing is short, particularly for pro se prisoner litigants. In her circuit, there is a local rule that sets the limit at 21 days. This member recommended against precluding circuits from affording litigants a longer period by local rule.

A practitioner member asked whether the proposed Rule 40(g) should say "[t]he provisions of Rule 40(b)(2)(D) . . ." instead of just "[t]he provisions of Rule 40(b)(2)." As written, Rule 40(b)(2)(A)-(C) all refer to "the panel decision," which would be inapplicable in a petition for initial hearing en banc. Judge Bybee agreed that the wording of Rule 40(b)(2)(A) would not apply literally to a request for initial hearing en banc, but the intent of the Advisory Committee was to allow for an initial hearing en banc when there is an intra-circuit inconsistency. Judge Bybee noted that in his circuit, initial hearings en banc sometimes occur sua sponte when a panel notices two inconsistent opinions of the circuit and refers the inconsistency to the en banc court. The practitioner member agreed that it makes sense to be inclusive if there is a concern about intra-circuit conflict.

The practitioner member asked about Rule 40(b)(2)(C)'s use of the phrase "authoritative decision" when discussing a panel decision's conflict with a decision from another circuit. This phrase is not used elsewhere in the rule. Judge Bybee responded that this phrasing would rule out rehearing requests based on conflicts with unpublished decisions from other circuits. Professor Hartnett agreed that this provision was designed to exclude petitions asserting conflicts merely with unpublished (i.e., nonprecedential) opinions from other circuits. In response to a follow-up question, Judge Bybee acknowledged that the omission of "authoritative" from Rule 40(b)(2)(A) means that that provision can extend to intra-circuit splits involving unpublished decisions.

The same practitioner member pointed out that Rule 40(d)(5) bars oral argument on whether to grant a rehearing petition and asked whether this prohibition should be revised to allow for local rules or orders to the contrary. In his recent experience, a circuit had ordered argument on whether to grant a petition for rehearing – and subsequently issued a decision that both granted the petition for rehearing and reached a different outcome on the merits. Such a process can be useful, this member said, so why remove this flexibility? Judge Bybee explained that the rule is drafted to discourage requests for argument on whether to grant rehearing. Professor Hartnett added that, under Rule 2, the court has authority to suspend the prohibition on oral arguments by order in a case. Based on these responses, the practitioner member stated that he did not see a need to revise proposed Rule 40(d)(5).

A judge member asked a pair of drafting questions. First, he asked why the proposed new title for Rule 40 ("Rehearing; En Banc Determination") used the word "determination." Professor Hartnett explained that "en banc determination" was selected to encompass an initial hearing en banc, which would not be a "rehearing." Second, the judge member noted that the timing provision in current Rule 35(c) says "must be filed" but the timing provision in current Rule 40(a)(1) says "may be filed." He asked why proposed Rule 40(d)(1) used "may be filed" (on lines 105 and 112 of the draft at page 128 of the agenda book). Professor Hartnett responded that one possible reason was to avoid the use of a word ("must") that might lead lay readers to think that the rule was requiring the filing of a rehearing petition. A judge member agreed that pro se litigants might misread "must" as a requirement that they file a petition for a rehearing even if they do not desire a rehearing, while "may" clarifies that they can file a petition, and if they do so, they must do so within fourteen days. The Standing Committee, along with Judge Bybee, Professor Hartnett, and the style consultants, discussed the competing virtues of "may" and "must," as well as a suggestion from the style consultants to change to "any petition … must" (at lines 103-05) rather than "a petition … must." As a result of the discussion, Judge Bybee and Professor Hartnett agreed to change "a" to "any" in line 103 and "may" to "must" in line 105. As to the use of "may" in line 112, further discussion noted that keeping this as "may" would parallel the use of "must" and "may" in, respectively, Rules 4(a)(1)(A) and 4(a)(1)(B). Ultimately the decision was made to retain "may" at line 112.

A practitioner member suggested that the wording of proposed Rule 40(c) seemed (in comparison to the current rule) to liberalize the standard for granting rehearing en banc. New Rule 40(c) says it "[o]rdinarily … will be ordered only if" a specified condition is met, whereas current Rule 35(a) says that it "is not favored and ordinarily will not be ordered unless" a specified condition is met. Saying "will not be ordered unless" would help emphasize that en banc rehearing is not preferred. Relatedly, the same member noted that the phrase "rehearing en banc is not favored" had been moved to proposed Rule 40(a), and he suggested that phrase should appear in Rule 40(c). Professor Hartnett stated that the first of the member's points was a style issue on which the Advisory Committee had deferred to the style consultants. As to the second point, Professor Hartnett explained that the Advisory Committee had moved "rehearing en banc is not favored" up to Rule 40(a) for emphasis. He recalled that an earlier draft may have featured that phrase in both Rule 40(a) and Rule 40(c), and he suggested that the Advisory Committee would prefer to include the phrase in both subparts (even if redundant) rather than simply moving it to Rule 40(c). Judge Bybee agreed with Professor Hartnett but noted he had no objection to including

"rehearing en banc is not favored" in both Rule 40(a) and Rule 40(c). A judge member who had participated in the Advisory Committee discussions voiced support for including the phrase in both places. In response to the practitioner member's first point, Professor Garner suggested changing "ordered" to "allowed" in line 98 ("[o]rdinarily … will be allowed only if"). Such a change would recognize that the court has discretion, but is not required, to order an en banc rehearing if one of the four criteria is met.

A judge member thanked the Advisory Committee and thought the proposed amended rule is more user friendly and clearer. She suggested that reinserting the word "panel" in the title would clarify the rule, particularly for self-represented litigants. Professor Hartnett and Judge Bybee agreed with the suggestion to add "panel" back into the title. Judge Bates voiced his support for adding the word "panel" back into the title as well; he observed that might assist users of the table of contents.

A judge member, stating that adverbs are over-used, questioned the use of "ordinarily" in the phrase about when rehearing en banc will be ordered; this member expressed a preference for "may be allowed." A different judge member disagreed and thought the word "ordinarily" should be retained. In rare cases the court may want to grant rehearing en banc even though none of the stated criteria are met. A practitioner member concurred in the latter view and said that "ordinarily" usefully preserves the court's discretion both in Rule 40(c) and in proposed Rule 40(d)(4), which provides that the court "ordinarily" will not grant rehearing without ordering a response to the petition. Judge Bates agreed that "ordinarily" should be retained.

After further discussion, Judge Bybee requested approval for publication of the proposed transfer of Rule 35's contents to Rule 40, the proposed amendments to Rule 40, and the proposed conforming amendments to Rule 32 and the Appendix of Length Limits. The rule amendments being voted on would include the following changes to Rule 40 compared with the version shown at pages 122-132 in the agenda book: (1) insertion of "Panel" in the title; (2) correction of typographical errors on lines 77, 85, and 86; (3) on lines 97-98, replacing "Ordinarily, rehearing en banc will be ordered" with "Rehearing en banc is not favored and ordinarily will be allowed;" (4) on line 103, changing "a" to "any," and (5) on line 105, changing "may" to "must"

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendments to Rules 35 and 40, with the changes as noted above, and conforming amendments to Rule 32 and the Appendix of Length Limits.**

*Information Items*

*Amicus Disclosures*. Judge Bybee invited Professor Hartnett to introduce the information item concerning potential amendments to Rule 29's disclosure requirements. Professor Hartnett underscored the Advisory Committee's interest in obtaining the Standing Committee's feedback on this topic. The Advisory Committee began a review of Rule 29 in 2019 following the introduction in both houses of Congress of the Assessing Monetary Influence in the Courts of the United States Act (AMICUS Act). In 2021, Senator Sheldon Whitehouse and Representative

Henry C. "Hank" Johnson, Jr. requested that the Advisory Committee review Rule 29's disclosure requirements for organizations that file amicus briefs.

Professor Hartnett explained that the question of amicus disclosures involves important and complicated issues. One issue is that insufficient amicus disclosure requirements can enable parties to evade the page limits on briefs or permit an amicus to file a brief that appears independent of the parties but is not. Another issue 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. Countervailing concerns include First Amendment rights of persons who do not wish to reveal their identity.

Professor Hartnett stated that there are many approaches the Advisory Committee could take in amending Rule 29, depending on how these various issues are resolved. One approach is that the Advisory Committee could move forward with minimal amendments such as adding "drafting" to the current rule's disclosure requirement concerning persons that "contributed money that was intended to fund preparing or submitting the brief" – to foreclose the contention that this disclosure requirement only reaches funding for the costs of printing and filing a brief.

He advised that a more extensive revision to Rule 29 is possible, and he noted three issues that the Advisory Committee is reviewing. First, Rule 29 could be amended to address contributions beyond funds earmarked for a particular brief. However, if the Advisory Committee goes down this road, it raises the question of the contribution threshold that would trigger disclosure requirements. The sketch of a potential rule on page 106 of the agenda book would trigger disclosure if a party (or its counsel) contributed at least 10 percent of the amicus's gross annual revenue. That 10 percent trigger is borrowed from Rule 26.1, which deals with corporate disclosures. The purposes of the two rules are different, but the 10 percent number provides a starting point for the discussion.

Professor Hartnett noted that a second issue is whether any increased disclosure requirements should apply only to relationships between the parties and an amicus, or whether such increased requirements should also encompass disclosures relating to the relationship between non-parties and an amicus. Finally, he stated that the Advisory Committee is also looking at the issue of whether to retain the current rule's exemption from disclosure for nonparty members of an amicus. An exclusion avoids some of the constitutional issues regarding membership lists, but if any disclosure requirement excludes members, it would make it easy to avoid disclosure by converting contributions into membership fees.

Judge Bates noted that this is a particularly important and sensitive subject, and specifically so because it comes through the Supreme Court to the Advisory Committee. Judge Bates asked if members had any comments or suggestions.

A practitioner member stated that the three issues Professor Hartnett noted are important to consider, and the Advisory Committee should try to find middle ground. A broader amendment, particularly with respect to disclosure regarding non-parties, may not be successful.

A judge member believed the Advisory Committee was asking the right questions and was right on point with its conclusions. Another judge member agreed that the Advisory Committee was heading in the right direction. As a judge, he would rather know who was behind a brief, though he noted that the importance of that question does get greatly overstated. He suggested that seeking the "middle ground" might prove to be quite a challenge because actors might structure their transactions to evade the disclosure requirement.

A practitioner member thought the middle ground route would be preferable. The member also noted that there is an uptick in the motions to file amicus briefs in district courts now, particularly in multi-district litigation and other complex litigation, and the district courts have less experience in dealing with amicus filings. Judge Bates noted the absence of any national rule governing amicus filings in the district court and observed that this may be a matter for other Advisory Committees and the Standing Committee to consider in the future. A judge member suggested that it is important for the Civil Rules to address amicus filings in the district courts, particularly to deal with the possibility that an amicus might file a brief for the purpose of triggering a recusal. (Discussion of amicus filings in the district court recurred later in the meeting, during the Civil Rules Advisory Committee's presentation, as noted below.) Another judge member suggested that it would be helpful to know more about the AMICUS Act's prospects of enactment.

A practitioner member noted that amicus filings often face a time crunch and increasing the disclosure requirements risks dissuading amici from undertaking the effort. For an organization with many members – such as a banking association – detailed disclosures could be burdensome.

A judge member suggested that one approach might be to adopt a rule that invites voluntary disclosures – that is, an amicus would either identify its principal members and funders or state that it is choosing not to disclose. This voluntary standard avoids constitutional issues while also allowing parties to disclose the information.

A judge member stated she liked the 10 percent rule. It is a significant trigger for recusal concerns, and it is already in use in the corporate disclosure requirements. Moreover, if the disclosure would require a judge to either recuse herself or to deny leave to file an amicus brief, it seems very "head-in-the-sand" to not require that disclosure.

A practitioner member stressed the importance of the distinction between parties and non-parties. As to parties, he observed that it is very easy to see the concern about a party using an amicus filing as an additional opportunity to make an argument. However, in practice there is a lot of coordination between amici and parties. Parties seek out potential amici whose voices they would like to get before the court. Though it is important to enforce the rule's current requirements, practical experience illustrates the limits of what can be done by rulemaking. As to non-parties, it would be useful for the court to know if there is a dominant, hidden figure lurking behind an amicus. But if the rule were to go beyond that level of detail, one would have to ask what problem the rule is trying to solve. If the court has never heard of the amicus, the court can simply assess the amicus brief on its own merits.

Judge Bybee thanked the Standing Committee members for their comments and stated that he would relay them to the Advisory Committee.

Judge Bates asked for comments on the other information items outlined in the Advisory Committee's report in the agenda book. There were no further comments.

## REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Schiltz and Professor Capra provided the report of the Advisory Committee on Evidence Rules, which last met in Washington, DC on November 5, 2021. The Advisory Committee's report presented multiple information items but no action items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 302.

*Information Items*

*Rules Published for Public Comment in August 2021.* Judge Schiltz reminded the Standing Committee that proposed amendments to Rules 106, 615, and 702 had been published for public comment in August 2021. The proposed amendments to Rule 702, which clarify the court's gatekeeping role for admitting expert testimony, will be controversial. The Advisory Committee has received a number of comments on that proposal and expects to hear testimony on it at its upcoming January 2022 hearing. Judge Schiltz stated that courts have frequently misconstrued Rule 702 requirements as going only to the weight, and not the admissibility, of the expert's testimony; those judges will admit the testimony if they think that a reasonable juror could conclude that the requirements are met. The proposed amendments to the rule emphasize that the court must determine that the reliability-based requirements for expert testimony are established by a preponderance of the evidence, and that the trial court must evaluate whether the expert's conclusion is properly derived from the basis and methodology that the expert has employed. The latter aspect of the proposal is designed to address the problem of overstatement by experts.

Judge Schiltz provided some detail concerning the comments received regarding Rule 702. He explained that there is some opposition, particularly from members of the plaintiffs' bar, to the concept of amending the rule. Judge Schiltz said that the Advisory Committee is unlikely to accept this point of view, because it believes that Rule 702 needs clarification. Courts frequently issue decisions interpreting Rule 702 incorrectly. Conversely, comments from the defense bar say that the Advisory Committee has not done enough to clarify the rule, and that the committee note should be more explicit that certain decisions are wrong and are rejected. The Advisory Committee does not think specifically singling out incorrect decisions in the committee note is the correct approach.

When discussing a draft of the proposed amendments, some Advisory Committee members had expressed concern that under the proposal as then formulated ("if the court finds"), some judges might think they need to make formal findings on the record that all the requirements of the rule are met, even if no party objects to the expert testimony. To address this concern, the proposed amendment as published for comment instead uses the phrase "if the proponent has demonstrated." A number of commentators have objected to this change. These comments note

that the very problem the amendment is designed to fix is that often the judge delegates this responsibility to jurors when it should be the judge who determines whether the requirements are met. According to these commentators, because this language does not say who needs to make the determination, it does not in fact provide the clarification that the amended rule is intended to convey. Judge Schiltz asked whether the Standing Committee had comments on the proposed amendments to Rule 702 for the Advisory Committee's consideration at its next meeting.

A practitioner member noted that in mass tort litigation, there are complaints among defense lawyers that courts do not sufficiently screen expert testimony, choosing instead to say that objections go to weight, not admissibility. There are limits to how much can be done to legislate this issue, so the member agrees with the Advisory Committee's decision not to specifically criticize incorrect decisions in the committee note. However, some emphasis on enhancing the judicial role, even if only in situations where the testimony's admissibility is central and contested, would not be too much of an imposition on the court.

*Rule 611 – Illustrative Aids*. Judge Schiltz introduced this information item as one that the Advisory Committee will likely submit to the Standing Committee in June 2022 with a request for approval to publish for public comment. He explained that illustrative aids are not specifically addressed by any rules. Judges, himself included, often struggle to distinguish demonstrative evidence (offered to prove a fact) from illustrative aids. Additionally, judges have very different rules on whether parties must disclose illustrative aids prior to use at trial, as well as whether (and how) they can go to the jury. Finally, judges have different rules on whether illustrative aids are or can be part of the record. Judge Schiltz noted that there is a companion proposal to amend Rule 1006, which deals with summaries, that is also under consideration by the Advisory Committee.

A judge member applauded the proposed changes to Rule 611 and Rule 1006. He suggested that to the extent that the proposed addition to Rule 611 (as set out on pages 304-05 of the agenda book) sets conditions for the use of an illustrative aid, it seems odd to include items (3) and (4). Those two provisions—the prohibition on providing the aid to the jury over a party's objection unless the court finds good cause; and the requirement that the aid be entered into the record—are not conditions on the use of an illustrative aid but rather regulations of what happens after the use of the illustrative aid. Professor Capra agreed with the judge member that items (3) and (4) should be part of a separate subdivision.

A practitioner member noted that he does not turn over opening or closing slide presentations prior to using them in arguments. Also, during examination of a witness, he will often have an easel where he can write down highlights of the testimony as it is given. He asked whether these types of aids would be covered by the proposed rule. If these are considered illustrative aids, it is important to draft the rule in a way that does not discourage their use. Professor Capra acknowledged the validity of this concern, noted that these questions have been part of the Advisory Committee's discussions, and agreed that it would be important to ensure that the notice requirement would not be unduly rigid as applied to such situations. Judge Schiltz stated that the practitioner members on the Advisory Committee had expressed a similar concern, but the judge members favored requiring advance notice. Without advance notice, judges could have to deal with objections interpolated in the middle of an opening statement. In sum, Judge Schiltz

stated, this is a challenging issue, but the Advisory Committee is very focused on the pros and cons of the notice requirement.

Another practitioner member emphasized that trial practice has moved toward very slick presentations, for openings and closings, with expert witnesses, and even with fact witnesses. He stated that advance disclosure to opposing counsel can be a good idea; otherwise, if counsel shows the jury slides that mischaracterize the evidence, there is a real risk of a mistrial. The member said that judges often impose notice requirements for slides used in opening arguments, although they may be more flexible about closing arguments. Slides have become crucial in trial practice. Something might be lost by disclosing, he said, but disclosure avoids sharp practices. Judge Schiltz stated that he requires attorneys to provide advance disclosure, but the disclosure can be made five minutes beforehand. A judge member concurred; in her view, this is a case management issue on which it is difficult to write a rule. The judge has to know the case and require advance disclosures by the lawyers.

Professor Bartell noted the proposed rule text does not define "illustrative aid." For example, if a lawyer stands 20 feet away from the witness and asks, "can you see my glasses," one might say that is illustrative. She suggested being careful to cabin the rule's scope.

*Rule 1006 Summaries.* Judge Schiltz introduced this information item as a companion proposal to the proposed amendment to Rule 611. Rule 1006 provides that certain summaries are admissible as evidence if the underlying records are admissible and if they are too voluminous to be conveniently examined at trial. This rule is often misapplied. Some judges erroneously instruct the jury that a summary admitted under Rule 1006 is not evidence. Some judges will not admit a Rule 1006 summary unless all the underlying records have been admitted into evidence, which runs contrary to the purpose of Rule 1006. Other judges do the opposite and will not allow Rule 1006 summaries if any of the underlying records have been admitted into evidence. The confusion over Rule 1006 is closely related to the confusion over illustrative aids, and the Advisory Committee hopes to clarify both topics.

*Rule 611 – Safeguards to Apply When Jurors Are Allowed to Pose Questions to Witnesses*. Judge Schiltz provided the update on this information item, explaining that the proposed amendment would list the safeguards that a court must use when it allows jurors to ask questions. The proposed rule would not take any position on whether jurors should be allowed to ask questions, but rather would provide a floor of safeguards that must apply if the judge does allow juror questions. These safeguards were taken from caselaw.

A judge member stated that it makes sense to have a rule regarding juror questions because it is an important and perilous area. He noted that there are various possible approaches to juror questions; one is to allow the lawyers to take the juror's question under advisement and allow the lawyers to decide whether they will cover that topic in their own questioning of the witness. This seems like it might often be the prudent course, but proposed Rule 611(d)(3) appears to foreclose it. Professor Capra said he would look into this issue. His understanding was that judges that permit juror questions generally read the questions to the witness, and then allow for follow-up questioning from counsel.

Judge Bates asked whether proposed Rule 611(d)(1)(D) should be a bit broader. He suggested that instead of saying that no "negative inferences" should be drawn, it should say "no inferences" should be drawn. Professor Capra agreed that "negative" should be omitted. Following up on Judge Bates's suggestion, a judge member added that it would be better to be even broader and suggested that Rule 611(d)(1)(D) say that no inference should be drawn from anything the judge does with a juror's question (whether asking, not asking, or rephrasing it). Judge Bates stated his agreement with the judge member's suggestion.

A judge member asked a question about Rule 611(d)(1). As she read the rule, it seems to prohibit juror questions outright unless the judge provides the required instructions "before any witnesses are called." She asked how the rule would handle instances where the issue of juror questioning arises mid-trial; also, she wondered whether this timing requirement should be placed elsewhere in the rule. Professor Capra promised to take this issue into account.

Judge Schiltz referred the Standing Committee to the Advisory Committee's report in the agenda book for information regarding the remainder of the information items, and there were no further comments.

## REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Dennis Dow and Professors Gibson and Bartell provided the report of the Advisory Committee on Bankruptcy Rules, which last met via videoconference on September 14, 2021. The Advisory Committee presented one action item and three information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 157.

*Action Item*

*Rule 7001.* Judge Dow introduced this action item to request approval to publish for public comment an amendment to Rule 7001. The proposed amendment responds to Justice Sotomayor's suggestion in her concurring opinion in *City of Chicago v. Fulton*, 141 S. Ct. 585 (2021), that the rulemakers "consider amendments to the Rules that ensure prompt resolution of debtors' requests for turnover under § 542(a), especially where debtors' vehicles are concerned," because the delay in resolving turnover proceedings can present a problem for a debtor's ability to recover the car that the debtor needs to get to work in order to earn money to fund a Chapter 13 plan. Before the Advisory Committee had a chance to address Justice Sotomayor's comment, a group of law professors submitted a suggestion, which later was generally endorsed by another suggestion submitted by the National Bankruptcy Conference. The law professors recommended a new rule to allow all turnover proceedings to be brought by motion rather than adversary proceeding. The Advisory Committee decided on a narrower approach tailored to the issues raised by Justice Sotomayor and proposed amending Rule 7001 to provide that turnover of tangible personal property of an individual debtor could be sought by motion as opposed to adversary proceeding. The Advisory Committee decided not to adopt a national procedure for these turnover motions, preferring instead to allow them to remain governed by local rules.

An academic member stated that this rule will be a huge improvement over current procedure. He asked what would happen, under the proposal, in a Chapter 7 case when the trustee is seeking turnover of tangible property. The member expressed an expectation that the motion procedure would not apply to the trustee's turnover proceeding, because the proposal only extends to proceedings "by an individual debtor." Judge Dow agreed that under the proposed amendment, the trustee would need to seek turnover by adversary proceeding.

Upon motion, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Rule 7001.**

*Information Items*

*Rule 9006(a)(6) (Legal Holidays)*. Judge Dow stated that the Advisory Committee has approved a technical amendment to Rule 9006(a)(6) adding Juneteenth National Independence Day to the list of legal holidays. The Advisory Committee is not asking for approval at this time; rather, it will make that request in June 2022 in coordination with the other Advisory Committees' parallel proposals.

*Electronic Signatures*. Judge Dow introduced this information item, which concerns electronic signatures by debtors and others who do not have a CM/ECF account. Judge Dow noted that this issue connects to the question of electronic filing by self-represented litigants, but he observed that the working group of reporters and FJC researchers is addressing the latter topic, so the Advisory Committee's focus in this information item was on the electronic-signature topic. The Advisory Committee is looking at the practice of requiring the debtor's counsel to retain a wet signature for documents signed by the debtor and filed electronically. Previously, when the Advisory Committee last considered amendments to Rule 5005(a) that would have allowed the filing of debtors' scanned signatures without the retention of the original "wet" signature, the DOJ raised concerns with technologies available for verifying those signatures. The Advisory Committee has asked the DOJ whether its concerns have been alleviated by intervening technical advances. The pandemic has given us some experience with courts relaxing the wet-signature-retention requirement, and the FJC is assisting the Advisory Committee in studying the issue. There is a preliminary draft of a possible amendment to Rule 5005(a) on page 161 of the agenda book.

Professor Gibson stated the Advisory Committee found this to be a challenging problem. With documents that are filed electronically, what constitutes a valid signature for purposes of the rules? Under all rule sets, a CM/ECF account holder's signature is associated with that holder's unique account. A filing made through the account holder's account, and authorized by that person, constitutes the person's signature. But that does not address the common situation in bankruptcy where the *attorney* is filing a document with the *debtor's* signature, as the debtor is not the account holder. (Also, a pro se litigant might be allowed by some courts to submit documents through some electronic means other than CM/ECF—for instance, via email.) The Advisory Committee is not sure where it stands with wet signature requirements, but it is continuing to explore. Professor Gibson also noted that the Advisory Committee needs to learn more about lawyers' views concerning the requirement that the attorney for a represented debtor retain a wet signature.

An academic member noted that the DOJ's concern the last time this issue came before the Advisory Committee was that without a requirement for the retention of a wet signature, the Department's experts in bankruptcy fraud prosecutions would not be able to verify the authenticity of a signature. He asked whether the possible change in approach now would flow from a change in what a handwriting expert was willing to testify to, or whether it would flow from the advent of electronic methods for verifying the signature. Professor Gibson answered that technology has improved since the last time the Advisory Committee addressed this issue, and now there are electronic-signing software programs that offer a means to trace electronic signatures back to the signer. DOJ has told the Advisory Committee that the proposal is no longer dead from the beginning, meaning there does not always have to be a wet signature for its experts to be able to verify the authenticity of the signature. But it depends on the technology. Software that enables verification of electronic signatures may not currently be incorporated into the software that consumer lawyers are using to prepare bankruptcy filings. The technology exists, however. Therefore, the Advisory Committee felt it is worth pursuing the amendment. Judge Dow noted that the Advisory Committee has included the DOJ in the discussions of this item from the outset and has stressed to the DOJ that its input is necessary.

Professor Coquillette applauded Professor Gibson's attention to state ethics requirements and cautioned that the Advisory Committee needs to be careful not to amend the rules in ways that could conflict with state-law professional-responsibility requirements. State-law professional-responsibility requirements may, for example, address the lawyer's retention of a client's "wet" signature.

Deputy Attorney General Monaco said she is hopeful that the Department can work through some of the technology issues that this proposal would raise. The Department has convened an internal working group to review the issue.

A judge member noted that he understands the point that the Advisory Committee does not want to have rules that require adoption of new software, but might the rules incentivize it? What if the rule says that if counsel use software that enables electronic signature verification, then they do not have to retain a wet signature? That could be a good development.

*Restyling*. Judge Dow introduced the final information item: an update on the restyling project. The project is going well. Parts I and II have gone through the entire process up to (but not including) transmission to the Judicial Conference, which will happen once the remaining parts have also passed through the entire process. Parts III through VI are out for public comment and are on track to go to the Standing Committee at the next meeting. Parts VII, VIII, and IX will come to the Advisory Committee this spring and should be ready for Standing Committee approval for publication this summer.

Professor Bartell added that while the restyling project has been ongoing, some of the restyled rules have been subsequently amended. The Advisory Committee still needs to decide how it wants to handle these amended rules. One possibility will be to request to republish for public comment all the restyled rules that have been subsequently amended.

Professor Kimble stated that the style consultants will conduct one final top-to-bottom review of all the restyled rules for consistency and any other minor issues. They are currently doing so for Parts I and II.

Judge Bates thanked the style consultants for their work on the restyling project.

## REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Robert Dow and Professors Cooper and Marcus provided the report of the Advisory Committee on Civil Rules, which last met via videoconference on October 5, 2021. The Advisory Committee presented one action item and three information items. The Advisory Committee briefly noted other items on its agenda, one of which elicited discussion. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 184.

*Action Item*

*Publication of Rule 12(a).* Judge Dow introduced the only action item, a proposed amendment to Rule 12(a) that the Advisory Committee was requesting approval to publish for public comment. Rule 12(a) sets the time to serve responsive pleadings. Rule 12(a)(1) recognizes that a federal statute setting a different time should govern, but subdivisions 12(a)(2) and (3) do not recognize the possibility of conflicting statutes. However, there are in fact statutes that set times shorter than the time set by Rule 12(a)(2). While not every glitch in the rules requires a fix, this is one that would be an easy fix. The Advisory Committee decided unanimously to request publication for public comment.

Professor Cooper added there is an argument that Rule 12(a)(2) as currently drafted supersedes the statutes that set a shorter response time, and the Advisory Committee never intended such a supersession. In addition to fixing the glitch, the proposed amendment will avoid the potential awkwardness of arguments concerning unintended supersession.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Rule 12(a).**

*Information Items*

*Multi-District Litigation (MDL) Subcommittee*. Judge Dow introduced the work of the MDL Subcommittee as the first information item. Two major topics remain on the subcommittee's agenda. First, the subcommittee is looking at the idea of an "initial census" (what used to be known as "early vetting")—that is, methods for the MDL transferee judge to get a handle on the cases that are included in the MDL. There are three current MDLs where some version of this is in use—the *Juul MDL* before Judge Orrick in the Northern District of California, the *3M MDL* before Judge Rodgers in the Northern District of Florida, and the *Zantac MDL* before Judge Rosenberg (who chairs the MDL Subcommittee) in the Southern District of Florida. Second, the subcommittee is reviewing issues concerning the court's role in the appointment and compensation of leadership

counsel. Several meetings ago, the Advisory Committee discussed what it called a "high impact" sketch of a potential new Rule 23.3 that would extensively address court appointment of leadership counsel, establishment of a common benefit fund to compensate lead counsel, and court rulings on attorney fees. More recently, the subcommittee has been considering a sketch of a "lower impact" set of rules amendments that focuses on Rules 16(b) and 26(f). It would deal with both the initial census and issues of appointing, managing, and compensating leadership counsel throughout an MDL proceeding.

The approach taken in the lower impact sketch is similar to what the Advisory Committee did with Rule 23 a few years ago: operate at a high level of generality and not try to prescribe too much, but put prompts in the rules so that lawyers and judges know from day one a lot of the important things that they will encounter over the number of years it will take for an MDL to conclude. The subcommittee is trying to preserve flexibility. Much of what is in the rule sketch will not apply in any single given MDL. The prompts in the rule will guide MDL participants, and the committee note will provide more detail on how the court might apply these prompts. The subcommittee has met with Lawyers for Civil Justice and will meet with American Association for Justice and others in the coming months.

Professor Marcus observed, with respect to the call for rulemaking with respect to matters such as attorney compensation in MDLs, that rulemaking on such topics is challenging. One approach would be to amend Rule 26(f) so as to require the lawyers to address such matters in their proposed discovery plan; this could then inform the judge's consideration of how to address those matters in the Rule 16(b) order. As to oversight of the settlement, Judge Dow noted that the subcommittee initially considered giving the judge oversight of the substance of the settlement, but now is focusing instead on whether to provide for judicial oversight of the process for arriving at the settlement. In current practice, some judges exert indirect influence on the settlement, for example through their orders appointing leadership counsel. But whether to make rules concerning settlement in MDLs is the most controversial issue the subcommittee is considering, and its members do not agree on how best to proceed. Professor Cooper added that the rules do not currently define what obligations, if any, leadership counsel has to plaintiffs other than their own clients.

Judge Bates said he agrees with the Civil Rules Committee report's observation that the absence of any mention of MDLs in the Civil Rules is striking, given that MDLs make up a third or more of the federal civil caseload. He commended the Advisory Committee and subcommittee on their work on these issues.

A judge member suggested that the Advisory Committee consider addressing appointment of special masters. The role that courts have delegated to special masters in some large MDLs is significant. If the Advisory Committee addresses special masters, a rule could deal with whether and when special masters should have *ex parte* communications with counsel. There is the potential for an appearances problem if the special master is viewed as favoring one side or the other. A poor decision concerning the use of a special master can have significant consequences. Professor Marcus noted that Rule 53 requires that the order appointing a special master must address the circumstances, if any, in which the master may engage in *ex parte* communications.

However, the question then is whether Rule 53 is sufficient to address the issue in the MDL context.

A judge member thanked the subcommittee for its work on the MDL rules. He expressed skepticism concerning the desirability of rules specific to MDLs, noting that one size does not fit all as the cases range from quite simple to large and complicated. The current rules are flexible and capacious enough to accommodate the differences. Judge Chhabria's point (in the *Roundup MDL*) concerning the transferee judge's learning curve is well taken, but the judge member questioned whether a rule change could really make that learning curve any easier.

Apart from that big-picture skepticism, this judge member also made some more specific suggestions. First, the question of who should speak for the plaintiffs during the early meet-and-confer is a big one, and whether any rule should address that is a worthy issue that may warrant treatment if the Advisory Committee is going to be addressing MDLs. Second, in some MDLs the court has appointed lead counsel on the defense side, and the judge member queried whether the rules should address that. Third, if the rules will be amended to address table-setting issues that counsel and the court should consider early on, one such issue is whether there will be a master consolidated complaint and what its effect will be (a topic touched on in *Gelboim v. Bank of Am. Corp.*, 574 U.S. 405, 413 n.3 (2015)). Fourth, the judge member stressed that the common benefit fund order should be clear as to whether plaintiffs' lawyers will be required to submit to the common benefit fund a portion of their fees arising from the settlement of cases pending in other courts; he expressed doubt, however, as to whether the question of court authority to impose such a requirement is an appropriate topic for rulemaking. Lastly, the member noted that in the current rule sketch of proposed Rule 16(b)(5)(F) provided in the agenda book (at p. 197) it seemed a little odd to require the court in an initial order to provide a method for the court to give notice of its assessment of the fairness of the process that led to any proposed settlement.

A practitioner member stated that the judge member whose comments preceded hers had raised all the issues that she had in mind. She suggested that the Rule 16 approach is particularly well taken. It will cause more lawyers to read Rule 16 earlier and to pay attention to it. Rule 16 is "the Swiss Army knife" for active case management, and it is precisely the right context for adding provisions to deal with MDLs. Right now, judges are innovating in their MDL case-management orders, but that procedural common law is not as well disseminated as it should be amongst the people who need it the most: transferee judges and the lawyers practicing before them. If Rule 16 addresses MDL practice, judges will cite the rule in their orders, and in turn these orders will more likely be published and found in searches. Moreover, the proposed approach will not stifle the flexibility that exists in the absence of a rule. No two MDLs are the same. She noted that she wishes there were a repository of all MDL case-management orders. Getting MDLs into the rules in a very flexible way may confer at least some of that benefit.

Professor Coquillette seconded Professor Cooper's point concerning the significance of conflict-of-interest issues with lead counsel in MDLs. Questions percolate regarding American Bar Association (ABA) Model Rule 1.7. The rulemakers should always be aware that attorney conduct is subject to another regulatory system, which applies broadly because most federal courts adopt by local rule either the ABA Model Rules or the rules of attorney conduct of the State in which they sit. Professor Marcus noted the added complication that the lawyers in an MDL may

be based in many different states. Professor Coquillette observed that the ABA Model Rules do have a choice-of-law provision, but it can be challenging to apply.

An academic member expressed his appreciation for the work of the subcommittee and reporters on this. He echoed the suggestion that, in this area, less is more. With the complexity and variation of MDLs, encasing things in formal rules is probably not a good idea. The goal should be to provide transparency and give some guidance to judges who do not have prior experience in MDLs. However, it would be a mistake to try to make something concrete when it should be plastic. Thus, the Manual for Complex Litigation seems to be the natural place to locate much of the guidance concerning best practices. This member also cautioned against trying to assimilate MDLs to Rule 23 class actions. Class action practice should not be the model for MDLs, because MDLs require flexibility.

Judge Bates acknowledged that the range of MDLs is daunting and that is a reason to question whether rules that apply to all MDLs can be formulated. However, that view is in tension with the Federal Rules of Civil Procedure themselves, which are a set of rules that apply to an even wider variety of cases.

A judge member echoed the comment on having a "best practices" guide outside the rules, and stated that the Advisory Committee should resist writing rules specific to MDLs.

Another judge member applauded the effort to continue to think about this important but difficult topic. The draft Rule 16(b)(5) is a little unusual in that it is a precatory statement about what a judge should consider, but it does not give the judge any additional tools that the judge does not already have. In this sense, the sketch of Rule 16(b)(5) resembles the Manual for Complex Litigation. This member suggested that, instead, the focus should be on whether there are tools that MDL transferee judges want but do not currently have, and whether those tools are something that an amendment under the Rules Enabling Act process can provide. Judge Dow observed that although a new edition of the Manual for Complex Litigation is in process, it will be several years before it comes out. The Judicial Panel on Multidistrict Litigation, likewise, has tried to provide guidance on best practices, but has held conferences only intermittently. He noted that the Standing Committee's discussion overall evinced more support for the low-impact (Rule 16) approach than the high-impact (Rule 23.3) approach. Director Cooke reported that the FJC is in the preliminary stages of organizing a committee to assist in the preparation of a new edition of the Manual for Complex Litigation.

*Discovery Subcommittee*. Judge Dow briefly discussed the Discovery Subcommittee's work on privilege log issues. Plaintiffs' and defendants' lawyers have very different views as to whether the current rules present problems. However, there are areas of consensus—that it could be valuable to encourage the parties to discuss privilege-log issues early on, perhaps with the

judge's guidance, and that a system of rolling privilege logs is useful. These areas are the subcommittee's current focus.

Judge Dow also noted the subcommittee's work on sealing. The AO is already reviewing issues related to sealing documents. The Advisory Committee is going to hold off on further consideration of sealing issues and will monitor the progress of the broader AO project.

*Rule 9(b) Subcommittee*. Judge Dow introduced the work of the new Rule 9(b) Subcommittee (chaired by Judge Lioi). The subcommittee is considering a proposal by Dean Benjamin Spencer to amend Rule 9(b)'s provision concerning pleading conditions of the mind ("[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally"). The subcommittee has had its first meeting and will report to the Advisory Committee at its March meeting.

*Other Items*

Judge Dow briefly noted a multitude of other projects under consideration by the Advisory Committee, including proposals regarding Rules 41, 55, and 63, as well as one regarding amicus briefs in district courts and one involving the standards and procedures for granting petitions to proceed as a poor person ("in forma pauperis"). Judge Dow also noted that the Advisory Committee is awaiting public comments on the proposed new emergency rule, Rule 87.

Professor Cooper asked whether amicus practice in the district court may present very different questions from amicus practice in appellate courts. In addition to the relative rarity of amicus filings in the district court, he suggested there might be more of a risk that an amicus's participation could interfere with the parties' opportunity to shape the record and develop the issues germane to the litigation in the district court. The discussion during the Appellate Rules Committee's presentation left Professor Cooper concerned about drafting a Civil Rule to address amicus issues.

Judge Bates agreed that amicus filings in the district court could present different issues. He doubted whether there would be many instances where anything in an amicus brief could help to develop the record of the case. For example, in an administrative review case, the record is already set by what was before the administrative agency. And in most other civil cases, the factual record will be developed by the parties through discovery. On the other hand, amicus filings could help to frame or identify issues.

A judge member noted that he too was skeptical about addressing amicus filings in the Civil Rules. This seems to be a solution in search of a problem. If an organization wants to file an amicus brief, it requests leave to file the brief, and the judge decides whether to grant leave and how to handle ancillary issues such as affording the parties an opportunity to respond. Especially given that amicus filings in the district courts are relatively rare, why should the Civil Rules

address this topic when they do not address the general topic of briefs? The judge member also noted that having a rule regarding amicus briefs might encourage people to file more of them.

Judge Bates echoed the judge member's skepticism. Amicus briefs in district courts are almost all filed in just a few courts nationwide, including the District of Columbia (which has a local rule) and the Southern District of New York. This may be something where it is best to leave the practice to local rules in the few courts that see most of the amicus briefs.

Judge Dow stated that he agreed with the comments of the judge member and of Judge Bates. He noted that if a person has the resources to draft an amicus brief, it will have the resources to figure out how to request leave to file it.

A practitioner member stated that amicus briefs are being filed with increasing frequency in MDLs. This is not to say that there should be a Civil Rule on point, but it may be useful to keep in mind that the Appellate Rules' treatment of amicus briefs can be a useful resource for district judges. This member stated that amicus filings in the district court may sometimes attempt to contribute to the record by requesting judicial notice of particular matters; and amicus filings might sometimes add to the complexity in MDLs that are already complex enough. However, trying to craft a Civil Rule to address such issues may be borrowing trouble.

Professor Hartnett returned to the concern (that a member had raised during the discussion of the Appellate Rules Committee's report) that an amicus filing might be made in the district court with the goal of triggering the judge's recusal. Appellate Rule 29 allows the court of appeals to disallow or strike an amicus brief when that brief would require a judge's disqualification. Amicus filings designed to trigger recusal—if they became a common practice—would be more dangerous at the district court level when the case is before a single judge.

Another practitioner member stated that it would be a big mistake to have a national rule governing amicus briefs in district courts. Amicus briefs can be taken for what they are worth, and judges can either read them or not read them. To regulate this on a national basis just does not make sense.

Turning to matters covered in the Civil Rules Committee's written report, Judge Bates noted the Civil Rules Committee's decision not to proceed with a proposal to amend Rule 9 to set a pleading standard for certain claims under the Americans with Disabilities Act. He requested that the Civil Rules Committee coordinate with the Rules Committee Staff at the AO to communicate this decision to Congress. The proposal in question, he noted, initially came from members of the Senate.

## REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Kethledge and Professors Beale and King presented the report of the Advisory Committee on Criminal Rules, which met in Washington, DC on November 4, 2021. The Advisory Committee presented several information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 258.

*Information Items*

*Grand Jury Secrecy Under Rule 6(e)*. Judge Kethledge described the Advisory Committee's decision not to proceed with a proposed amendment to Rule 6 regarding an exception to grand jury secrecy for materials of exceptional historical or public interest. The Advisory Committee had received multiple proposals for such an exception. Both the Rule 6 Subcommittee (chaired by Judge Michael Garcia) and the full Advisory Committee extensively considered the proposals. The subcommittee held an all-day miniconference where it heard a wide range of perspectives, including from former prosecutors, defense attorneys, the general counsel for the National Archives, a historian, Public Citizen Litigation Group, and the Reporters Committee for Freedom of the Press. The subcommittee thereafter met by phone four times. It had two main tasks. First, it tried to draft the best proposed amendment. Second, it had to decide whether to recommend to the full Advisory Committee whether to proceed with a proposed amendment. The draft rule that the subcommittee worked out would have allowed disclosure only 40 years after a case was closed, and only if the grand jury materials had exceptional historical importance. However, a majority of the subcommittee decided not to recommend that the full Advisory Committee proceed with an amendment.

At its fall 2022 meeting, the Advisory Committee discussed the matter fully and voted 9-3 not to proceed with an amendment. Judge Kethledge noted that the Advisory Committee benefited from a wealth and broad range of relevant experience on the part of its members. The Advisory Committee understood the proposal's appeal and found it to present a close question. The members identified "back end" concerns – that is to say, possible risks that could arise at the time of the disclosure of the grand jury materials – and noted that those concerns could be addressed (although not fully avoided) by employing safeguards. However, Advisory Committee members were concerned that on the "front end" – that is, when a grand jury proceeding is contemplated or ongoing – the potential for later disclosure pursuant to the proposed exception would complicate conversations with witnesses and jeopardize the witnesses' cooperation. A number of members also noted that this exception would be different in kind from those that are currently in the rule. The other exceptions relate to the use of grand jury materials for other criminal prosecutions or national security interests. Historical interest would be an altogether different kind of exception. There was the sense that a historical significance exception would signal a relaxation of grand jury secrecy and could lead to unintended consequences. The grand jury is an ancient institution that advances its purposes in ways that we are often unaware of; this heightens the risk of unintended consequences from a rule amendment. The DOJ has consistently supported a historic significance exception, but all eight former federal prosecutors on the Advisory Committee opposed having an amendment along these lines. In sum, the Advisory Committee voted to not make an amendment, subject to input from the Standing Committee.

Judge Bates stated that he thought this was a carefully considered decision by the Advisory Committee.

A practitioner member expressed agreement with the recommendation not to proceed. This is a hard issue, and he recognizes the appeal of having an exception, but as a former federal prosecutor who is now on the other side of the bar, he does not feel comfortable having an

exception that only touches certain cases, namely those of exceptional historical interest, and therefore treats some grand jury participants differently than others.

A judge member praised the Advisory Committee's report for its thoroughness. This member asked how categorically the Advisory Committee had rejected the possibility of disclosures of very old materials of great public interest. Did the Advisory Committee believe that, had there been a grand jury investigation into the assassination of President Lincoln, disclosing those grand jury materials now would create "front end" problems with the cooperation of current-day witnesses? Judge Kethledge stated that it was the sense of the Advisory Committee that it should not add a new exception to Rule 6, even for material of great historical interest. One can think of examples where one would be glad for materials of such strong historical interest to be disclosed, but that does not mean that there should be a rule permitting such disclosure. As an analogy, take President Lincoln suspending habeas corpus during the Civil War. Many people would say they are glad that he did so because things may have turned out differently if he had not done so. Yet at the same time, most people would not want a general rule allowing the President to suspend habeas corpus when he sees fit.

Additionally, Judge Kethledge noted that although the Advisory Committee decided not to recommend a rule amendment, that does not exclude the possibility of common-law development of an exception. There is a circuit split as to whether federal courts have inherent authority to authorize disclosure of grand jury materials. Justice Breyer thought that the Advisory Committee should resolve the circuit split via rulemaking. However, Judge Kethledge stated his view, which he believed the Advisory Committee shares, that the underlying question of inherent authority was outside the purview of Rules Enabling Act rulemaking. If the Supreme Court resolves the circuit split in favor of recognizing inherent authority to authorize disclosure, the courts will be free to take a case-by-case approach.

Professor Beale added that a number of Advisory Committee members had noted that they felt comfortable with the state of the law prior to *McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 597 (2020), and *Pitch v. United States*, 953 F.3d 1226 (11th Cir. 2020) (en banc), *cert. denied*, 141 S. Ct. 624 (2020), and probably would have concluded (as the Advisory Committee had in 2012) that there was not a problem with courts very occasionally authorizing disclosure. Yet writing it out in a rule is fundamentally different: It would change the calculus and change the context under which the grand jury would operate going forward. It is unclear how changing that calculus and context would affect the grand jury as an institution.

A judge member said he thought that the Advisory Committee should consider a rule. He recalled from the Advisory Committee's discussions a shared sense that it is actually a good thing that grand jury materials have been released in certain cases of exceptional historical significance. The problem under the current regime is the circuit-to-circuit variation on whether disclosure is ever possible. Additionally, by not resolving the issue the Advisory Committee is just kicking the can down the road. If the Supreme Court rules that courts lack inherent authority to authorize disclosures not provided for in the Rule, then there will be renewed pressure for a rule amendment. If the Supreme Court instead rules that courts do have such inherent authority, there will still be demands for a rule amendment so as to provide a common approach to disclosure decisions. Therefore, either way, the rulemakers will end up having to take up this issue again.

The same member also stated he was less persuaded by the argument that an exception for materials of exceptional historical interest will dissuade witnesses from testifying. As it is, there are exceptions to grand jury secrecy, including—in some circuits—a multifactor test for whether to release grand-jury materials to the defendant once the defendant has been indicted. Thus, prosecutors already are unable to tell witnesses that there are no circumstances under which their testimony could become public. Furthermore, the comment that certain organizations, such as Al Qaeda or gangs, have long memories is a red herring: These are not the types of cases of exceptional historical interest that would fit within the contemplated exception. The member closed, however, by thanking the Advisory Committee for its thoughtful consideration of the issue.

Professor Hartnett advocated precision in the use of the phrase "inherent authority." It can mean two different things: first, the court's authority to act in the absence of authorization by a statute or rule; and second, the court's authority to act despite a statute or rule that purports to prohibit it from acting. The latter type of inherent authority is much narrower and its scope presents a constitutional question. Judge Kethledge acknowledged this distinction, but noted that the question addressed by the Advisory Committee was only whether to adopt a provision of positive law, in the Criminal Rules, recognizing the exception in question.

*Clarification of Court's Authority to Release Redacted Versions of Grand Jury-Related Judicial Opinions.* Judge Kethledge introduced this information item, which stems from a suggestion by Chief Judge Howell and former Chief Judge Lamberth of the District of Columbia District Court. The suggestion requested that Rule 6(e) be amended to clarify the court's authority to issue opinions that discuss and potentially reveal matters before the grand jury. Both the subcommittee and entire Advisory Committee considered the issue. The Advisory Committee's conclusion was that the issue is not yet ripe. There has not been any indication so far that redaction is inadequate as a means to avoid contentions that the release of a judicial opinion somehow violates Rule 6. Absent any recent contentions that the release of a judicial opinion violated Rule 6, the Advisory Committee did not think it should act on the suggestion at this time.

*Rule 49.1 and CACM Guidance Referenced in the Committee Note.* Judge Kethledge introduced this information item, which arises from a suggestion by Judge Furman. Judge Furman suggested amending Rule 49.1 and its committee note to clarify that courts cannot allow parties to file under seal documents to which the public has either a common law or First Amendment right of access. The Advisory Committee appointed a subcommittee to review the issue. Judge Kethledge noted that in his experience, there does seem to be a problem of parties filing documents under seal that should not be so filed.

Judge Furman clarified that the issue is more with the committee note than the text of the rule. The committee note specifies that a financial affidavit in connection with a request for representation under the Criminal Justice Act should be filed under seal. This is in tension with the approach of most courts, which have found that these affidavits are judicial documents and therefore subject to a public right of access under the Constitution. However, at least one court in reliance on the committee note has allowed defendants to file CJA-related financial affidavits under seal.

## OTHER COMMITTEE BUSINESS

*Legislative Report.* The Rules Law Clerk delivered a legislative report. The chart in the agenda book at page 332 summarized most of the relevant information, but an additional bill had been introduced since the finalization of the agenda book. The AMICUS Act, which had been introduced in the previous Congress, was reintroduced in December, albeit with some differences compared to the previous version. As relevant to the Standing Committee, the new bill would apply to any potential amicus in the Courts of Appeals or Supreme Court, regardless of how many briefs it filed in a given year. The Rules Law Clerk also specifically noted the Protecting Our Democracy Act, which had passed the House in December 2021 and now awaits action in the Senate. That bill would prohibit any interpretation of Criminal Rule 6(e) that would prohibit disclosure to Congress of grand jury materials related to the prosecution of certain individuals that the President thereafter pardons. Additionally, the bill would direct the Judicial Conference to promulgate under the Rules Enabling Act rules to facilitate the expeditious handling of civil suits to enforce Congressional subpoenas.

*Judiciary Strategic Planning.* Judge Bates addressed the Judiciary Strategic Planning item, which appeared in the agenda book at page 339. The Judicial Conference has asked all its committees to provide any feedback on lessons learned over the past two years that may assist it in planning for future pandemics, natural disasters, and other crises that threaten to significantly impact the work of the courts.

Judge Bates asked the Standing Committee whether there was anything the members thought the Standing Committee should focus on in responding to the Judicial Conference. No members had any comments or questions regarding this item.

Judge Bates then asked the Standing Committee members whether there was any concern with delegating to him, Professor Struve, and the Rules Committee Staff the matter of communicating with the Judicial Conference. With no objections raised, Judge Bates said that he would consider that the approval of the Standing Committee.

*Judicial Conference Committee Self-Evaluation Questionnaire.* Every five years, the Judicial Conference requires all its committees to complete a self-evaluation. Judge Bates stated that he had circulated to the Standing Committee members a draft of that response.

The main item to address in the current draft is the modest adjustments to the jurisdictional statement for the Standing Committee and the Advisory Committees. First, the draft deletes the reference to receiving rule amendment suggestions "from bench and bar" because the Advisory Committees receive suggestions from others as well. Second, the draft clarifies that the Standing Committee, rather than the Advisory Committees, approves rules for publication for public comment. Third, the draft's descriptions of the duties of the Standing Committee and Advisory Committees have been revised to reflect the discussion of those duties in the Judicial Conference's procedures governing the rulemaking process.

Judge Bates asked the Standing Committee whether there were any comments regarding the draft response to the Judicial Conference's committee self-evaluation questionnaire. There were none.

Judge Bates requested that the Standing Committee members delegate to him, Professor Struve, the Advisory Committee chairs, and the Rules Committee Staff the matter of responding to the self-evaluation questionnaire. Judge Bates noted that the Advisory Committee chairs had already weighed in on the draft response. With no objections raised, Judge Bates said that he would consider that the approval of the Standing Committee.

*Update on Judiciary's Response to COVID-19 Pandemic.* Julie Wilson provided an update on the judiciary's response to the COVID-19 pandemic. She observed that the federal judge members of the Standing Committee had access to a number of resources on this topic via the "JNet" (the federal judiciary's intranet website). There is a COVID-19 task force studying a wide range of items relevant to the judiciary's response to the pandemic. Its current focus is on issues related to returning to the workplace. The task force has a virtual judiciary operations subgroup ("VJOS") that includes representatives from the courts, federal defenders' offices, and DOJ, and it is studying the use of technology for remote court operations. Ms. Wilson noted that she has highlighted for the VJOS participants the relevant Criminal Rules concerning remote versus in-person participation, and she predicted that suggestions on this topic are likely to reach the rulemakers in the future.

## CONCLUDING REMARKS

Before adjourning the meeting, Judge Bates thanked the Standing Committee members and other attendees for their patience and attention. The Standing Committee will next meet on June 7, 2022. Judge Bates expressed the hope that the meeting would take place in person in Washington, DC.

# TAB 2B

# 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, 2022. Due to the Coronavirus Disease 2019 (COVID-19) pandemic, the meeting was held by videoconference. All members participated.

Representing the advisory committees were Judge Jay S. Bybee, Chair, and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Dennis Dow, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura B. Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge Robert M. Dow, Jr., Chair, Professor Edward H. Cooper, Reporter, and Professor Richard Marcus, Associate Reporter, Advisory Committee on Civil Rules; Judge Raymond M. Kethledge, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, Advisory Committee on Criminal Rules; and Judge Patrick J. Schiltz, Chair, and Professor Daniel J. Capra, Reporter, Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; Bridget Healy, Scott Myers, and Julie Wilson, Rules Committee Staff Counsel; Burton DeWitt, Law Clerk to the Standing Committee; John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, Federal

Judicial Center (FJC); and Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, and Andrew Goldsmith, National Coordinator of Criminal Discovery Initiatives, Department of Justice (DOJ).

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 three items of coordinated work among the Appellate, Bankruptcy, Civil, and Criminal Rules Committees: (1) the proposed emergency rules developed in response to the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) and published for public comment in August 2021; (2) consideration of suggestions to allow electronic filing by pro se litigants; and (3) consideration of amendments to list Juneteenth National Independence Day in the definition of "legal holiday" in the federal rules. Finally, the Committee was briefed on the judiciary's ongoing response to the COVID-19 pandemic.

## FEDERAL RULES OF APPELLATE PROCEDURE

### *Rules Approved for Publication and Comment*

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 32, 35, and 40, and the Appendix of Length Limits, with a recommendation that they be published for public comment in August 2022. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 32 (Form of Briefs, Appendices, and Other Papers)

The proposed amendment to Rule 32 is a conforming amendment that reflects the proposed transfer of Rule 35's contents into a restructured Rule 40. In Rule 32(g)'s list of papers that require a certificate of compliance, the amendment would replace the reference to papers

submitted under Rules 35(b)(2)(A) or 40(b)(1) with a reference to papers submitted under Rule 40(d)(3)(A).

Rule 35 (En Banc Determination)

The proposed amendment to Rule 35 would transfer its contents to Rule 40 in an effort to provide clear guidance in one rule that will cover en banc hearing and rehearing and panel rehearing.

Rule 40 (Petition for Panel Rehearing)

The proposed amendment to Rule 40 would expand that rule by incorporating into it the provisions of current Rule 35. The proposed amended Rule 40 would govern all petitions for rehearing as well as the rare initial hearing en banc.

Proposed amended Rule 40(a) would provide that a party may petition for panel rehearing, rehearing en banc, or both. It sets a default rule that a party seeking both types of rehearing must file the petitions as a single document. Proposed amended Rule 40(b) would set forth the required content for each kind of petition for rehearing; the requirements are drawn from existing Rule 35(b)(1) and existing Rule 40(a)(2).

Proposed amended Rule 40(c)—which is drawn from existing Rules 35(a) and (f)—would describe the reasons and voting protocols for ordering rehearing en banc. Rule 40(c) makes explicit that a court may act sua sponte to order rehearing en banc; this provision also reiterates that rehearing en banc is not favored. Proposed amended Rule 40(d)—drawn from existing Rules 35(b), (c), (d), and existing Rules 40(a), (b), and (d)—would bring together in one place uniform provisions governing matters such as the timing, form, and length of the petition. A new feature in Rule 40(d) would provide that a panel's later amendment of its decision restarts the clock for seeking rehearing.

Proposed Rule 40(e)—which expands and clarifies current Rule 40(a)(4)—addresses the court's options after granting rehearing. Proposed Rule 40(f) is a new provision addressing a panel's authority to act after the filing of a petition for rehearing en banc. Proposed Rule 40(g) carries over (from existing Rule 35) provisions concerning initial hearing en banc.

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

The proposed amendments are conforming amendments that would reflect the relocation of length limits for rehearing petitions from Rules 35(b)(2) and 40(b) to proposed amended Rule 40(d)(3).

***Information Items***

The Advisory Committee met by videoconference on October 7, 2021. In addition to the matters discussed above, agenda items included the consideration of two suggestions related to the filing of amicus briefs, several suggestions regarding in forma pauperis issues, including potential changes to Appellate Form 4 (Affidavit Accompanying Motion for Permission to Appeal in Forma Pauperis), and a new suggestion regarding costs on appeal.

Amicus Briefs

The Advisory Committee reported that, in response to a suggestion from Senator Sheldon Whitehouse and Representative Henry Johnson, Jr., it is continuing its consideration of whether additional disclosures should be required for amicus briefs. Proposed legislation regarding disclosures in amicus briefs has been filed in the Senate and House, most recently in December 2021.

The Advisory Committee reported that the question of amicus disclosures involves important and complicated issues. One issue is that insufficient amicus disclosure requirements can enable parties to evade the page limits on briefs or permit an amicus to file a brief that appears independent of the parties but is not. Another issue 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. On the other hand, when considering any disclosure requirement, it is necessary to consider the First Amendment rights of those who do not wish to disclose themselves.

The Advisory Committee sought the Committee's feedback on these issues. In doing so, the Advisory Committee highlighted the distinction between disclosure regarding an amicus's relationship to a party and disclosure regarding an amicus's relationship to a nonparty. The Advisory Committee also noted that 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. Various members of the Committee voiced their perspectives on these issues, and expressed appreciation for the Advisory Committee's ongoing work on these topics.

The Advisory Committee also has before it a separate suggestion regarding amicus briefs and Rule 29. 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 suggestion proposes adopting standards for when judicial disqualification would require a brief to be stricken or its filing prohibited. This suggestion is under consideration by the Advisory Committee.

Appellate Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis)

The Advisory Committee is continuing to consider suggestions to regularize the criteria for granting in forma pauperis status, including possible revisions to Form 4 of the Federal Rules of Appellate Procedure. It is gathering information on how courts handle such applications, including what standards are applied and how Appellate Form 4 is used.

Costs on Appeal

In a recent decision, the Supreme Court stated that the current rules could specify more clearly the procedure that a party should follow to bring arguments about costs to the court of appeals. *See City of San Antonio v. Hotels.com L. P.*, 141 S. Ct. 1628 (2021). Accordingly, the Advisory Committee created a subcommittee to explore the issue.

## FEDERAL RULES OF BANKRUPTCY PROCEDURE

### *Rule Approved for Publication and Comment*

The Advisory Committee on Bankruptcy Rules submitted a proposed amendment to Rule 7001 (Types of Adversary Proceedings) with a recommendation that it be published for public comment in August 2022. The Standing Committee unanimously approved the Advisory Committee's recommendation.

The proposed amendment to Rule 7001 addresses a concern raised by Justice Sotomayor in *City of Chicago v. Fulton,* 141 S. Ct. 585 (2021). The *Fulton* Court held that a creditor's continued retention of estate property that it acquired prior to bankruptcy does not violate the automatic stay under § 362(a)(3). In so ruling, the Court found that a contrary reading of § 362(a)(3) would render largely superfluous § 542(a)'s provisions for the turnover of estate property from third parties. In a concurring opinion, Justice Sotomayor noted that under current procedures turnover proceedings can be very slow because, under Rule 7001(1), they must be pursued by an adversary proceeding. Addressing the need of chapter 13 debtors, such as those in *Fulton,* to quickly regain possession of a seized car in order to work and earn money to fund a plan, she stated that the Advisory Committee on Rules of Bankruptcy Procedure should consider rule amendments that would ensure prompt resolution of debtors' requests for turnover under § 542(a). Post-*Fulton*, two suggestions were submitted that echo Justice Sotomayor's call for amendments; these suggestions advocate that the rules be amended to allow all turnover

proceedings to be brought by a quicker motion-based practice rather than by adversary proceeding.

Members of the Advisory Committee generally agreed that debtors should not have to wait an average of a hundred days to get a car needed for a work commute, and they supported a motion-based turnover process in that and similar circumstances involving tangible personal property. There was less support, however, for broader rule changes that would allow all turnover proceedings to occur by motion. The Advisory Committee ultimately recommended an amendment to Rule 7001 that would exempt, from the list of adversary proceedings, "a proceeding by an individual debtor to recover tangible personal property under § 542(a)."

***Information Items***

The Advisory Committee met by videoconference on September 14, 2021. In addition to the recommendation discussed above, the Advisory Committee considered possible rule amendments in response to a suggestion from the Committee on Court Administration and Case Management (CACM Committee) regarding the use of electronic signatures in bankruptcy cases by individuals who do not have a CM/ECF account and discussed the progress of the Restyling Subcommittee.

Electronic Signatures

The Bankruptcy Rules now generally require electronic filing by represented entities and authorize local rules to allow electronic filing by unrepresented individuals. Documents that are filed electronically and must be signed by debtors or others without CM/ECF privileges will of necessity bear electronic signatures. They may be in the form of typed signatures, /s/, or images of written signatures, but none is currently deemed to constitute the person's signature for rules purposes. The issue the Advisory Committee has been considering, therefore, is whether the rules should be amended to allow the electronic signature of someone without a CM/ECF

account to constitute a valid signature and, if so, under what circumstances. The Advisory Committee's Technology Subcommittee is studying this issue.

Bankruptcy Rules Restyling Update

The 3000, 4000, 5000, and 6000 series of the restyled Bankruptcy Rules have been published for comment. The Advisory Committee will be reviewing the comments at its spring 2022 meeting.

In fall 2021, the Restyling Subcommittee completed its initial review of the 7000 and 8000 series and began its initial review of the 9000 series. The subcommittee will continue to meet until the subcommittee and style consultants have agreed on draft amendments. The subcommittee expects to present the 7000, 8000, and 9000 series of restyled rules—the final group of the restyled bankruptcy rules—to the Advisory Committee at its spring 2022 meeting with a request that the Advisory Committee approve those proposed amendments and submit them to the Standing Committee for approval for publication.

## FEDERAL RULES OF CIVIL PROCEDURE

### *Rule Approved for Publication and Comment*

The Advisory Committee on Civil Rules submitted a proposed amendment to Rule 12 (Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing) with a request that it be published for public comment in August 2022. The Standing Committee unanimously approved the Advisory Committee's request.

Rule 12(a) prescribes the time to serve responsive pleadings. Paragraph (1) provides the general response time, but recognizes that a federal statute setting a different time governs. In contrast, neither paragraph (2) (which sets a 60-day response time for the United States, its agencies, and its officers or employees sued in an official capacity) nor paragraph (3) (which sets

a 60-day response time for United States officers or employees sued in an individual capacity for acts or omissions in connection with federal duties) recognizes the possibility of conflicting statutory response times.

The current language is problematic for several reasons. First, while it is not clear whether any statutes inconsistent with paragraph (3) exist, there are statutes setting shorter times than the 60 days provided by paragraph (2); one example is the Freedom of Information Act. Second, the current language fails to reflect the Advisory Committee's intent to defer to different response times set by statute. Third, the current language could be interpreted as a deliberate choice by the Advisory Committee that the response times set in paragraphs (2) and (3) supersede inconsistent statutory provisions.

The Advisory Committee determined that an amendment to Rule 12(a) is necessary to explicitly extend to paragraphs (2) and (3) the recognition now set forth in paragraph (1), namely, that a different response time set by statute supersedes the response times set by those rules.

***Information Items***

The Advisory Committee met by videoconference on October 5, 2021. In addition to the action item discussed above, the Advisory Committee considered reports on the work of the Multidistrict Litigation Subcommittee and the Discovery Subcommittee, and was advised of the formation of an additional subcommittee that will consider a proposal to amend Rule 9(b). The Advisory Committee also retained on its agenda for consideration a suggestion for a rule establishing uniform standards and procedures for filing amicus briefs in the district courts, suggestions that uniform in forma pauperis standards and procedures be incorporated into the Civil Rules, and suggestions to amend Rules 41, 55, and 63.

Multidistrict Litigation Subcommittee

Since November 2017, a subcommittee has been considering suggestions that specific rules be developed for multidistrict litigation (MDL) proceedings. Over time, the subcommittee has narrowed the list of issues on which its work is focused to two, namely (1) efforts to facilitate early attention to "vetting" (through the use of "plaintiff fact sheets" or "census"), and (2) the appointment and compensation of leadership counsel on the plaintiff side. To assist in its work, the subcommittee prepared a sketch of a possible amendment to Rule 16 (Pretrial Conferences; Scheduling; Management) that would apply to MDL proceedings. The amendment sketch encourages the court to enter an order (1) directing the parties to exchange information about their claims and defenses at an early point in the proceedings, (2) addressing the appointment of leadership counsel, and (3) addressing the methods for compensating leadership counsel. The subcommittee drafted a sketch of a corollary amendment to Rule 26(f) (Conference of the Parties; Planning for Discovery) that would require that the discovery plan include the parties' views on whether they should be directed to exchange information about their claims and defenses at an early point in the proceedings. For now, the sketches of possible amendments are only meant to prompt further discussion and information gathering. The subcommittee has yet to determine whether to recommend amendments to the Civil Rules.

Discovery Subcommittee

In 2020, the Discovery Subcommittee was reactivated to study two principal issues. First, the Advisory Committee has received suggestions that it revisit Rule 26(b)(5)(A), the rule that requires that parties withholding materials on grounds of privilege or work product protection provide information about the materials withheld. Though the rule does not say so and the accompanying committee note suggests that a flexible attitude should be adopted, the suggestions state that many or most courts have treated the rule as requiring a document-by-

document log of all withheld materials. One suggestion is that the rule be amended to make it clearer that such a listing is not required, and another is that the rule be amended to provide that a listing by "categories" is sufficient.

As a starting point, the subcommittee determined that it needed to gather information about experience under the current rule. In June 2021, the subcommittee invited the bench and bar to comment on problems encountered under the current rule, as well as several potential ideas for rule changes. The subcommittee received more than 100 comments. In addition, subcommittee members have participated in a number of virtual conferences with both plaintiff and defense attorneys.

While the subcommittee has not yet determined whether to recommend rule changes, it has begun to focus on the Rule 26(f) discovery plan and the Rule 16(b) scheduling conference as places where it might make the most sense for the rules to address the method that will be used to comply with Rule 26(b)(5)(A).

The second issue before the subcommittee is a suggestion for a new rule setting forth a set of requirements for motions seeking permission to seal materials filed in court. In its initial consideration of the suggestion, the subcommittee learned that the AO's Court Services Office is undertaking a project to identify the operational issues related to the management of sealed court records. The goals of the project will be to identify guidance, policy, best practices, and other tools to help courts ensure the timely unsealing of court documents as specified by the relevant court order or other applicable law. Input on this new project was sought from the Appellate, District, and Bankruptcy Clerks Advisory Groups and the AO's newly formed Court Administration and Operations Advisory Council (CAOAC). In light of this effort, the subcommittee determined that further consideration of the suggestion for a new rule should be deferred to await the result of the AO's work.

Amicus Briefs

The Advisory Committee has received a suggestion urging adoption of a rule establishing uniform standards and procedures for filing amicus briefs in the district courts. The proposal is accompanied by a draft rule adapted from a local rule in the District Court for the District of Columbia, and informed by Appellate Rule 29 (Brief of an Amicus Curiae) and the Supreme Court Rules. The Advisory Committee determined that the suggestion should be retained on its study agenda. The first task will be to determine how frequently amicus briefs are filed in district courts outside the District Court for the District of Columbia.

Uniform In Forma Pauperis Standards and Procedures

The Advisory Committee has on its study agenda suggestions to develop uniform in forma pauperis standards and procedures. The Advisory Committee believes that serious problems exist with the administration of 28 U.S.C. § 1915, which allows a person to proceed without prepayment of fees upon submitting an affidavit that states "all assets" the person possesses and states that the person is unable to pay such fees or give security therefor. For example, the procedures for gathering information about an applicant's assets vary widely. Many districts use one of two AO Forms, but many others do not. Another problem is the forms themselves, which have been criticized as ambiguous, as seeking information that is not relevant to the determination, and as invading the privacy of nonparties. Further, the standards for granting leave to proceed in forma pauperis vary widely, not only from court to court but often within a single court as well.

The Advisory Committee retained the topic on its study agenda because of its obvious importance and because it is well-timed to the ongoing work of the Appellate Rules Committee (discussed above) relating to criteria for granting in forma pauperis status. There is clear potential for improvement, but it is not yet clear whether that improvement can be effectuated

through the Rules Enabling Act process.

Rule 41(a) (Dismissal of Actions – Voluntary Dismissal)

Rule 41(a) governs voluntary dismissals without court order. The Advisory Committee is considering a suggestion that Rule 41(a) be amended to make clear whether it does or does not permit dismissal of some, but not all claims in an action. There exists a division of decisions on the question whether Rule 41(a)(1)(A)(i) authorizes dismissal by notice without court order and without prejudice of some claims but not others. That provision states, in relevant part, that "the plaintiff may dismiss an action without a court order by filing … a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment . . . ." The preponderant view is that the rule authorizes dismissal only of all claims and that anything less is not dismissal of "an action"; however, some courts allow dismissal as to some claims while others remain. The Advisory Committee will consider these and other issues relating to Rule 41, including the practice of allowing dismissal of all claims against a particular defendant even though the rest of the action remains.

Rule 55 (Default; Default Judgment)

Rule 55(a) directs the circumstances under which a clerk "must" enter default, and subdivision (b) directs that the clerk "must" enter default judgment in narrowly defined circumstances. The Advisory Committee has learned that at least some courts restrict the clerk's role in entering defaults short of the scope of subdivision (a), and many courts restrict the clerk's role in entering default judgment under subdivision (b). The Advisory Committee has asked the FJC to survey all of the district courts to better ascertain actual practices under Rule 55. The information gathered will guide the determination whether to pursue an amendment to Rule 55.

## FEDERAL RULES OF CRIMINAL PROCEDURE

### *Information Items*

The Advisory Committee on Criminal Rules met in person (with some participants joining by videoconference) on November 4, 2021. A majority of the meeting was devoted to consideration of the final report of the Rule 6 Subcommittee. The Advisory Committee also decided to form a subcommittee to consider a suggestion to amend Rule 49.1.

Rule 6 (The Grand Jury)

Rule 6(e) (Recording and Disclosing the Proceedings). The Advisory Committee last considered whether to amend Rule 6(e) to allow disclosure of grand jury materials of exceptional historical importance in 2012, when it considered a suggestion from the DOJ to recommend such an amendment. At that time, the Advisory Committee concluded that an amendment would be "premature" because courts were reasonably resolving applications "by reference to their inherent authority" to allow disclosure of matters not specified in the exceptions to grand jury secrecy listed under Rule 6(e)(3). Since then, *McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 597 (2020), and *Pitch v. United States*, 953 F.3d 1226 (11th Cir. 2020) (en banc), *cert. denied*, 141 S. Ct. 624 (2020), overruled prior circuit precedents and held that the district courts have no authority to allow the disclosure of grand jury matters not included in the exceptions stated in Rule 6(e)(3), thereby deepening a split among the courts of appeals with regard to the district courts' inherent authority. Moreover, in a statement respecting the denial of certiorari in *McKeever*, Justice Breyer pointed out the circuit split and stated that "[w]hether district courts retain authority to release grand jury material outside those situations specifically enumerated in the Rules, or in situations like this, is an important question. It is one I think the Rules Committee both can and should revisit." *McKeever*, 140 S. Ct. at 598 (statement of

Breyer, J.).

In 2020 and 2021, the Advisory Committee received suggestions seeking an amendment to Rule 6(e) that would address the district courts' authority to disclose grand jury materials because of their exceptional historical or public interest, as well as a suggestion seeking a broader exception that would ground a new exception in the public interest or inherent judicial authority. The latter urged an amendment "to make clear that district courts may exercise their inherent supervisory authority, in appropriate circumstances, to permit the disclosure of grand jury materials to the public." In contrast, over the past three administrations (including the suggestion the Advisory Committee considered in 2012), the DOJ has sought an amendment that would abrogate or disavow inherent authority to order disclosures not specified in the rule. The DOJ's most recent submission advocates that "any amendment to Rule 6 should contain an explicit statement that the list of exceptions to grand jury secrecy contained in the Rule is exclusive."

After the Rule 6 Subcommittee was formed in May 2020 in reaction to *McKeever* and *Pitch*, two district judges suggested an amendment that would explicitly permit courts to issue judicial opinions when even with redaction there is potential for disclosure of matters occurring before the grand jury.

As reported to the Conference in September 2021, the subcommittee's consideration of the proposals included convening a day-long virtual miniconference in April 2021 at which the subcommittee obtained a wide range of perspectives based on first-hand experience. Participants included academics, journalists, private practitioners (including some who had previously served as federal prosecutors but also represented private parties affected by grand jury proceedings), representatives from the DOJ, and the general counsel of the National Archives and Records Administration. In addition, the subcommittee held four meetings over the summer of 2021.

Part of its work included preparing a discussion draft of an amendment that defined a limited exception to grand jury secrecy for historical records meant to balance the interest in disclosure against the vital interests protected by grand jury secrecy. The draft proposal would have (1) delayed disclosure for at least 40 years, (2) required the court to undertake a fact-intensive inquiry and to determine whether the interest in disclosure outweighed the public interest in retaining secrecy, and (3) provided for notice to the government and the opportunity for a hearing at which the government would be responsible for advising the court of any impact the disclosure might have on living persons. In the end, a majority of the subcommittee recommended that the Advisory Committee not amend Rule 6(e).

After careful consideration and a lengthy discussion, a majority of the Advisory Committee agreed with the recommendation of the subcommittee and concluded that even the most carefully drafted amendment would pose too great a danger to the integrity and effectiveness of the grand jury as an institution, and that the interests favoring more disclosure are outweighed by the risk of undermining an institution critical to the criminal justice system.

Further, a majority of members expressed concern about the increased risk to witnesses and their families that would result from even a narrowly tailored amendment such as the discussion draft prepared by the subcommittee. A majority of the members concluded that the dangers of expanded disclosure would remain, and that the addition of the exception would be a significant change that would both complicate the preparation and advising of witnesses and reduce the likelihood that witnesses would testify fully and frankly. Moreover, as drafted, the proposed exception was qualitatively different from the existing exceptions to grand jury secrecy, which are intended to facilitate the resolution of other criminal and civil cases or the investigation of terrorism.

Consideration of these suggestions by both the subcommittee and the full Advisory Committee revealed that this is a close issue. Although many members recognized that there are rare cases of exceptional historical interest where disclosure of grand jury materials may be warranted, the predominant feeling among the members was that no amendment could fully replicate current judicial practice in these cases. Moreover, members felt that, even with strict limits, an amendment expressly allowing disclosure of these materials would tend to increase both the number of requests and actual disclosures, thereby undermining the critical principle of grand jury secrecy.

Members also discussed a broader exception for disclosure in the public interest. The subcommittee had recommended against such a broad exception, and members generally agreed that a broader and less precise exception would be an even greater threat to the grand jury.

Finally, the Advisory Committee chose not to address the question whether federal courts have inherent authority to order disclosure of grand jury materials. In the Advisory Committee's view, this question concerns the scope of "[t]he judicial power" under Article III. That is a constitutional question, not a procedural one, and thus lies beyond the Advisory Committee's authority under the Rules Enabling Act.

The Advisory Committee further declined the suggestion that subdivision (e) be amended to authorize courts "to release judicial decisions issued in grand jury matters" when, "even in redacted form," those decisions reveal "matters occurring before the grand jury." The Advisory Committee agreed with the subcommittee's determination that the means currently available to judges—particularly redaction—were generally adequate to allow for sufficient disclosure while complying with Rule 6(e).

Rule 6(c) (Foreperson and Deputy Foreperson). Also before the Advisory Committee was a suggestion to amend Rule 6(c) to expressly authorize forepersons to grant individual grand

jurors temporary excuses to attend to personal matters. Forepersons have this authority in some, but not all, districts. The Advisory Committee agreed with the recommendation of the subcommittee that at present there is no reason to disrupt varying local practices with a uniform national rule.

Rule 49.1 (Privacy Protections for Filings Made with the Court)

Rule 49.1 was adopted in 2007, as part of a cross-committee effort to respond to the E-Government Act of 2002. The committee note incorporates the *Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files* (March 2004) issued by the CACM Committee that "sets out limitations on remote electronic access to certain sensitive materials in criminal cases," including "financial affidavits filed in seeking representation pursuant to the Criminal Justice Act." The guidance states in part that such documents "shall not be included in the public case file and should not be made available to the public at the courthouse or via remote electronic access."

Before the Advisory Committee is a suggestion to amend the rule to delete the reference to financial affidavits in the committee note because the guidance as to financial affidavits is "problematic, if not unconstitutional" and "inconsistent with the views taken by most, if not all, of the courts that have ruled on the issue to date." *See United States v. Avenatti*, No. 19-CR-374-1 (JMF), 2021 WL 3168145 (S.D.N.Y. July 27, 2021) (holding that the defendant's financial affidavits were "judicial documents" that must be disclosed (subject to appropriate redactions) under both the common law and the First Amendment).

The Advisory Committee formed a subcommittee to consider the suggestion. Its work will include consideration of the privacy interests of indigent defendants and their Sixth Amendment right to counsel, and the public rights of access to judicial documents under the First Amendment and the common law. The subcommittee plans to coordinate with the Bankruptcy

and Civil Rules Committees since their rules have similar language, and will also inform both the CACM Committee and the CAOAC that it is considering this issue.

## FEDERAL RULES OF EVIDENCE

### *Information Items*

The Advisory Committee on Evidence Rules met in person (with some non-member participants joining by videoconference) on November 5, 2021. In addition to an update on Rules 106, 615, and 702, currently out for public comment, the Advisory Committee discussed possible amendments to Rule 611 to regulate the use of illustrative aids and Rule 1006 to clarify the distinction between summaries that are illustrative aids and summaries that are admissible evidence. The Advisory Committee also discussed possible amendments to Rule 611 to provide safeguards when jurors are allowed to pose questions to witnesses, Rule 801(d)(2) to provide for a statement's admissibility against the declarant's successor in interest, Rule 613(b) to provide a witness an opportunity to explain or deny a prior inconsistent statement before extrinsic evidence of the statement is admitted, and Rule 804(b)(3) to require courts to consider corroborating evidence when determining admissibility of a declaration against penal interest in a criminal case.

Rule 611 (Mode and Order of Examining Witnesses and Presenting Evidence)

The Advisory Committee is considering two separate proposed amendments to Rule 611. First, the Advisory Committee is considering adding a new provision that would provide standards for allowing the use of illustrative aids, along with a committee note that would emphasize the distinction between illustrative aids and admissible evidence (including demonstrative evidence). Second, the Advisory Committee is considering adding a new provision to set forth safeguards that must be employed when the court has determined that jurors will be allowed to pose questions to witnesses.

Rule 1006 (Summaries to Prove Content)

The Advisory Committee determined that courts frequently misapply Rule 1006, and most of these errors arise from the failure to distinguish between summaries of evidence that are admissible under Rule 1006 and summaries of evidence that are inadmissible illustrative aids. It is considering amending Rule 1006 to address the mistaken applications in the courts.

Rule 801 (Definitions That Apply to This Article; Exclusions from Hearsay)

The Advisory Committee is considering a proposed amendment to Rule 801(d)(2) regarding the hearsay exception for statements of party-opponents. The issue arises in cases in which a declarant makes a statement that would have been admissible against him as a party-opponent, but he is not the party-opponent because his claim or defense has been transferred to another, and it is the transferee that is the party-opponent. The Advisory Committee is considering an amendment to provide that if a party stands in the shoes of a declarant, then the statement should be admissible against the party if it would be admissible against the declarant.

Rule 613 (Witness's Prior Statement)

The Advisory Committee is considering a proposed amendment to Rule 613(b), which currently permits extrinsic evidence of a prior inconsistency so long as the witness is given an opportunity to explain or deny it. However, courts are in dispute about the timing of that opportunity. The Advisory Committee determined that the better rule is to require a prior opportunity to explain or deny the statement (with the court having discretion to allow a later opportunity), because witnesses will usually admit to making the statement, thereby eliminating the need for extrinsic evidence.

Rule 804 (Hearsay Exceptions; Declarant Unavailable)

The Advisory Committee is considering a proposed amendment to Rule 804(b)(3). The rule provides a hearsay exception for declarations against interest. In a criminal case in which a

declaration against penal interest is offered, the rule requires that the proponent provide "corroborating circumstances that clearly indicate [the] trustworthiness" of the statement, but there is a dispute about the meaning of the "corroborating circumstances" requirement. The Advisory Committee is considering a proposed amendment to Rule 804(b)(3) that would parallel the language in Rule 807 and require the court to consider the presence or absence of corroborating evidence in determining whether "corroborating circumstances" exist.

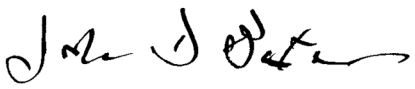
**JUDICIARY STRATEGIC PLANNING**

The Committee was asked to consider a request by the Judiciary Planning Coordinator, Chief Judge Jeffrey R. Howard (1st Cir.), regarding pandemic-related issues and lessons learned for which Committee members recommend further exploration through the judiciary's strategic planning process. The Committee's views were communicated to Chief Judge Howard by letter dated January 11, 2022.

**FIVE-YEAR REVIEW OF COMMITTEE JURISDICTION AND STRUCTURE**

In 1987, the Judicial Conference established a requirement that "[e]very five years, each committee must recommend to the Executive Committee, with a justification for the recommendation, either that the committee be maintained or that it be abolished." JCUS-SEP 1987, p. 60. Because this review is scheduled to occur again in 2022, the Committee was asked to evaluate the continuing importance of its mission as well as its jurisdiction, membership, operating procedures, and relationships with other committees so that the Executive Committee can identify where improvements can be made. To assist in the evaluation process, the Committee was asked to complete the 2022 Judicial Conference Committee Self-Evaluation Questionnaire. The Committee provided the completed questionnaire to the Executive Committee.

Respectfully submitted,



John D. Bates, Chair

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| Elizabeth J. Cabraser | Troy A. McKenzie |
| Jesse M. Furman | Patricia A. Millett |
| Robert J. Giuffra, Jr. | Lisa O. Monaco |
| Frank Mays Hull | Gene E.K. Pratter |
| William J. Kayatta, Jr. | Kosta Stojilkovic |
| Peter D. Keisler | Jennifer G. Zipps |
| Carolyn B. Kuhl | |

# TAB 3

Minutes of the Fall 2021 Meeting of the

Advisory Committee on the Appellate Rules

October 7, 2021

Via Microsoft Teams

Judge Jay Bybee, Chair, Advisory Committee on the Appellate Rules, called the meeting of the Advisory Committee on the Appellate Rules to order on Wednesday, October 7, 2021, at 10:00 a.m. EDT. The meeting was conducted remotely, using Microsoft Teams.

In addition to Judge Bybee, the following members of the Advisory Committee on the Appellate Rules were present: Justice Leondra R. Kruger, Judge Carl J. Nichols, Professor Stephen E. Sachs, Danielle Spinelli, Judge Paul J. Watford, Judge Richard C. Wesley, and Lisa Wright. Acting Solicitor General Brian H. Fletcher was represented by H. Thomas Byron III, Senior Appellate Counsel, Department of Justice.

Also present were: Judge John D. Bates, Chair, Standing Committee on the Rules of Practice and Procedure; Judge Frank Hull, 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, Advisory Committee on the Appellate Rules; Bridget M. Healy, Acting Chief Counsel, Rules Committee Staff (RCS); Scott Myers, Counsel, RCS; Julie Wilson, Counsel, RCS; Brittany Bunting, Administrative Analyst, RCS; Shelly Cox, Management Analyst, RCS; Burton DeWitt, Rules Law Clerk, RCS; Marie Leary, Senior Research Associate, Federal Judicial Center; Professor Edward A. Hartnett, Reporter, Advisory Committee on the Appellate Rules; Professor Catherine T. Struve, Reporter, Standing Committee on the Rules of Practice and Procedure; and Professor Daniel R. Coquillette, Consultant, Standing Committee on the Rules of Practice and Procedure.

## I. Introduction

Judge Bybee opened the meeting and welcomed guests and observers. He welcomed two new members of the Committee, Judge Carl J. Nichols who is replacing Judge Stephen Murphy, and Justice Leondra Kruger who is replacing Justice Judith French. He thanked Judge Murphy and Justice French for their service. He also thanked those who put everything together for the meeting.

## II. Report on Meeting of the Standing Committee

The draft minutes of the January Standing Committee meeting are in the agenda book, along with the report of the Standing Committee to the Judicial Conference.

## III. Approval of the Minutes

The draft minutes of the April 7, 2021, Advisory Committee meeting were approved.

## IV. Discussion of Matter Published for Public Comment

### Proposed Amendments to Rules 2 and 4—CARES Act

The Reporter stated that Rule 2 and Rule 4, which had been developed in close coordination with other Advisory Committees and input from the Standing Committee, was published for public comment. Prior to publication of the agenda book, two comments were received and appear in the agenda book (page 123). Since then, another comment has been received. The Reporter did not think that any the comments warranted further discussion by the Committee. No member of the Committee disagreed, nor did any member have anything else to add at this point. The comment period is open until February, so the Committee can review any additional comments at the spring meeting.

## V. Discussion of Matters Before Subcommittees

### A. Proposed Amendments to FRAP 35 and 40—Rehearing (18-AP-A)

Professor Sachs presented the subcommittee's report regarding Rules 35 (dealing with hearing and rehearing en banc) and Rule 40 (dealing with panel rehearing). (Agenda book page 137). He noted that the Committee has been considering amendments to these rules for some time and had sought the Standing Committee's permission to publish a draft for public comment, but the Standing Committee remanded for the Committee to take a freer hand in combining and clarifying Rules 35 and 40.

A redline of the subcommittee's proposal is in the agenda book (page 138). Rather than describe Rule 35 as abrogated, the proposal describes it as transferred to Rule 40. Rule 40(a) is designed to tell a party exactly what to do, front-loading the general requirement of filing a single document. Rule 40(b)(2) states clearly four grounds for petitioning for rehearing en banc, and Rule 40(c) incorporates those by reference in stating when rehearing en banc is ordinarily granted. It also reiterates clearly that a court may act sua sponte. The time to seek initial en banc hearing is

changed in Rule 40(g) to the date when a party's principal brief is due. Corresponding changes are made to the Committee Note.

Judge Bybee thanked Professor Sachs, noting how much time he and the subcommittee had put into this project.

The Reporter added that Professor Struve had noticed that the reference in the conforming amendment to Rule 32(g)(1) should be to Rule 40(d)(3)(A), not simply Rule 40(d)(3). He initially referred to the Appendix regarding length limits, but Professor Struve and Mr. Byron clarified that the text of Rule 32—which governs certificates of compliance—is where the conforming amendment needs to be changed.

A judge member thought that Rule 40(a) should include a reference to "both," not simply a reference to a petition for rehearing or a petition for rehearing en banc. A lawyer member noted that the subcommittee had debated whether it was better to refer to two petitions or a single petition seeking two forms of relief. The judge member asked for more information about the nature of the problem.

Mr. Byron stated that in clarifying and combining Rule 35 and Rule 40, an issue arose about how to talk about the situation where a party seeks both panel rehearing and rehearing en banc. He is a little disappointed with where the subcommittee landed. It could be done more simply if it were not for the desire to allow for local rules providing for separate documents. His recollection is that only the Court of Appeals for the Fifth Circuit has such a local rule, and that inquiry was being made about its attachment to that rule.

Judge Bybee stated that he had reached out to the Chief Judge and not received a response, which he took as standing by the existing local rule, but he will follow up.

The judge member who has asked for more information said that he now understood the nature of the problem, that he had not been aware of the practice in the Fifth Circuit and did not resist adding "or both."

A liaison member provided some background, explaining that the proposed amendment would combine Rule 35 and 40, thereby eliminating lots of redundant material. Her court allows petitions to be joined but receives lots of separate petitions. She always liked including "or both," noting that half of the cases are pro se cases.

Professor Sachs was comfortable with adding "or both," but not "or for both." Consensus was reached that the first sentence of Rule 40(a) should read, "A party may seek rehearing of a decision through a petition for panel rehearing, a petition for rehearing en banc, or both."

A lawyer member praised the revision but asked why Rule 40(c) says that "ordinarily" rehearing en banc will not be ordered unless one of the criteria in Rule 40(b)(2)(A)–(D) is met. Professor Sachs responded that it is in existing Rule 35(a) and is designed to reflect the court's discretion, discretion that there is no need to restrict. Judge Bybee added that there can be infighting in a court of appeals over whether it is permissible to use en banc procedures to engage in error correction; leave in "ordinarily." A judge member agreed.

A lawyer member noted that in some places Rule 40 refers to "the petition" while in others it refers to "a petition." Professor Sachs suggested that dealing with the apparent discrepancy could be left to the style consultants. A judge member suggested changing all instances of "the petition" to "a petition"; Professor Struve noted that the Rules contemplate other kinds of petitions as well. Working on a shared screen, the Reporter changed "the petition" to "a petition" in Rule 40(d)(1)(D), (d)(4), and (d)(5), noting that he can raise the issue with the style consultants.

A judge member suggested referring to a "petition under this Rule." Professor Sachs responded that the Rule also governs petitions for initial hearing en banc. A lawyer member suggested being explicit: "a petition for panel rehearing or rehearing en banc." A liaison member agreed that this adds clarity for the unsophisticated lawyers and pro se litigants. Judge Bybee stated that the phrase should be the same in 40(d) and 40 (e). The Committee agreed that both Rule 40(d) and Rule 40(e) should use the phrase "a petition for panel rehearing or rehearing en banc."

The Reporter noted that Rule 40(b)(2)(C) refers to a decision that has addressed "the issue," while Rule 40(b)(2)(D) refers to "one or more questions" of exceptional importance and that when the style consultants had reviewed an earlier version of this proposal, they had asked about the difference between an "issue" and a "question." Apologizing that he had not raised this with the subcommittee, he suggested that the phrase "that has addressed the issue" be deleted from Rule 40(b)(2)(C). A judge member agreed, observing that for decisions to conflict they must involve the same issue, so the phrase is redundant.

Judge Bybee stated that if there were no further comment, he would invite a motion to approve the draft, with the changes made during this conversation, and ask the Standing Committee for permission to publish the proposal for public comment. The motion was made and approved without dissent.

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

Danielle Spinelli presented the report of the AMICUS subcommittee. (Agenda book page 153). She explained that the subcommittee has been discussing possible modifications to Rule 29's disclosure requirements. The AMICUS Act would institute a registration and disclosure system like the one that applies to lobbyists and apply

to those who filed three or more amicus briefs per year. What is within our bailiwick are the disclosure requirements of Rule 29.

The underlying concern is transparency. There may be no way to know who exactly is speaking if an amicus is funded by a party or a single entity funds numerous amici. The primary focus of the AMICUS Act is the Supreme Court, but this Committee and the Standing Committee have been asked to consider the issue in the context of the courts of appeals.

The current rule is reproduced on page 153 of the Agenda book. Subsection (i)—which deals with authorship of an amicus brief by a party's counsel—is not at issue. But subsection (ii)—which deals with contributions by a party or its counsel intended to fund an amicus brief—and subsection (iii)—which deals with such contributions by any person other than the amicus itself, its members, or its counsel—are at issue. Subsection (ii) gets at whether a party is really behind an amicus brief. Subsection (iii) gets at whether a non-party is really behind an amicus brief. It is important to note that the existing rule already reaches funding by non-parties. The question is whether the existing rule should be made stronger and less easy to evade.

The subcommittee report addresses the issues involving parties separately from the issues involving non-parties.

It is possible to construe the existing requirement of disclosure regarding contributions "intended to fund preparing or submitting the brief" so narrowly that it covers only the printing and filing of the amicus brief. That problem is easy to fix.

A more complicated issue to deal with involves contributions that are not earmarked for a particular brief but instead are made to the general funds of an amicus with the tacit or implicit understanding that the amicus will advance a party's agenda.

The drafts in the agenda book are not even suggestions. They are thought exercises about what could be done, if the Committee decides to do it, to make the current rule less easily evaded.

The simpler issue can be handled by adding the word "drafting" to the second bullet point on page 158 of the agenda book.

The draft sketches out two possible ways in which the more complicated issue might be addressed. One way is with a rule that requires disclosure if a party has a 10% or greater ownership interest in the amicus curiae, or if a party 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. This is similar to, but is by no means identical to, the AMICUS Act. For example, the AMICUS Act sets the level lower, at 3%. A second way would be with a standard that would call for disclosure if a party

had sufficient ownership of or made sufficient contributions to an amicus that a reasonable person would attribute significant influence regarding the filing or content of the brief. The Committee might choose one, both, or neither. Either approach would call for disclosure, if otherwise appropriate, even if the party were a member of the amicus. Again, the purpose of these drafts is to help the Committee think through the issues.

Issues involving non-parties are more complex, raising arguable constitutional concerns. The subcommittee draft is designed for discussion. It essentially makes the same kinds of changes just discussed to provisions governing non-parties.

The subcommittee seeks further direction from the Committee on how to proceed.

Mr. Byron noted the complexity of the issues and asked whether there is a lot of pressure to address through rulemaking what the proposed legislation is concerned about or whether the issue is just left to the Committee's own judgment whether it is a good idea.

Judge Bates responded that there isn't pressure, but the letter was addressed to the Supreme Court and the Court, rather than doing anything with its own rules, sent it to this process. Ultimately, the issue is perhaps for the Supreme Court, and this Committee should not feel that it has to do something or feel constrained in addressing the issue. Judge Bybee agreed, noting that the issues involving amici are ones that mostly arise in the Supreme Court.

Mr. Byron asked if the subcommittee was making a recommendation, and Ms. Spinelli answered that it was not making one. Mr. Byron thought that this was telling; he doesn't see a problem that needs to be addressed in the appellate rules. Ms. Spinelli responded that the subcommittee sees legitimate concerns, and that while amicus practice is much more significant at the Supreme Court, we have been asked by the Supreme Court to consider the issue. We should be reluctant to say that it is not a problem in the court of appeals so we are not going to do it. There are legitimate concerns about evasion and transparency, but the solution may be too onerous or infringe on constitutional rights. The subcommittee is teeing up these issues for the Committee.

A judge member observed that there does not seem to be a problem in the courts of appeals, but putting that aside, he is not troubled with a percentage rule. It is easy to understand, and the rules already require corporate disclosure. He would be troubled by a standard. That would be a nightmare to police, raising all kinds of factual issues. Ms. Spinelli noted that her preference was also for a rule over a standard, but there was disagreement on the subcommittee so both approaches were presented to the Committee. The judge member responded that some litigation goes for years with the parties fighting over everything, including $500 in costs. The bar

understands the current 10% rule regarding corporate disclosure; the right percentage is open to debate.

The Committee took a short break. When the meeting resumed, the Reporter reminded the Committee that it had begun to discuss rules vs. standards. Ms. Spinelli stated that there are broader concerns to be addressed to provide guidance to the subcommittee.

Professor Coquillette stated that, historically, the committees have favored rules over standards. A judge member observed that a standard would lead to an enormous amount of litigation without extensive guidance. An academic member pointed out that a rule could be overinclusive or underinclusive. Mr. Byron stated that he was not a huge advocate for standards, but that a standard might lead an amicus to err on the side of disclosure. However, if it could lead to motions for sanctions for failure to disclose, that would be problematic. A standard captures the purpose better; he worries that a rule might not do a good job. The 10% threshold, borrowed from Rule 26.1, serves a very different purpose.

Another judge member agreed that rules are preferable to standards. More generally, changes are not necessary for the courts of appeals. The subcommittee memo was helpful in distinguishing between party and non-party. He might be interested in knowing if an amicus is a close affiliate of a party because it could affect the weight judges give to the filing. The issue isn't public appearances; the issue is what weight judges give to an amicus brief. With a non-party, the concerns are way more attenuated, as the memo puts it, whether the amicus is serving as a paid mouthpiece for some other person. Where an amicus has a track record, judges know how much weight to give its brief. The concern that there will be a large number of amicus briefs giving the illusion of broad support is remote at the court of appeals. Maybe there is no real problem calling for any change; alternatively, maybe any amendments should be limited to parties.

Mr. Byron noted that the concerns articulated in the Committee Notes for the existing rule are different than those addressed by the AMICUS Act. Ms. Spinelli agreed, adding that the current rule does reach non-parties, although the rationale for that is harder to see. Concerns regarding parties are clearer and less problematic.

Professor Struve did not recall that there was any deep discussion of parties vs. non-parties at the time the current rule was adopted. It was modeled on Supreme Court Rule 37.6, which included both.

An academic member stated that the existing rule deals with the one-off case where an amicus is acting as a sock puppet. In such a case, where someone funds one brief, it is likely to mislead about who is speaking while unlikely to affect an amicus' ability to function. There is a much greater worry if an amicus must reveal a non-party who provides 10% of the funding of an amicus. CERCLA disclosures can lead

people to decline to enter transaction. In a trade association, it may be controversial who is paying—or not paying. There will be some chilling of amici, and the benefit to the court is lower. For example, if the Cato Institute submits a brief, we know who they are and learning who funds them does not tell us anything new.

Judge Bybee stated that this is largely a Supreme Court problem, but if this Committee decline to act, then legislation might be enacted, or the Supreme Court might act on its own so that we wind up with it anyway. It's better if we get our first shot at it. We have to take the constitutional question seriously, perhaps with an internal opinion. Judge Bates added that the Supreme Court will get a crack at anything that the rulemaking process produces.

A judge member added that in addition to the Supreme Court, the Standing Committee will look at it. He stated that he's not sure that there's a constitutional problem: the scope is limited to filing a brief in a judicial proceeding. Some kinds of cases in the courts of appeals do draw amici, and sometimes the judges know who an amicus is (the ACLU, the Sierra Club) but sometimes they judges have no idea who they are. Judges don't look to see which way the amicus wind is blowing, but industry information and prognostications about the results of a decision can be useful.

Professor Struve noted that, pursuant to the policy of the Judicial Conference, any memo that went to the full Committee would be part of the public record.

An academic member stated that the need for a constitutional memo should make the Committee hesitate. Even if an amendment would not violate the Constitution, constitutional interests counsel against getting within shouting distance of a constitutional violation. Yes, it would be nice to know who is behind an amicus brief, but we often don't know who is behind speech. If Citizen for Goodness and Wellness file an amicus brief, the danger caused by not knowing who they are is lower than the danger of chilling speech by requiring disclosure.

A judge member stated that we are not talking about all donors, just those who contribute 10% or more. 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. Ms. Spinelli reminded the Committee that the existing rule already reaches non-parties. An academic member noted that the current rule reaches one-off amicus briefs while the Committee is considering taking a much more aggressive stance. Rule 26.1 is limited to public companies because it is designed to facilitate recusal. Extending disclosure to non-public companies is a vast expansion. There are dangers from this loss of privacy that have to be compared to the benefits.

The Reporter added that while it is common for this Committee to decline to propose an amendment if it does not see a sufficient problem in the courts of appeals, that approach may not be appropriate in this case. The Supreme Court does not have an Advisory Committee like this one.

A liaison member stated that in her court there are frequently three or four amici on each side, often with acronyms, leaving the judges to not know who they are. A lot of the concern is with the public perception that judges might be influenced by people and not know who they are. A rule would be better than a standard.

Judge Bybee stated that the discussion has been very helpful, that he did not want to cut it off, but asked if the subcommittee had enough guidance.

Ms. Spinelli responded that the discussion was extremely helpful, and that she is happy to hear from judges what they want to know. It seems that the Committee is interested in taking a hard look at more disclosure regarding parties, prefers a rule to a standard, and agrees that a constitutional analysis is needed, while some members are interested in more disclosure regarding non-parties as well.

A lawyer member asked about the exclusion for members, noting that an amicus can switch from calling something a donation to calling it a membership fee. Should this membership loophole be eliminated?

Ms. Spinelli responded that if the disclosure requirements are made more stringent it would make sense to keep the exclusion for members, noting that the letter from Scott Harris indicated that the Supreme Court rule deliberately excluded members in response to a concern about protecting membership lists. An academic member said that the membership provision should not be viewed as a loophole because an amicus is speaking for itself; the concern under the existing rule is that if non-members are funding a particular brief, then it is not that group speaking for itself. The exclusion of members from this provision usefully signals its purpose. He is concerned that if an amicus has nine members, all must be disclosed. PETA and the Sierra Club would have to disclose which members gave more than 10%; he thinks that the number of front groups is much lower than the number of established groups with a donor who gives greater than 10%.

In response to a question from Judge Bates, Ms. Spinelli stated that the subcommittee had not yet addressed issues regarding recusal but that it intends to do so. The Reporter added that the subcommittee might conclude that the issue of recusal is outside the Committee's bailiwick.

Returning to the issue of excluding members from disclosure, Ms. Spinelli indicated her inclination to continue to exclude them. The Reporter noted that there is some tension between expanding the disclosure requirements regarding non-parties while keeping the membership exclusion because an amicus could change donations into membership fees. To use the Mark Zuckerberg example, instead of simply making a large contribution to an amicus, he could become a member of that amicus.

A judge member stated that the devil is in the details. What is a member?

An academic member flagged an additional issue: Does an amicus have to have the capacity to sue and be sued? What kind of entity can be an amicus? As a matter of professional responsibility, it must at least be capable of hiring and firing a lawyer.

The Committee took a lunch break and resumed at 1:45.

### C. Relation Forward of Notices of Appeal—Rule 4 (20-AP-A)

Mr. Byron presented the report of the subcommittee (Agenda book page 175). He explained that the Committee had previously decided not to recommend a suggestion that would broadly permit premature notices of appeal to ripen upon entry of a final judgment, fearing that such a rule would create more problems than it would solve and invite premature notices of appeal.

At its last meeting, the subcommittee then focused on two issues.

The first issue involved a circuit split regarding relation forward of notices of appeal taken from orders that could have been, but were not, certified under Civil Rule 54(b). The subcommittee concluded that there is a fairly clean circuit split with the Eighth Circuit not permitting relation forward and most others permitting it. (The Federal Circuit is harder to classify.)

But it is not clear whether it is worth trying to resolve the circuit split. For one thing, 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. In addition, the Supreme Court might ultimately side with the Eighth Circuit; its approach may be better reasoned if not the better policy. Moreover, among the courts that permit relation forward, there is another split regarding whether that result is based on an interpretation of Rule 4(a)(2) or instead is based on earlier case law. Any amendment would also need to deal with this underlying question. There is also an issue about the scope of the appeal: does it reach decisions made after the notice of appeal but before final judgment? An argument that the pending amendment to Rule 3 might be construed to allow the scope of appeal to reach such decisions is sketched in footnote 1 of the subcommittee report. (Agenda book page 177). It is unlikely that courts will adopt that construction, but we can't be certain.

One possible approach would be to limit 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 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.

The Reporter added that the subcommittee had considered a more detailed rule but rejected that approach as too complicated. A lawyer member stated that the idea of the approach in the subcommittee report was to capture in a rule what was being done even though not within the plain language of the rule, thereby allowing courts to continue existing practice.

An academic member noted that he appreciated the memo and thought it made a good case for doing something. He did not think the Committee should wait for the Supreme Court to resolve the conflict; it's not the kind of problem that the Supreme Court really has to care about. It's perfectly appropriate for the Court as a rule maker to write a better rule rather than act as an interpreter and shoehorn good policy into the existing rule.

Professor Struve pointed out that this issue is a hardy perennial. About a decade ago the Supreme Court denied a cert. petition and this Committee took up the issue. It declined to act, in part because of the complexities in trying to address the issue and in part because the circuit splits seemed too narrow. The current discussion is a thoughtful one, but the language in the subcommittee report would narrow the grounds for relation forward even as to some situations that the Supreme Court has seemed to have already endorsed (by citing lower court decisions with apparent approval). In particular, the Court seems to have endorsed allowing relation forward when a district court renders a decision that is not final—because contingent on a future event—once the contingency occurs. Perhaps the Committee is now willing to go where it previously feared to tread.

Judge Bybee observed that maybe we are brave or maybe just naïve.

Professor Coquillette recalled some history: He and Judge Lee Rosenthal had been invited to meet with several Justices and received the clear message that the Court does not like to resolve circuit splits regarding procedure. He is not sure that this is the best example, but in general it is appropriate for the Committee to seek to resolve a circuit split rather than wait for the Supreme Court.

Judge Bybee pointed to the open-ended grant of discretion that would be provided by the word "may" without any other qualifications. An academic member noted that "may" could lead to different litigants being treated differently and offered "good cause" as an alternative.

Mr. Byron noted that the subcommittee had not tried to resolve the merger question discussed in footnote one of the memo. Professor Struve agreed that it would be surprising if a court were to buy the argument suggested in that footnote. Plus, no one is likely to rely on that argument: anyone who dug deeply enough to figure out that argument would also have figured out that the better thing to do would be to amend the notice of appeal.

Judge Bybee asked Professor Struve for her reaction to a good cause standard. She replied that it would override a lot of case law and subject parties to the slings and arrows of discretion. She also noted that it would clash in spirit with the pending amendment to Rule 3, which is designed to reduce the loss of appellate rights. There might be pain in the transition, but litigants can adjust.

The Reporter stated that the language in the agenda book is just a sketch designed to get the Committee's feedback on whether something along those lines is worth pursuing. Further refinement would be necessary to deal with the contingency situations noted by Professor Struve as well as situations involving belated Rule 54(b) certifications.

Mr. Byron clarified that these concerns apply not only to a "good cause" standard but also the text as written in the subcommittee report. Perhaps it is better to leave a lopsided circuit split than to risk unknown mischief. Ms. Dwyer stated that pro se litigants—which are involved in half the cases—fall into this trap. The Court of Appeals for the Ninth Circuit liberally construes pro se submissions; there are ugly things under these rocks. The status quo is just fine.

An academic member stated that the reason for the first sentence in the subcommittee language is to narrow existing case law as to when relation forward is mandatory, but a court could rely on its existing case law to determine when it is appropriate to exercise its discretion, under both the "good cause" and "may" standard. Alternatively, a rule could spell out when relation forward is allowed, permitting it if the other party doesn't object and the court didn't notice.

He also asked what happens if the district court wants to reconsider while an appeal is pending. Professor Struve noted that case law allows a district court to proceed if a party notices an appeal from a clearly non-appealable order. The Reporter noted that the subcommittee had considered but decided against codifying that process.

Mr. Byron stated that Rule 4(a)(2) hides some chaos, but that he is not as worried about that as he is about making things more complex and creating more opportunities for motion practice. Existing practice is not perfect and may be rough justice, but an amendment is not necessary; the problem doesn't warrant it.

Judge Bybee asked Mr. Byron and the Reporter whether the subcommittee had enough guidance from the Committee. Both answered no.

A lawyer member stated that she was persuaded by the discussion today to not pursue the amendment. A judge member said it was time to pull the plug. An academic member concluded that if others aren't interested, he will give up. Mr. Byron favored taking it off the agenda.

Mr. Byron then turned to the second issue addressed by the subcommittee, noting that it was more straightforward (Agenda book page 179). Rule 4 treats the need to file a new or amended notice of appeal after disposition of a motion that resets appeal time differently in civil and criminal cases. A new or amended notice is needed in civil cases, but not in criminal cases.

The subcommittee was not satisfied that there was a good reason for this difference in treatment, although it considered some speculation that might be thought to justify it. But either way of making them uniform was not great. If criminal were aligned with civil, there would be a real risk of loss of appellate rights and claims of ineffective assistance of counsel. So, any change would be in the other direction, making civil like criminal. But there does not appear to be a problem calling for a solution.

Ms. Dwyer said that she was unaware of any problem; leave it alone. An academic member agreed.

Mr Byron moved to have the entire item removed from the agenda. There was no objection to the motion. The matter was removed from the agenda and the subcommittee discharged with thanks.

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

Judge Bybee stated that the subcommittee had been waiting for the results of a survey done by Lisa Fitzgerald. Those results have now been received and should be very useful. The subcommittee will review them and report to the Committee. (Agenda book page 182).

## VI. Discussion of Matters Before Joint Subcommittees

The Reporter provided a brief update on the status of two matters before joint subcommittees.

First, the joint subcommittee considering the midnight deadline for electronic filing is continuing to gather information. (Agenda book page 185). A judge member noted that he had received lots of calls about this saying that how late associates have to work is none of our business.

Second, the joint subcommittee considering the final judgment rule in consolidated actions is continuing its study. Research by the Federal Judicial Center did not reveal significant problems, but problems may remain hidden. (Agenda book page 187).

## VII. Discussion of Recent Suggestions

### A. Costs on Appeal—Rule 39 (21-AP-D)

The Reporter introduced the suggestion from Dean Alan Morrison. (Agenda book page 190). Dean Morrison brought to the Committee's attention a then-pending Supreme Court case that led him to believe that Rule 39 is unclear. The Supreme Court has now decided that case and held that Rule 39 does not permit a district court to alter a court of appeals' allocation of the costs. *City of San Antonio v. Hotels.com*, 141 S.Ct. 1628 (2021).

That result seems untroubling. But while typical costs on appeal are modest, such as the appellate docket fee and the costs of printing, 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. Such a bond is posted by a defendant so that a money judgment is not enforceable pending appeal; the bond protects the ability of a plaintiff to collect if the plaintiff prevails on appeal. The cost of securing such a bond can be high. Under Rule 39, the district court taxes these costs because they were incurred in the district court, but the court of appeals (not the district court) has discretion to apportion those costs.

The Supreme Court stated that the current rules could specify more clearly the procedure that a party should follow to bring their arguments to the court of appeals. It suggested a motion, but there might be difficulties with a post-mandate motion.

In light of the Supreme Court's comment about the current rules, the Reporter suggested the appointment of a subcommittee. Another aspect that the subcommittee might consider is that when a district court is deciding whether to approve a bond it may be concerned with whether the bond is adequate to cover the judgment and whether the surety can pay the bond, but it may not be concerned with the premium paid for the bond. There may also be a question whether the premium for the bond should be a taxable cost at all.

Judge Bybee called for volunteers and appointed a subcommittee. Judge Nichols is the chair of the subcommittee. Judge Wesley and Mr. Byron are members.

### B. Electronic Filing by Pro Se Litigants (21-AP-E)

The Reporter introduced the suggestion by Sai to permit electronic filing by pro se litigants. (Agenda book page 213). He noted that this issue has come up repeatedly and that the last time the Committee considered the issue, it decided to await consideration by the Civil Rule Committee. It appears that the various Committees are doing an Alphonse and Gaston routine, waiting for the others to go first. This Committee might decide to continue to wait for Civil, might seek a joint subcommittee or because traditionally Circuit Clerks have been more open to

electronic filing by pro se litigants than District Clerks (perhaps because of the greater number of filings in a case in a district court) this Committee might choose to go first.

Judge Bates stated that with Bankruptcy, Civil, and now Appellate confronting this question, he has decided to convene the reporters to discuss the way to proceed. Professor Coquillette noted that the Committee on Court Administration and Case Management (CACM) has a role as well. An academic member noted that this Committee could also allow pro se electronic filing in any case where it was permitted in the district court. Professor Struve added that each Committee has its own issues to address. There are lots of events in bankruptcy. Some district courts allowed pro se electronic filing because of COVID and did okay. Civil has to deal with case initiating filings, which is not as much of an issue for Appellate. The different committees may recommend different rules. The reporters will coordinate and welcome feedback.

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

Judge Bybee introduced Gary Peel's suggestion that we put into the rules a time frame for the courts of appeals to decide habeas matters. He predicted considerable resistance if we were to attempt to do so.

A lawyer member moved to remove the item from the agenda, and this was done without objection.

## VIII. 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 still happens on occasion in various circuits, but the only one where it continues to be a regular practice is in the Fifth Circuit. He did not ask the Committee to take any action, noting that perhaps the best thing to do would be to bring it to the attention of a local rules advisory committee if one exists in the Fifth Circuit. Ms. Dwyer offered to contact her counterpart in the Fifth Circuit.

## IX. New Business

No member of the Committee presented any new business.

## X. Adjournment

Judge Bybee thanked the participants, stating that it is a pleasure to work with everyone involved.

The next meeting will be held on March 30, 2022. The hope is that it will be in person. The spring meeting is traditionally in some location other than Washington D.C.

The Committee adjourned at approximately 3:10.

# TAB 4

# TAB 4A

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: CARES Act Subcommittee

Re: Public Comments

Date: February 28, 2022

The proposed amendments to FRAP 2 and 4 were published in August of 2021 for public comment. We have received a total of six comments. All six follow this memo.[1]

Two were fully supportive. Two were broadly critical. One was irrelevant. One raised issues that the Committee had considered. The subcommittee does not recommend any changes in response to the public comments.

**Fully supportive**

The Federal Bar Association (comment 0009) "supports each of the revised and new rules developed . . . in response to . . . the CARES Act," noting that they "provide important flexibility . . . in future unforeseen situations." The Federal Bar Association "agrees that the Judicial Conference exclusively, rather than specific circuits, districts, or judges, should be permitted to declare a rules emergency. Conferring this authority to the Judicial Conference alone should help prevent a disjointed or balkanized response to unusual circumstances, including emergencies affecting only particular regions or other subsets of federal courts." It also "applauds the Rules Committee's success in achieving relative uniformity across all four emergency rules."

Louis Koerner (comment 0003) thinks the proposed amendments are "entirely appropriate, well drafted, and even overdue."

**Broadly critical**

Irvan Moritzky (comment 0004) opposes the emergency rules as impractical, complex, and centralized. He urges that issues be left to local district judges, noting that if large retailers are open, local judges should run their courts. He included the Supreme Court's decision in *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), which held

[1] Some attachments are omitted but are available at https://www.regulations.gov/docket/USC-RULES-AP-2021-0001/comments.

that Congress had not authorized the supplanting of courts in Hawaii with military tribunals.

Matthew Deinhardt (comment 0006) believes that the proposed amendments create an unequal playing field and lean heavily toward the government side. He urges notice to any defendant who is adversely affected by a suspension of the rules and the opportunity to postpone the proceeding. He also urges that the Judicial Conference not be empowered to terminate an emergency without input from the judge "presiding over that specific court."

Neither of these critical comments have convinced the subcommittee to recommend any changes. The subcommittee is confident that the Judicial Conference (or its executive committee) will consult as appropriate with the courts affected by any declaration of a rules emergency.

**Irrelevant**

Andrew Straw (comment 0005) states that no court of appeals should "hire an appellee who is before a panel of the Court to be a federal bankruptcy judge."

**Raised issues**

Jane Castro, Chief Deputy Clerk, United States Court of Appeals for the Tenth Circuit (comment 0010) raised several thoughtful issues.

*FRAP 2*. Ms. Castro suggests that the proposed amendment to Rule 2 is "largely unnecessary" because courts, under the current rules, can enter form orders suspending a rule in individual cases. She notes that "we did something similar when we suspended our paper copy requirement in March of 2020." She is concerned that "the theoretical operational efficiency that is gained by an emergency declaration allowing the circuit to suspend the rule across all cases is undermined by the bureaucratic inefficiency inherent in vesting the authority to declare the emergency somewhere other than the circuit(s) affected by the emergency."

There is some power to the critique; the proposed amendment to Rule 2 does not add a lot. But it would provide clear authority for across-the-board actions. Some might question whether current Rule 2, which limits the suspension authority to "a particular case," permits identical orders entered in every case.

She also suggests that perhaps "the circuits should be authorized to extend non-statutory deadlines for good cause even without a declared emergency." This suggestion is sufficiently broader than the current proposal that it would require republication. And current Rule 26(b) already imposes few limits on the court's power to extend non-statutory deadlines.

*FRAP 4.* Ms. Castro questions how the proposed amendment to Rule 4 will work in the context of Civil Rule 60 motions, noting that the proposed amendment "pegs the suspending effect of a Rule 60 motion to the time allowed for filing a motion under Rule 59." She is concerned that if a party seeks, and the district court grants, a motion to extend only the time to file a Civil Rule 60(b) motion, the party will not get the benefit of the Rules Emergency declaration.

The reason for drafting the proposed amendment this way is that the non-emergency deadlines for Civil Rule 59 and Civil Rule 60(b) motions are quite different. A Rule 59 motion must be filed within 28 days of the judgment. FRCP 59(b). A Rule 60(b) motion, on the other hand, must be made "within a reasonable time." FRCP 60(c)(1). It would seem unnecessary to allow an extension beyond a "reasonable time"; any emergency circumstances can be considered in determining what is reasonable. Motions made under FRCP 60(b)(1), (2), and (3) face the additional requirement that they must be brought no more than one year after judgment, FRCP 60(c)(1), so it is possible that an extension of this one-year deadline might be necessary in an emergency. But if the one-year deadline is the one that needs to be relaxed, the time to appeal the underlying judgment should not be reset.

*FRCP 6.* Finally, Ms. Castro noted that it is odd for a Civil Rule, rather than an Appellate Rule, to state the effect of an extension on the time to appeal. She added that "consistency and clarity for the public, courts, and practitioners" would seem to call for this to be included in FRAP 4, not FRCP 6.

In the abstract, there is much to be said for this critique. But drafting in this area proved daunting, and the placement in Emergency Civil Rule 6 resulted in the clearest drafting that could be found.

The provision is applicable only in a declared rules emergency, so all should know to look to the emergency rules. In addition, the effect on time to appeal in such an emergency arises in the context of extensions that are available only under Emergency Civil Rule 6, so anyone dealing with such an extension must already engage with Emergency Civil Rule 6. Having the relevant provisions in a single emergency rule—rather than spread over two sets of emergency rules—should promote ease of use.

In the end, the subcommittee was reassured by Ms. Castro's careful submission. That's because such a thoughtful comment did not reveal that the Committee had overlooked important concerns, but instead pointed to issues that the Committee had grappled with earlier.

# TAB 4B

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

**Rule 2. Suspension of Rules**

**(a) In a Particular Case.** On its own or a party's motion, a court of appeals may—to expedite its decision or for other good cause—suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b).

**(b) In an Appellate Rules Emergency.**

(1) **Conditions for an Emergency.** The Judicial Conference of the United States may declare an Appellate Rules emergency if it determines that extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court,

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

substantially impair the court's ability to perform its functions in compliance with these rules.

(2) **Content.** The declaration must:

(A) designate the circuit or circuits affected; and

(B) be limited to a stated period of no more than 90 days.

(3) **Early Termination.** The Judicial Conference may terminate a declaration for one or more circuits before the termination date.

(4) **Additional Declarations.** Additional declarations may be made under Rule 2(b).

(5) **Proceedings in a Rules Emergency.** When a rules emergency is declared, the court may:

(A) suspend in all or part of that circuit any provision of these rules, other than time limits imposed by statute and described in Rule 26(b)(1)-(2); and

(B) order proceedings as it directs.

**Committee Note**

Flexible application of the Federal Rules of Appellate Procedure, including Rule 2, has enabled the courts of appeals to continue their operations despite the coronavirus pandemic. Future emergencies, however, may pose problems that call for broader authority to suspend provisions of the Federal Rules of Appellate Procedure. For that reason, the amendment adds a new subdivision authorizing broader suspension authority when the Judicial Conference of the United States declares an Appellate Rules emergency. The amendment is designed to add to the authority of courts of appeals; it should not be interpreted to restrict the authority previously exercised by the courts of appeals.

The circumstances warranting the declaration of an Appellate Rules emergency mirror those warranting a declaration of a Civil Rules emergency and a Bankruptcy Rules emergency: extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, that substantially impair the court's ability

to perform its functions in compliance with these rules. A declaration must designate the circuit or circuits affected. It must also have a sunset provision so that the declaration is in effect for no more than 90 days unless the Judicial Conference makes an additional declaration. The Judicial Conference may also terminate the declaration for one or more circuits before the termination date.

When a rules emergency is declared, the court of appeals may suspend in all or part of that circuit any provision of these rules, other than time limits imposed by statute and described in Rule 26(b)(1)-(2). This enables the court of appeals to suspend the time to appeal or seek review set only by a rule, but it does not authorize the court of appeals to suspend jurisdictional time limits imposed by statute. Sometimes when a rule is suspended, there is no need to provide any alternative to the suspended rule. For example, if the requirement of submitting paper copies of briefs is suspended, it may be enough to rely on electronic submissions. However, to deal with situations in which an alternative is required, the amendment empowers the court to "order proceedings as it directs," the same language that existed in Rule 2—now Rule 2(a)—before this amendment.

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

**Rule 4. Appeal as of Right—When Taken**

**(a) Appeal in a Civil Case.**

(1) **Time for Filing a Notice of Appeal.**

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

* * * * *

(4) **Effect of a Motion on a Notice of Appeal.**

(A) If a party files in the district court any of the following motions under the Federal Rules of Civil Procedure—

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

and does so within the time allowed by those rules—the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed ~~no later than 28 days after the judgment is entered~~within the time allowed for filing a motion under Rule 59.

* * * * *

**Committee Note**

The amendment is designed to make Rule 4 operate smoothly with Emergency Civil Rule 6(b)(2) if that emergency Civil Rule is ever in effect, while not making any change to the operation of Rule 4 at any other time. It does this by replacing the phrase "no later than 28 days after the judgment is entered" in Rule 4(a)(4)(A)(vi) with the phrase "within the time allowed for filing a motion under Rule 59."

Certain post-judgment motions—for example, a renewed motion for judgment as a matter of law under Civil Rule 50(b) and a motion for a new trial under Civil Rule 59—may be made in the district court shortly after judgment is entered. Recognizing that it makes sense to await the district court's decision on these motions before pursuing an appeal, Rule 4(a)(4)(A) resets the time to appeal

from the judgment so that it does not run until entry of an order disposing of the last such motion.

Rule 4 gives this resetting effect only to motions that are filed within the time allowed by the Civil Rules. For most of these motions, the Civil Rules require that the motion be filed within 28 days of the judgment. See Civil Rules 50(b) and (d), 52(b), 59(b), (d), and (e). The time requirements for a Civil Rule 60(b) motion, however, are notably different. It must be filed "within a reasonable time," and for certain Civil Rule 60(b) motions, no more than a year after judgment. For this reason, Rule 4 does not give resetting effect to all Civil Rule 60(b) motions that are filed within the time allowed by the Civil Rules, but only to those Civil Rule 60(b) motions that are filed within 28 days of the entry of judgment. That is why most of the motions listed in Rule 4(a)(4)(A) are governed simply by the general requirement that they be filed within the time allowed by the Civil Rules, but Rule 4(a)(4)(A)(vi) adds the requirement that a Civil Rule 60(b) motion has resetting effect only if "filed no later than 28 days after the judgment is entered."

Significantly, Civil Rule 6(b)(2) prohibits the district court from extending the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). That means that when Rule 4 requires that a motion be filed within the time allowed by the Civil Rules, the time allowed by those Rules for motions under Rules 50(b) and (d), 52(b), 59(b), (d), and (e) will be 28 days—matching the 28-day requirement in Rule 4(a)(4)(A)(vi) applicable to Rule 60(b) motions.

However, Emergency Civil Rule 6(b)(2)—which would be operative only if the Judicial Conference of the United States were to declare a Civil Rules emergency under Civil Rule 87—authorizes district courts to grant extensions that they are otherwise prohibited from granting. If that

emergency Civil Rule is in effect, district courts may grant extensions to file motions under Civil Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). For all these motions except Civil Rule 60(b) motions, Rule 4 works seamlessly. Rule 4 requires only that those motions be filed "within the time allowed by" the Civil Rules, and a motion filed within a properly granted extension is filed "within the time allowed by" those rules. An emergency Civil Rule is no less a Civil Rule simply because it is operative only in a Civil Rules emergency.

Without amendment, Rule 4 would not work seamlessly with the Emergency Civil Rule for Rule 60(b) motions because the 28-day requirement in Rule 4(a)(4)(A)(vi) would not correspond to the extended time to file other resetting motions. For this reason, the amendment replaces the phrase "if the motion is filed no later than 28 days after the judgment is entered" with the phrase "within the time allowed for filing a motion under Rule 59."

At all times that no Civil Rules emergency has been declared, the amended Rule 4 functions exactly as it did prior to the amendment. A Civil Rule 60(b) motion has resetting effect only if it is filed within the time allowed for filing a motion under Civil Rule 59—which is 28 days.

When a Civil Rules emergency has been declared, however, if a district court grants an extension of time to file a Civil Rule 59 motion and a party files a Civil Rule 60(b) motion, that Civil Rule 60(b) motion has resetting effect so long as it is filed within the extended time set for filing a Civil Rule 59 motion. The Civil Rule 60(b) motion has this resetting effect even if no Civil Rule 59 motion is filed.

# TAB 4C

| | | |
|---|---|---|
| USC-RULES-AP-2021-0001-0003 | Comment from Koerner, Louis | I thought that these are entirely appropriate, well drafted, and even overdue. |
| USC-RULES-AP-2021-0001-0004 | Comment from Moritzky, Irvan | 1. I Oppose a rule granting the Judicial Conference exclusive power to declare or end Emergency. I oppose this entire rule making as impractical. 2. Supreme Court in Duncan v Kahanamoku, 327 U.S. 304 (1946) covered constitutional protection and guarantee of a fair trial. Leave issues to the local District Judges to decide appropriate rules to hold trials, summon jurors, examine witnesses, and run their courts. 3. If Walmart, Costco, Target, Giant, Safeway, Albertson's, Kroger, are open, let the local Judge run their courts. 4. The proposed One size fits all of the Judicial Conference means that no one fits. 5. See the Kahanamoku case attached. 6. The Courts have managed during the US Civil war, and wars before, and wars after. 7. If anyone abuses the law, there is always an appeal. 8. The proposed rules are not simple. You have a 327 page report styled as a preliminary draft. The Declaration of Independence is under 1400 words. The U.S. Constitution is 6 pages. Your rules will not advance respect, are not necessary, and are not effective. (PLEASE SEE PDF ATTACHMENT) |
| USC-RULES-AP-2021-0001-0005 | Comment from Straw, Andrew | NO U.S. Court of Appeals should never hire an appellee who is before a panel of the Court to be a federal bankruptcy judge. This creates permanent problems with conflict and unfairness toward the appellant, who is effectively deprived of the right to an open court. Similarly, there is a right to use a Court of Appeals under Rule 4 and the First Amendment and 28 U.S.C. 1291, and a court that has hired a person's appellee and acts in the tiniest way unfairly toward that appellant in any other matter or the same matter is acting in a criminal fashion because the Court has been corrupted in favor of one side. This represents a court emergency and that appellant needs to obtain compensation and justice from the United States. It should not take a motion but should be done sua sponte once the Court realizes what it has done. Let's make a simple rule. Federal courts may not hire anyone who is an appellee or appellant before any panel or en banc to be a federal judge. It is an emergency matter under Rule 2 that when this happens, it either be declared a |

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| | | mistake or admitted as a deliberate ethical violation and all damage must be completely undone. Compensation to the appellant is due from the moment that appellee is hired. The amount the United States should pay is the amount of damages sought in the case below the appeal. All of the damages. Further, it should be impossible to retaliate against a person for objecting to the hiring of an appellee. That appeal should be automatically granted against all the appellees. It should be impossible to impose a fine for objecting to this illegal hiring. It should be impossible to restrict use of the Courts because a person complained. The 7th Circuit has violated all of these rules. Straw v. Indiana Supreme Court, et. al., 17-1338 (7th Cir. 7/62017) (Dkts. 79 & 80) Watch how my appellee was hired with my appeal still open: http://www.ca7.uscourts.gov/news/positions/2017_appt_Judge_Ahler.pdf More about me: www.andrewstraw.com My life has been ruined by court corruption and I want to avoid this for others. It takes a federal court system as a whole to take the 7th Circuit by the scruff of the neck and FORCE THEM to act justly, since they are not getting it on their own. (PLEASE SEE PDF ATTACHMENTS) |
| USC-RULES-AP-2021-0001-0006 | Comment from Deinhardt, Matthew | The foundation for the below recommendations are based in that generally emergencies of the nature by virtue of how the USA works, places the defendants likely in a worse position than the courts to begin with. The current and amended set of rules throughout rarely take into account the equatable standing from a normal situation all the way to an emergency in regards to life considerations, resource constraints, educational status, and other things. If rule changes continue to only consider the Court, this creates an in-equal playing field for the opposing sides and leans heavily towards the government side. 1. The authority to suspend all rule sets, or any rule sets should only granted and occur after considerable thought on behalf of the actions whether adverse, advantageous or otherwise impactful on the case or proceeding. If a rule set is suspended that is determined to be unfavorable to the defendant, the individual, group, conference or other body should provide written notice as to the detrimental impacts of said suspension to the defendant. |

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| | | There should be a relief mechanism for the defendant to appeal or file a motion to postpone the current proceeding if the damage is too substantial. 2. Soft Landing Provision should be adopted for all the recommended areas of rules that do not currently permit it. If the emergency session ends the Judge of the that specific court case should determine if it's in the best interest to continue under that rule set for the defendant. In other words if the emergency rule set permits a more favorable action for the defendant, vice the normal rule set if the proceeding was conducted under the emergency rule set. 3. Like wise with adhering to the same principle, as above, if a proceeding was conducted under the normal rule set, and an emergency is declared and those rule sets would be more unfavorable for the defendant, the defendants case should be postponed until the emergency ends. 4. The Judicial Conference should not have the right to terminate an emergency rule set situation, without prior consultation and thorough input from the Judge presiding over that specific court as to the impact of doing so. If there are two sides of disagreement, the Judicial Conference should respect and implement the action the Judge recommends. Simply put, an emergency in New York , is not the same emergency that exists in Montana, the caliber of options must take into account this difference in order to be impartial and fair to all. |
| USC-RULES-AP-2021-0001-0009 | Comment from Federal Bar Association | PLEASE SEE PDF ATTACHMENT |
| USC-RULES-AP-2021-0001-0010 | Comment from Castro, Jane | PLEASE SEE PDF ATTACHMENT |

February 11, 2022

The Honorable John D. Bates, Chair
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, D.C. 20544

Re: Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, and the Federal Rules of Evidence

Dear Judge Bates:

The Federal Bar Association (FBA) appreciates the opportunity to provide comments regarding the August 2021 *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, and the Federal Rules of Evidence* (the "Proposed Amendments").

The FBA is the foremost voluntary professional association devoted to strengthening the federal legal system and administration of justice by serving the interests and the needs of the federal practitioner, the federal judiciary and the public they serve. With over 15,000 members of the legal profession, our attorneys and other professionals are affiliated with almost 100 local FBA chapters across the country and support roughly thirty active sections and divisions organized by substantive areas of practice.

After consideration by the Federal Litigation, Civil Rights, Criminal Law, Bankruptcy, Judiciary, and Qui Tam sections, the FBA finds that the Proposed Amendments are consistent with the FBA's objectives in strengthening the federal judicial system, and the FBA has no objections to any of them.

The FBA's greatest area of interest in the Proposed Amendments concerns The CARES Act Project Regarding Emergency Rules. The FBA supports each of the revised and new rules developed by the Appellate, Bankruptcy, Civil, and Criminal Rules Committees in response to the rulemaking directive in Section 15002(b)(6) of the CARES Act. Consistent with past statements, letters, and testimony concerning a co-equal, independent judicial branch, the FBA believes the judiciary is best suited to declare an emergency concerning court rules of practice and procedure. The Proposed Amendments – to Appellate Rules 2 and 4, new Bankruptcy Rule 9038, new Civil Rule 87, and new Criminal Rule 62 – provide important flexibility for the U.S. Courts in future unforeseen situations, some of which may not rise to the level of a national emergency (i.e. such as under the National Emergencies Act).

The FBA agrees that the Judicial Conference exclusively, rather than specific circuits, districts, or judges, should be permitted to declare a rules emergency. Conferring this authority to the

Judicial Conference alone should help prevent a disjointed or balkanized response to unusual circumstances, including emergencies affecting only particular regions or other subsets of federal courts.

Finally, the FBA applauds the Rules Committee's success in achieving relative uniformity across all four emergency rules within the Proposed Amendments and acknowledges the Rules Committee's special attention to safeguarding fundamental rights in criminal proceedings while allowing some flexibility in emergency situations.

The FBA looks forward to supporting the Judicial Conference and Rules Committees in their future rulemaking efforts.

Sincerely yours,

Anh Le Kremer
National President

**From:** Jane Castro
**To:** RulesCommittee Secretary
**Subject:** FW: Request for Comments on Proposed Amendments to FRAP Rules 2 and 4
**Date:** Wednesday, February 16, 2022 3:48:54 PM

Hello,

I am part of an informal appellate working group that reviews proposed and pending rules amendments. I had several thoughts about the proposed amendments to FRAP 2 and 4 (and FRCP 6), and was asked to forward them to you for posting on regulations.gov. Please see below, and please let me know if you have any questions.

Thank you,

Jane Castro
Chief Deputy Clerk
U.S. Court of Appeals for the Tenth Circuit

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**Rule 2**

It appears to me the Proposed Amendment to FRAP 2 is largely unnecessary. It adds an extra bureaucratic layer to an emergency. In its current form a court of appeals can suspend any rule (except as provided in Rule 26(b)) in a particular case. It appears the proposed amendment allows a court of appeals to suspend any rule across all cases in one fell swoop. But we can already achieve the same result by issuing a form order that suspends the same rule in individual cases as the need arises—we did something similar when we suspended our paper copy requirement in March of 2020. I'm afraid the theoretical operational efficiency that is gained by an emergency declaration allowing the circuit to suspend rules across all cases is undermined by the bureaucratic inefficiency inherent in vesting the authority to declare the emergency somewhere other than the circuit(s) affected by the emergency.

The one thing the proposed amendment does do is put a finer point on a circuit's ability to extend deadlines for good cause. Rule 26(b) currently prohibits a circuit from extending both rule- and statutory-based deadlines. The proposed amendment would allow a circuit to extend rule-based deadlines in a declared emergency. Perhaps the circuits should be authorized to extend nonstatutory deadlines for good cause even without a declared emergency. This could be addressed by amending Rule 26(b) rather than adding the Rules Emergency language to Rule 2.

**Rule 4**

I'm not sure the Proposed Amendment to FRAP 4 will work quite like the committee envisions in all circumstances. The proposed amendment to FRCP 6 for a Rules Emergency will authorize the district court to extend the time for filing certain Rule 50, 52, 59 and 60 motions. If a party moves for an extension of time to file its Rule 60(b) motion, and the district court grants that motion, the district court will have extended the deadline for filing a Rule 60 motion. But the Proposed

Amendment to FRAP 4 pegs the suspending effect of a Rule 60 motion to the time allowed for filing a motion under Rule 59. If the district court has extended the deadline for filing a Rule 60 motion, not a Rule 59 motion, the party will not get the benefit of the Rules Emergency declaration. (If, under a Rules Emergency declaration, the district court sua sponte extends the deadline for all the eligible Rule 50, 52, 59 and 60 motions, this won't be an issue. I think the issue only arises when a party specifically seeks an extension for a Rule 60 motion, thereby inadvertently limiting themselves).

Also, I noticed that the proposed amendment to FRCP 6(b)(2) sets forth the effect on the time to appeal. This strikes me as an odd place to put this. The time to appeal (and the effect of certain motions on the time to appeal) is set forth in statute, 28 U.S.C. § 2107, and in FRAP 4; not the civil rules. For consistency and clarity for the public, courts, and practitioners, it seems like the effect should be included in FRAP 4; not FRCP 6.

# TAB 4D

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett, Reporter

Re: Juneteenth

Date: February 28, 2022

On June 17, 2021, President Biden signed into law the Juneteenth National Independence Day Act, P.L. 117-17 (2021) which amends 5 U.S.C. § 6103(a) to add to the list of public legal holidays "Juneteenth National Independence Day, June 19."

To reflect the new public legal holiday, I recommend that the Advisory Committee approve an amendment to Federal Rule of Appellate Procedure 26(a)(6)(A) to insert the words "Juneteenth National Independence Day," immediately following the words "Memorial Day," and that the Committee recommend this amendment to the Standing Committee for approval without publication. See Procedures for Committees On Rules of Practice and Procedure § 440.20.49 ("The Standing Committee may also eliminate public notice and comment for a technical or conforming amendment if the Committee determines that they are unnecessary.").

Other Advisory Committees are considering or have considered parallel amendments. Here is what the amended text of Rule 26(a)(6) would provide:

**Rule 26. Computing and Extending Time**

**(a) Computing Time.**

* * *

(6) "Legal Holiday" Defined. "Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Juneteenth National Independence Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, or Christmas Day;

(B) any day declared a holiday by the President or Congress; and

(C) for periods that are measured after an event, any other day declared a holiday by the state where either of the following is located: the district court that rendered the challenged judgment or order, or the circuit clerk's principal office.

* * *

Committee Note

The amendment adds "Juneteenth National Independence Day" to the list of legal holidays. See Juneteenth National Independence Day Act, P.L. 117-17 (2021) (amending 5 U.S.C. § 6103(a)).

# TAB 4E

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

**Rule 26. Computing and Extending Time**

**(a) Computing Time.** The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

* * * * *

(6) "Legal Holiday" Defined. "Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Juneteenth National Independence Day, Independence

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

Day, Labor Day, Columbus Day,

Veterans Day, Thanksgiving Day, or

Christmas Day;

* * * * *

**Committee Note**

The amendment adds "Juneteenth National Independence Day" to the list of legal holidays. See Juneteenth National Independence Day Act, P.L. 117-17 (2021) (amending 5 U.S.C. § 6103(a)).

# TAB 5

# TAB 5A

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett, Reporter

Re: Rules 35 and 40 (18-AP-A)

Date: February 27, 2022

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The proposed amendments to Rules 35 and 40, along with conforming amendments to Rule 32(g) and the Appendix of Length Limits, were approved for publication by the Standing Committee at the January meeting.

After the meeting of the Standing Committee, Cathie Struve noticed a minor problem: The proposed amendment to the Appendix of Length Limits would change the table that lists the document types and applicable limits, but it would not change the bullet points prior to the table.

The third bullet point currently reads:

> * * *
>
> ○ For the limits in Rules 5, 21, 27, 35, and 40:
>
> * * *

Given the proposal to transfer the content of Rule 35 to Rule 40, the reference to Rule 35 should be deleted. This bullet point should be amended as follows:

> * * *
>
> ○ For the limits in Rules 5, 21, 27, ~~35,~~ and 40:
>
> * * *

Because the amendments already approved are not scheduled for publication until August, this correction change can be made before publication if the Advisory Committee and Standing Committee approve.

# TAB 5B

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

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

* * * * *

**(g) Certificate of Compliance.**

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

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

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

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

**Committee Note**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Committee Note**

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

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

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

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

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

~~(1) **Time.** Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days~~

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

~~after entry of judgment. But in a civil case, unless an order shortens or extends the time, the petition may be filed by any party within 45 days after entry of judgment if one of the parties is:~~

~~(A) the United States;~~

~~(B) a United States agency;~~

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

~~(D) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf including all instances in which the United States represents that person when the court~~

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

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

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

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

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

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

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

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

(1) ~~a petition for panel rehearing produced using a computer must not exceed 3,900 words; and~~ **Petition for Panel Rehearing.** A petition for panel rehearing must:

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

(B) argue in support of the petition.

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

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

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

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

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

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

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

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

(1) **Time.** Unless the time is shortened or extended by order or local rule, any petition for panel rehearing or rehearing en banc must be filed within 14 days after judgment is entered—or, if the panel later amends its decision (on rehearing or otherwise), within 14 days after the amended decision is entered. But in a civil case, unless an order shortens or extends the time, the petition may be filed by any party within 45 days after entry of judgment or of an amended decision if one of the parties is:

(A) the United States;

(B) a United States agency;

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

(D) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf—including all instances in which the United States represents that person when the court of appeals' judgment is entered or files that person's petition.

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

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

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

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

(B) 15 pages if handwritten or typewritten.

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

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

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

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

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

(2) order additional briefing or argument; or

(3) issue any other appropriate order.

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

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

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

**Committee Note**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

# TAB 6

# TAB 6A

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Amicus Subcommittee

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

Date: February 25, 2022

The subcommittee has been considering whether to recommend that Rule 29 be amended to require additional disclosures by amici curiae. Rather than repeat the discussion from the subcommittee's last report, that report is included after this memo.

We have received three comments on this project, two from Senator Whitehouse and Representative Johnson, and one from the United States Chamber of Commerce. Because no proposal has yet been published for public comment, these comments have been docketed as new suggestions. (21-AP-G; 21-AP-H; 22-AP-A). The subcommittee considered these comments, and they are also included after this memo.

As with the subcommittee's last report, this report includes draft language to help guide the discussion by the Advisory Committee. The subcommittee did not then—and is not now—recommending that this draft language be proposed for publication for public comment, much less recommending that it be adopted. Instead, the point of providing draft language is to focus the Advisory Committee's consideration of these issues.

The key questions that the subcommittee believes should be discussed are highlighted after the relevant provisions of the draft. For each provision, the subcommittee urges the Advisory Committee to consider the purpose served by requiring such disclosure, the burden imposed by such disclosure, and whether there are less burdensome ways to serve that purpose. The discussion after each provision focuses on the benefit to the court of disclosure. In addition, disclosure also serves the public interest in knowing who is seeking to influence the court.

Rule 29(a)(4)(E) currently provides that an amicus curiae—other than the United States, a federal officer or agency, or a State—must include in its brief "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.

For ease of reference, the draft language below is set out as new, separate subdivisions of Rule 29, rather than as a complex set of romanette items (and bulleted subitems) under Rule 29(a)(4)(E).

**Rule 29. Brief of an Amicus Curiae**

* * *

(c) **Disclosures of Relationship Between the Amicus and a Party**. Unless the amicus curiae is one listed in the first sentence of Rule 29(a)(2), an amicus brief must include the following disclosures:

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

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

(3) whether a party is a member of the amicus curiae;

[Issue to discuss: should the rule require disclosure that a party is a member of the amicus curiae?

In evaluating the arguments made by an amicus, it is important for a court to know whether an amicus is independent of a party. If an amicus is understood to speak for its members, and one of the members for which it is speaking is a party, but the court does not know about this relationship, the court might think the amicus is more independent of the party than it is.

On the other hand, a party may be a member of an amicus for reasons that have nothing to do with the amicus brief. The risk of disclosure might dissuade some people from joining an organization. And the need to disclose might dissuade an organization from filing an amicus brief. Depending on the size and structure of an organization, an individual member may have little or no control over decisions by the amicus.

A narrower means of furthering the goal of determining whether an amicus is independent of a party might be the next provision.]

(4) whether a party or its counsel has (or two or more parties or their counsel collectively have) a 50% or greater interest in the ownership or control of the amicus curiae; and

[Issue to discuss: should the rule require disclosure that a party or its counsel has control over an amicus, or require disclosure of some lesser interest in the amicus?

As with the prior provision, in evaluating the arguments made by an amicus, it is important for a court to know whether an amicus is independent of a party. If a party has majority ownership or control of an amicus, but the court does not know about this relationship, the court is likely to think that the amicus is more independent of the party than it is.

On the other hand, the need to disclose might dissuade some from filing an amicus brief.

Setting the percentage at 50% means that some parties with considerable influence over an amicus will not be disclosed. Consider, for example, someone with a 40% interest where no one else has more than a 2% interest.

On the other hand, setting the percentage at a lower rate increases the risk that the need to disclose might dissuade some from filing an amicus brief.

The higher percentage might be viewed as a narrower means of furthering the goal of determining whether an amicus is independent of a party. It is less burdensome. But it is also underinclusive.]

(5) whether a party or its counsel has (or two or more parties or their counsel collectively have) 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. Amounts unrelated to the amicus curiae's amicus activities that were received in the form of investments or in commercial transactions in the ordinary course of business may be disregarded.

[Issue to discuss: should the rule require disclosure of contributions to an amicus by a party or its counsel and, if so, at what level?

Again, in evaluating the arguments made by an amicus, it is important for a court to know whether an amicus is independent of a party. A party that makes significant contributions to an amicus may have significant influence over that amicus. And if the court does not know about this relationship, it may think that the amicus is more independent of the party than it is.

On the other hand, a party may make significant contributions to an amicus for reasons that have nothing to do with the amicus brief. And the need to disclose contributors might dissuade some people from making significant contributions. Or it might dissuade some recipients of contributions from filing an amicus brief. Depending on the size and structure of an organization, a contributor—even a significant contributor—may have little or no control over decisions by the amicus.

The lower the percentage that triggers disclosure, the greater the burden. But the higher the percentage that triggers disclosure, the greater the likelihood that some parties with considerable influence over an amicus will not be disclosed.

As with the prior provision, the higher percentage might be viewed as a narrower means of furthering the goal of determining whether an amicus is independent of a party. But it is also underinclusive.]

Any required disclosure must identify the name of the party or counsel.

(d) **Disclosures of Relationship Between the Amicus and a Nonparty**.

Unless the amicus curiae is one listed in the first sentence of Rule 29(a)(2), an amicus brief must include the following disclosures:

(1) whether any person—other than the amicus, its members, or its counsel—contributed or pledged to contribute money intended to fund (or intended as compensation for) drafting, preparing, or submitting the brief;

[Issue to discuss: should the rule exclude from the disclosure requirement those earmarked contributions to an amicus that are given by a nonparty who is a member of the amicus curiae?

The current rule requires disclosure of earmarked contributions by nonparties, but it excludes earmarked contributions by members of the amicus.

The current rule can be understood as seeking to make sure that the amicus is speaking for itself and its members, rather than simply being a paid mouthpiece for someone else. If an amicus is serving as a paid mouthpiece for someone else but the court does not know this, the court may think that the amicus is presenting its own views rather than the views of the one who funded this brief.

The current rule is easily evaded so long as the nonparty making the earmarked contribution is willing to become a member of the amicus. The distinction between a member and a contributor might be viewed as artificial, depending on the structure of the amicus. Expanding the disclosure requirement so that earmarked contributions by members must be revealed would block this easy evasion.

On the other hand, members of an organization speak through the organization, and an organization speaks for its members. Having to disclose that a nonparty member made earmarked contributions would discourage members from making such contributions and discourage organizations from submitting such amicus briefs. And the direction of causation may not be clear: Did the member make the earmarked contribution because the amicus wanted to file the brief, needed funding, and asked a generous member? Or did the member make the contribution to prompt the filing of the brief?

The current rule might be viewed as a narrower means of furthering the goal of determining whether an amicus is speaking for itself. But it is also underinclusive because of the possibility of evasion.]

(2) whether any person has a 50% or greater interest in the ownership or control of the amicus curiae; and

[Issue to discuss: should the rule require disclosure that a nonparty has control over an amicus, or require disclosure of some lesser interest in the amicus?

In evaluating the arguments made by an amicus, a court may want to know whether an amicus is controlled by someone else. A person who controls the amicus might have interests that would affect a court's evaluation of the amicus brief but that are obscured by speaking through the amicus. Knowing the identity of such a person would allow a court to take those interests into account.

On the other hand, the need to disclose might dissuade some from filing an amicus brief. This would be more likely than if such disclosure were limited to a controlling interest in the amicus by a party. That's because a rule that requires disclosure of a controlling interest by a nonparty would require disclosure in *every* amicus brief filed by that amicus.

Setting the percentage at 50% means that some nonparties with considerable influence over an amicus will not be disclosed. On the other hand, setting the percentage at a lower rate increases the risk that the need to disclose might dissuade some from filing an amicus brief.

A higher percentage might be viewed as a narrower means of furthering the goal of determining whether an amicus is independent of a nonparty. It is less burdensome. But it is also underinclusive.

There is another approach to the problem that an amicus might effectively be a front for someone else: *caveat lector*. That is, perhaps courts should simply be skeptical of amicus briefs submitted by unknown entities that do not provide an adequate account of their "interest" as required by Rule 29(a)(3)(A). An amicus with a long track record is far less likely to be a front than one created during litigation.]

(3) whether any person has contributed 40% or more of the gross annual revenue of the amicus curiae during the twelve-month period preceding the filing of the amicus brief. Amounts unrelated to the amicus curiae's amicus activities that were received in the form of investments or in commercial transactions in the ordinary course of business may be disregarded.

[Issue to discuss: should the rule require disclosure of contributions to an amicus by a nonparty and, if so, at what level?

In evaluating the arguments made by an amicus, a court may want to know whether an amicus is being influenced by someone else. A party that makes significant contributions to an amicus may have significant influence over that amicus. A person with significant influence over the amicus might have interests that would affect a court's evaluation of the amicus brief but that are obscured by speaking through the amicus. Knowing the identify of such a person would allow a court to take those interests into account. And knowing the identify of significant contributors behind a number of amici in a given case would enable the court to see that what may appear to be broad support for a position has been manufactured.

On the other hand, a party may make significant contributions to an amicus for reasons that have nothing to do with the amicus brief. And the need to disclose contributors might dissuade some people from making significant contributions. Or it might dissuade some recipients of contributions from filing an amicus brief. Depending on the size and structure of an organization, a contributor—even a significant contributor—may have little or no control over decisions by the amicus.

The lower the percentage that triggers disclosure, the greater the burden. But the higher the percentage that triggers disclosure, the greater the likelihood that some persons with considerable influence over an amicus will not be disclosed.

In balancing these two, it might be appropriate to set a higher percentage for nonparty contributors than party contributors. A party obviously has a stake in the outcome, while a nonparty contributor may not.

Here again, *caveat lector* might be an alternative. If a court doesn't know—and can't tell from the statement of interest submitted by the amicus—that an amicus (or group of amici) warrants trust, it shouldn't provide that trust.]

Any required disclosure must identify the person.

# TAB 6B

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: AMICUS Act Subcommittee

Re: AMICUS Act and Potential Amendments to Rule 29

Date: September 8, 2021

At the April 2021 meeting of the Advisory Committee, the subcommittee presented a memorandum with background and initial thoughts about the AMICUS Act and the concerns underlying it (the "April 2021 Memo"), noting that while some matters addressed by that Act are outside the purview of the Advisory Committee, issues relating to disclosure requirements for filers of amicus briefs called for further study and consideration by the Advisory Committee. See April 2021 Agenda Book 133.

The subcommittee has met and considered these issues in some depth. In addition, since the last meeting of the Advisory Committee, the Supreme Court decided *Americans for Prosperity Foundation v. Bonta*, No. 19-251 (July 1, 2021), which held California's requirements for disclosure of contributors to charitable organizations facially unconstitutional. While the subcommittee is not at this point proposing any particular amendments to the Rules' current amicus disclosure provisions, it has drafted language to help guide the Committee's consideration of these issues.

## Rule 29's Current Disclosure Requirements

Rule 29(a)(4)(E) currently provides that an amicus curiae—other than the United States, a federal officer or agency, or a State—must include in its brief "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.

These provisions, modeled on Supreme Court Rule 37.6, were added in 2010. The Committee Note explains that the disclosure requirement "serves to deter counsel from using an amicus brief to circumvent page limits on the parties' briefs" and "also

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."

**Concerns Regarding the Current Disclosure Regime**

The concerns that drove the introduction of the AMICUS Act and that the subcommittee has been asked to consider are set out in a February 23, 2021 letter from Senator Sheldon Whitehouse to Judge Bates (the "2021 Whitehouse Letter," attached as Exhibit C to the April 2021 Memo, agenda book at 153), which asked that the Committee on Rules of Practice and Procedure establish a working group "to address the problem of inadequate funding disclosure requirements for organizations that file amicus curiae briefs in the federal courts." They are also discussed at length in the April 2021 Memo.

The overarching concern expressed in the letter and embodied in the AMICUS Act is that the current disclosure requirements in Rule 29 are sufficiently weak and easily evaded that they have enabled "a massive, anonymous judicial lobbying program," undertaken through amicus briefs paid for by undisclosed persons or entities, that "systematically favors well-heeled insiders over the average citizen." 2021 Whitehouse Letter at 6.

As discussed in more detail in the April 2021 Memo, the letter makes the following specific points about the current disclosure rules (reorganized here, for clarity, to track the provisions of Rule 29):

**1. *<u>Parties</u> could evade Rule 29's disclosure requirements and fund amicus briefs without disclosing it.***

- Rule 29(a)(4)(E)(ii) requires an amicus to disclose whether "a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief."

- The letter suggests that rule is too narrowly drawn because, money being fungible, it still allows parties to fund amicus briefs through monetary contributions to the amicus organization that are not specifically earmarked "to fund preparing or submitting" a particular amicus brief.

- In fact, the letter suggests that the "preparing or submitting" language could be construed "so narrowly as to only encompass the costs of formatting, printing, and delivering the specific brief."

- Moreover, because Rule 29(a)(4)(E)(iii) exempts "members" of an amicus from disclosing contributions they make to fund the preparation or

submission of an amicus brief, the letter suggests that parties who are members of an amicus organization can contribute to an amicus brief without disclosing it.

2. ***<u>Non-parties</u> who are not named amici could evade Rule 29's disclosure requirements and fund amicus briefs without disclosing it.***

- Rule 29(a)(4)(E)(iii) requires amici to disclose whether "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, identif[y] each such person."

- Like the corresponding rule for parties in clause (ii), this rule requires disclosure only of contributions by non-parties "intended to fund preparing or submitting" the amicus brief. The letter suggests that it therefore still allows non-parties to fund amicus briefs anonymously through monetary contributions to the amicus organization that are not specifically earmarked "to fund preparing or submitting" a particular brief.

- Moreover, the rule expressly exempts from disclosure contributions by members of an amicus organization.

- As a result of these potential loopholes, the letter suggests that a single deep-pocketed person or entity could anonymously fund multiple amicus briefs (and potentially a party brief as well) in a single case, creating the misleading impression of widespread or grassroots support for a position that in reality lacks such support.

The letter concludes by noting that while "it would be salutary for the judicial branch to address these issues on its own," "a legislative solution" like the AMICUS Act "may be in order to ensure much-needed transparency around judicial lobbying, and to put all *amicus* funders on an equal playing field." 2021 Whitehouse Letter at 8.

## The AMICUS Act

The AMICUS Act (as introduced in 2019 and attached as Exhibit A to the April 2021 Memo, agenda book at 144) is discussed in more detail in the April 2021 Memo. The provisions most directly relevant here are the following:

> *Covered Amici*. The Act does not apply to all amici, but only to any "covered amicus," defined to mean "any person . . . that files not fewer than 3 total amicus briefs in any calendar year in the Supreme

Court of the United States and the courts of appeals of the United States." S. 1411, §2(a) (proposing new 28 U.S.C. §1660(a)).

*Disclosure*. The Act would require any covered amicus who files an amicus brief in the Supreme Court or courts of appeals to "list in the amicus brief the name of any person who—(A) contributed to the preparation or submission of the amicus brief; (B) contributed not less than 3 percent of the gross annual revenue of the covered amicus for the previous calendar year if the covered amicus is not an individual; or (C) contributed more than $100,000 to the covered amicus in the previous year." S. 1411, §2(a) (proposing new 28 U.S.C. §1660(b)(1)). It makes an exception for "amounts received by a covered amicus . . . in commercial transactions in the ordinary course of any trade or business conducted by the covered amicus or in the form of investments (other than investments by the principal shareholder in a limited liability corporation) in an organization if the amounts are unrelated to the amicus filing activities of the covered amicus." *Id.* (proposing new 28 U.S.C. §1660(b)(2)).[1]

**Constitutional Concerns Associated with Disclosure**

Since the last meeting of the Advisory Committee, the Supreme Court decided *Americans for Prosperity Foundation v. Bonta*, No. 19-251 (July 1, 2021), which 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.

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." *See* Slip op. at 7 (cleaned up) (opinion of Roberts, C.J.).[2] "While exacting

[1] The AMICUS Act also contains registration requirements for covered amici, a prohibition on covered amici making gifts to court of appeals judges or Supreme Court justices, and civil fines for violations. These requirements are discussed in the April 2021 Memo. Because the consensus of the subcommittee is that only disclosure requirements are within our purview, this memo does not address those parts of the AMICUS Act.

[2] 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.

scrutiny does not require that disclosure regimes be the least restrictive means of achieving their ends, it does require that they be narrowly tailored to the government's asserted interest." *Id.* at 9 (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 11.

The Court then found that California's disclosure regime did not satisfy the narrow tailoring requirement. *Id.* at 12. It accepted that "California has an important interest in preventing wrongdoing by charitable organizations." *Id.* But it found "a dramatic mismatch" between that interest and the state's disclosure requirements. *Id.* at 13. 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.* at 14. 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 17.

## Potential Amendments to Rule 29

The subcommittee believes that the Rules should *not* establish a different disclosure regime for entities that file three or more amicus briefs per year (as the AMICUS Act would do). Rule 29's current disclosure requirements apply to all parties and amici, and any amendments to Rule 29 should likewise apply to all parties and amici.

On the other hand, the subcommittee is far from certain whether the disclosure requirements regarding the relationship between a party and an amicus should be the same as those regarding the relationship between a non-party and an amicus. Both the interests supporting required disclosure and the burdens counseling against required disclosure may be different. As a result, both the policy analysis and the constitutional analysis may be different. The subcommittee has not reached even a tentative conclusion on this question; the subcommittee would particularly welcome discussion of this issue by the full Advisory Committee. This memo presents identical language addressed to both situations to facilitate the Committee's discussion of this important question, not to suggest its resolution.

### 1. *Amendments related to disclosure of party funding of amicus briefs*

The subcommittee tends to think that it would be appropriate to make some amendments to the rule regarding disclosure of party funding of amicus briefs to ensure that the rule's purpose, as identified in the Committee Note—preventing

parties from evading the page limits by funding amicus briefs to support their position—is served.

Here is proposed language to guide discussion. For ease of exposition, a clean text is shown with noteworthy additions shown in red. A full redline follows this memo. Notes regarding the text and issues to be discussed are enclosed in brackets and shown in blue.

**Rule 29. Brief of an Amicus Curiae**

* * *

(4) **Contents and Form**. An amicus brief . . . must include the following:

* * *

(E) unless the amicus curiae is one listed in the first sentence of Rule 29(a)(2) [the cross reference excuses the United States, its officer and agencies, as well as the States from these requirements], a statement that:

(i) indicates whether a party or its counsel—

- authored the brief in whole or in part;

- contributed money intended to fund drafting, preparing, or submitting the brief;

[The word "drafting" is added to the existing requirement to respond to the concern that the "preparing or submitting" language could be construed "so narrowly as to only encompass the costs of formatting, printing, and delivering the specific brief." The subcommittee believes this addition serves to clarify what is generally if not universally understood and is not controversial.]

- 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; or

[This would be wholly new. The idea is to create a relatively easy to administer rule to address the concern that a party could

influence amicus briefs through ownership or contributions to the amicus organization that are not earmarked for the "preparation or submission" of a particular brief. Such a rule has the advantage of clarity regarding what must be disclosed, making it easier to comply with and administer, but because the 10% threshold is necessarily somewhat arbitrary, the fit between means and end is imprecise.

The language is based in part on the disclosure provisions of the AMICUS Act, with some differences.

- The AMICUS Act requires disclosure if a person "contributed not less than 3 percent of the gross annual revenue of the covered amicus for the previous calendar year if the covered amicus is not an individual; or … contributed more than $100,000 to the covered amicus in the previous year." Any such threshold figure or percentage is necessarily somewhat arbitrary, and the lower the figure or percentage the greater the burden of disclosure becomes. Current Rule 26.1, which governs corporate disclosure statements, uses 10%, and the subcommittee has borrowed that benchmark for discussion purposes.

- The AMICUS Act refers to the "previous calendar year"; the proposed language above changes that to "the twelve-month period immediately preceding the filing of the amicus brief." Focusing on the previous calendar year may miss important contributions, the ones most proximate to the amicus filing. While compiling the information based on the immediately prior twelve months may be slightly more burdensome than compiling information based on the previous calendar year, the burden is not likely to be great if the requirement is limited to parties.

- The exception for "amounts received in commercial transactions in the ordinary course of business" and for investments is also taken from the AMICUS Act, but the Act carves out of the exception "investments by the principal shareholder in a limited liability corporation," which must be disclosed. Since the subcommittee's proposed language above already requires disclosure of ownership interests in amici, the subcommittee did not think it was necessary to include that carve-out.]

● directly or indirectly, possesses a sufficient ownership interest in, or has made sufficient contributions to, the amicus curiae that a reasonable person would, under the circumstances, attribute to the party or its counsel a significant influence over the amicus curiae with respect to the filing or content of the brief; and

[This would be wholly new. The idea is to create a standard to address the concern that a party could influence amicus briefs through ownership or contributions to the amicus organization that are not earmarked for the "preparation or submission" of a particular brief. Compared to a rule (like the one immediately above) that would set a specific threshold percentage above which a contribution must be disclosed, such a standard would be less clear and more difficult to administer but would arguably provide a tighter fit between means and ends.

The subcommittee decided to include both the rule and the standard for the full Committee's consideration. The Committee might choose one over the other. It might choose to include both, with one serving as a backstop for the other, although this might create the risk that the percentage rule could be viewed as a safe harbor. (Or, the Committee might choose to include neither if it concludes that the goal of broadening disclosure of party contributions to amicus briefs is not worth the complexity.)]

(ii) identifies any person—except for the amicus, its counsel, and its members who are not parties or counsel to parties—who contributed money intended to fund drafting, preparing, or submitting the brief.

[The current Rule does not specifically address the relationship between the provision requiring a party (or its counsel) to disclose contributions to an amicus brief and this provision, which requires all persons to disclose such contributions but exempts members of amici curiae (as well as amici and their counsel). This amendment would make clear that a party (or its counsel) must disclose contributions to an amicus brief even if the party or counsel is a member of the amicus. It would also add the word "drafting" for the same reason that word is added above in clause (i).]

### 2. *Amendments related to disclosure of non-party funding of amicus briefs*

Rule 29's current disclosure regime treats monetary contributions to amici by parties identically to monetary contributions to amici by non-parties. Amici are required to disclose the identity of any person, whether a party or not (other than the amicus itself, its counsel, or its members) who "contributed money that was intended to fund preparing or submitting the brief." That said, as discussed above, the subcommittee thinks that expanding the disclosure requirements regarding non-parties presents more difficult issues than expanding the disclosure requirements regarding parties.

Accordingly, the subcommittee has drafted language amending current Rule 29(a)(4)(E)(iii), which governs disclosure of contributions by non-parties, that parallels the language above concerning disclosure of contributions by parties. That language follows. The blue, bracketed notes do not repeat the points made above regarding the same language in the context of disclosure of party contributions (although those points remain applicable), but instead focus on some of the differences between disclosure of party contributors and non-party contributors. The hope is that seeing the language laid out like this helps the Committee to decide whether the two situations should be treated the same way.

If the Committee ultimately concludes that the two situations should be handled the same way—or even if the Committee concludes that the two situations should not be handled the same way, but still decides to expand disclosure of non-party contributions beyond what is contained in Rule 29(a)(4)(E)(ii) above—the amended language for non-parties would be integrated into amended Rule 29(a)(4)(E)(ii) above.

**Rule 29. Brief of an Amicus Curiae**

* * *

(4) **Contents and Form**. An amicus brief . . . must include the following:

* * *

(E) unless the amicus curiae is one listed in the first sentence of Rule 29(a)(2), a statement that:

* * *

(iii) identifies any person—except for the amicus, its counsel[, and its members who are not parties or counsel to parties]—who:

- contributed money intended to fund drafting, preparing, or submitting the brief; or

- 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; or

[This would be wholly new. As with the identical language above for party contributions, the idea is to create a rule to address the concern that a non-party could evade the current disclosure requirements and influence amicus briefs through ownership in or contributions to the amicus organization that are not earmarked for the "preparation or submission" of a particular brief.

A concern is that expanding the requirements regarding disclosure of non-party contributions in this way would impose a substantially greater burden on amici than a similar expansion of the requirement to disclose contributions by parties. That's because an amicus would *always* have to disclose major owners or contributors, not merely in the presumably unusual situation where a party is a major owner or contributor.

The subcommittee has discussed whether the exemption for members of the amicus in the current rule should be eliminated, on the ground that the distinction between a member and a contributor may be artificial in many situations. (Accordingly, it appears in brackets above.) However, that would involve not just tightening the current disclosure requirements regarding non-parties to ensure they are not evaded, but making a significant change to the existing disclosure regime, which does treat members differently. And it would further aggravate the burden on amici.]

- directly or indirectly, possesses a sufficient ownership interest in, or has made sufficient contributions to, the amicus curiae that a reasonable person would, under the circumstances, attribute to

the party or its counsel a significant influence over the amicus curiae with respect to the filing or content of the brief.

[This would be wholly new. As with the identical language above for party contributions, the idea is to create a standard to address the concern that a non-party could evade the current disclosure requirements and influence amicus briefs through ownership or contributions to the amicus organization that are not earmarked for the "preparation or submission" of a particular brief.

Again, expanding the disclosure requirements regarding non-parties in this way would impose a substantially greater burden on amici than expanding the disclosure requirements regarding parties. That's because an amicus would *always* have to disclose major owners or contributors, not merely in the presumably unusual situation where a party is a major owner or contributor.]

**Constitutional Considerations Regarding These Possible Amendments**

As discussed above, in *Americans for Prosperity Foundation*, the Supreme Court held unconstitutional a California law requiring charities that solicited in California to disclose their major contributors. While that decision is relevant to the analysis here, 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 Foundation*.

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." Slip op. at 16-17 (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 FRAP 29 would have to be based on careful identification of the governmental interest being served and be narrowly tailored to serve that interest. The governmental interest in allowing amicus briefs in the first place is to help a court decide cases properly. (The term, after all, is amicus curiae, not amicus partis.) What are the interests in disclosure by amici?

**Relationship between amicus and party.** According to the 2010 Committee Note, the disclosure of whether a party's counsel authored the brief and whether a party or a party's counsel contributed money to fund the brief "serves to deter counsel from using an amicus brief to circumvent page limits on the parties' briefs." While page limits might seem pedestrian, the idea that each party has a certain limited opportunity to makes its arguments and should not be able to exceed those limits by subterfuge is important to the fair functioning of an adversary system. More broadly, one could view this requirement as designed to prevent the court (and the public) from being misled into thinking that an amicus is independent of a party when it is not.

It might be thought that the only thing that matters is the persuasiveness of the arguments in an amicus brief. But the identity of the amicus and its interest in the case can also be important in evaluating those arguments. Indeed, Rule 29(a)(4)(D) already requires these disclosures as well. And sometimes a court will explicitly rely on the identity of an amicus. *See, e.g.*, *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021) (stating that the dissent "suggests that the best way to help aliens is to rule against the alien before us" but "unsurprisingly neither Mr. Niz-Chavez nor any of the immigration policy advocates who have filed amicus briefs in this Court share that assessment") (cleaned up).

The problem with existing Rule 29 is that a party may have considerable influence over an amicus without authoring the brief or contributing money earmarked for the brief. If an amicus is a corporation, it must already disclose any parent corporation and any publicly held corporation that owns 10% or more of its stock. Rule 29(a)(4)(A) (incorporating the requirements of Rule 26.1.) But if a party that is a privately held corporation has an ownership interest in the amicus—and there are privately held corporations with billions in revenue—no similar disclosure is currently required. Or suppose a party has no ownership interest in the amicus—perhaps because the amicus is a nonprofit—but a party is its primary contributor, donating money that is used for the amicus's operations generally but not earmarked for the particular brief at issue. Existing Rule 29 does not require disclosure of that relationship.

A rule that required disclosure of ownership or contributions by a party at the 10% level would impose some burden on amici. It would take some time and effort to make the determination, although if the disclosure is limited to parties, the burden would be quite limited. That is, an amicus would not have to ascertain each one of its 10% owners or contributors, but only whether a party passed that threshold. Some might decline to submit an amicus brief to avoid disclosure. In some cases, that might be a good thing, if the amicus realized that its relationship with the party would lead a court to discount its arguments. In other cases, if the amicus concluded that confidentiality was more important than filing the brief, the burden on the amicus would be greater.

It is difficult to be confident that 10% is the right threshold to closely match the government purpose. The lower the threshold, the greater the burden. And the lower the threshold, the greater the risk of requiring disclosure of owners and contributors with no substantial influence over the amicus. For current purposes, the 10% threshold is borrowed from the corporate disclosure requirement of Rule 26.1 (for comparison, the AMICUS Act threshold is 3%).

Using a standard rather than a rule to set the disclosure requirement arguably makes the requirement a closer fit with the purpose. By setting the standard at the ownership interest or contribution level at which a reasonable person would attribute to the party or its counsel a significant influence over the amicus curiae, the fit between means and end is quite close. But because a standard would require an exercise of judgment rather than a mechanical calculation, it would be considerably more burdensome for amici and their counsel, who would have to determine for themselves what the "reasonable person" standard would be. Such a malleable standard could also potentially lead to different amici interpreting the standard in very different ways, leading some amici to disclose much and others little, and thus making the disclosures less useful for the court.

As discussed above, because there are benefits and detriments associated with either a rule or a standard, the subcommittee has drafted potential language for each.

**Relationship between amicus and nonparty.** According to the 2010 Committee Note, the disclosure of whether a nonparty—other than the amicus itself, its members, or its counsel—contributed money to fund the brief "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." So understood, the government interest is in ascertaining whether the amicus is truly committed to speaking for itself or is instead simply willing to serve as a paid mouthpiece for someone else.

Alternatively, the government's interest in disclosure might be viewed as a broad interest in transparency, permitting the court—and the public—to know who is truly speaking in each amicus brief, so that, for example, it is possible to spot whether someone is funding multiple amici, thereby creating the illusion of broad

support for a position. Just as a party may have considerable influence over an amicus without contributing money earmarked for the brief, so too might a nonparty.

Again, some might think that the only thing that matters is the persuasiveness of the arguments in an amicus brief. But just as the identity of an amicus may matter, so too may the number of amici. In *American for Prosperity* itself, the Court highlighted both:

> The gravity of the privacy concerns in this context is further underscored by the filings of hundreds of organizations as amici curiae in support of the petitioners. Far from representing uniquely sensitive causes, these organizations span the ideological spectrum, and indeed the full range of human endeavors: from the American Civil Liberties Union to the Proposition 8 Legal Defense Fund; from the Council on American-Islamic Relations to the Zionist Organization of America; from Feeding America—Eastern Wisconsin to PBS Reno. The deterrent effect feared by these organizations is real and pervasive, even if their concerns are not shared by every single charity operating or raising funds in California.[3]

A rule that required disclosure of ownership or contributions by a nonparty at the 10% level would impose more of a burden on amici than one limited to parties. That's because an amicus would have to ascertain each one of its 10% owners or contributors, not only whether a party passed that threshold. Under such a rule, each one of the hundreds of amici who submitted briefs in *Americans for Prosperity* arguing against the constitutionality of California's disclosure requirement would have to determine whether any of its owners or contributors passed the threshold and, if so, either disclose them or decline to file. And rather than worrying that the government might not live up to its assurance of confidentiality, each amicus would know that its disclosure would be publicly available as part of its brief. On the other hand, the burden imposed would be less than the burden involved in *Americans for Prosperity* because fewer amici would have owners or contributors who meet that threshold than would meet the $5000 (or, in some cases, 2%) threshold, and because it would apply only to those seeking to file amicus briefs.

For the same reasons, a standard set at the ownership interest or contribution level at which a reasonable person would attribute to a person a significant influence

[3] Slip op. at 17-18. And at oral argument, Justice Barrett asked, "So we're at 250 organizations who filed briefs in support of the Petitioners here, arguing that the disclosure mandate would harm their rights. Is that enough for a facial challenge? I gather your position is no. So I'm wondering how many would it take?"

over the amicus curiae would also be more burdensome that the same standard limited to parties.

If the government interest in disclosure of the relationship between an amicus and a nonparty is to determine whether the amicus is truly committed to speaking for itself or is instead simply willing to serve as a paid mouthpiece for someone else, an expansion of the disclosure requirements might be justified as an anti-evasion measure. That is, to protect against the possibility that an amicus might be influenced by a major nonparty contributor who does not earmark the contribution for the brief, disclosure of the contribution might be warranted.

But if one is trying to distinguish between an amicus who is truly committed to speaking for itself and one who is simply willing to serve as a paid mouthpiece for someone else, it is necessary to figure out what it means for an amicus to speak for itself. An amicus with members speaks for those members, or put somewhat differently, members of an amicus speak through that amicus. So understood, there may be no need to require disclosure of major contributions by members because when speaking for its members, an amicus is speaking for itself. (Presumably that is at least part of the reason that the current Rule does not require disclosure of contributions by members.)

The current Rule treats contributions by non-members differently. But some might think that an amicus speaks for its contributors and that its contributors speak through the amicus. From this perspective, any distinction between member contributors and nonmember contributors is artificial. *Americans for Prosperity* involved contributors. It relied on *NAACP v. Patterson*, 357 U. S. 449 (1958), which involved members, and *Shelton v. Tucker*, 364 U. S. 479 (1960), which involved members and contributors.

If this is right, then the current Rule regarding the relationship between an amicus and a non-party may be the best approach. If a person is a member of an amicus or a general contributor to an amicus, a court can reasonably believe that the amicus is speaking for itself (including its members and contributors). But if a person is not willing to become a member of the amicus and makes a contribution that is ear-marked for an amicus brief, a court may have reason to question whether the views expressed in that amicus brief are as aligned with the declared identity and statement of interest of the amicus as would otherwise appear.

On the other hand, if the government's interest in disclosure is viewed more broadly than articulated in the 2010 Committee Note, then broadening the disclosure requirement regarding the relationship between an amicus and a nonparty might be more appropriate. If the governmental interest is a broad interest in transparency, permitting the court and the public to know who is behind each amicus and be able to spot whether someone is funding multiple amici, thereby creating the illusion of

broad support for a position, then the existing disclosure Rule might be viewed as inadequate to serve that interest.

Under the dissent's view in *Americans for Prosperity*, a broad disclosure requirement with exceptions for those who fear some harm would be sufficient, but the majority rejected any requirement of showing such a burden before evaluating for narrow tailoring. A less restrictive alternative might simply be a reminder to the courts to be careful when counting the number of amici on a side, to not assume that amici are acting independently of each other, and to be aware when reviewing the statement of identity of the amicus and its interest in the case that the court has no way of knowing the extent to which the filing and content of that brief has been influenced by an unidentified owner or donor if such influence was accomplished by means other than through direct funding of that particular brief.

* * *

There is another governmental interest in amicus disclosures: informing the recusal decisions of judges. The subcommittee has not yet addressed the suggestion that standards for recusal based on amicus filings be developed.

# TAB 6C

# Congress of the United States
Washington, DC 20510

January 7, 2022

Honorable John D. Bates
Chair, Judicial Conference Committee on Rules of Practice and Procedure
333 Constitution 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

Re: Follow-up to Improving Rule 29's *Amicus* Disclosure Requirements

Dear Judge Bates and Judge Bybee,

We write to follow up on our November 10, 2021, letter regarding Rule 29's *amicus* disclosure requirements. Currently, Rule 29 allows wealthy donors to fund multiple *amici* in a single case without disclosing those connections to courts, giving the false impression of broad support for those donors' positions. A recent order in the District Court for the District of Columbia, attached, illustrates how members of the U.S. Chamber of Commerce (Chamber) take advantage of this loophole to amplify their legal claims.

On December 7, 2021, Judge Emmet Sullivan of the District Court for the District of Columbia denied the Chamber's request to participate as an *amicus* in *In re Am. Nat'l Red Cross ERISA Litig.*[1] Judge Sullivan's order noted that "several of the [Chamber's] arguments are duplicative of those in the [American Red Cross's] motion to dismiss."[2] The Chamber's arguments in support of the American Red Cross are part of a larger effort to submit duplicative briefs on behalf of its members, even while it accuses parties in these cases of submitting "cookie-cutter complaints."[3] The Chamber made similar arguments in *amicus* briefs filed in support of

[1] D.D.C., No. 1:21-cv-00541, minute order 12/7/2021.
[2] *Id.*
[3] *Infra* note 7, at 1.

Humana,[4] Principal Life Insurance,[5] Salesforce.com,[6] and Xerox, Inc.[7] in related ERISA litigation. These businesses comprise some of the few publicly-known Chamber members, but the Chamber did not disclose this direct connection to the parties in any of its briefs.[8] These cases are the latest examples of the Chamber's repeated failure to disclose these connections even as they echo their members' arguments.[9]

Several of these briefs were submitted in district court, meaning Rule 29 does not apply. Nevertheless, these cases illustrate why Rule 29 should better arm judges with the information they need to evaluate whether to permit an *amicus*, the credibility of the *amicus*'s arguments, and ultimately the final decision on the merits. Disclosure reforms that help judges identify *amici* who act as clones of their members would enhance the marketplace of ideas, not undermine it.

The circumstances where courts allow participation in judicial proceedings by masked or anonymous entities are rare. These front-group *amici* offer anonymity to the true interests seeking to influence court proceedings. Allowing this de facto anonymity favors the big interests who can afford the masquerade. Neither the masking nor the favoring is appropriate.

We hope this information helps inform the Committee's deliberations going forward. We look forward to seeing the results of those discussions in the coming months.

Sincerely,

Sheldon Whitehouse
United States Senator

Henry C. "Hank" Johnson, Jr.
Member of Congress

[4] Brief of Amicus Curiae Chamber of Commerce of the United States of America in Support of Defendants' Motion to Dismiss Plaintiff's First Amended Complaint, *Moore v. Humana, Inc.*, W.D. Ky., No. 3:21-cv-00232-RGJ (2021).
[5] Brief of *Amici Curiae* the Chamber of Commerce of the United States of America and the American Benefits Council in Support of Defendant-Appellee 5-14, *Rozo v. Principal Life Insurance Co*., 8th Cir., No. 21-2026 (2021).
[6] Brief for the Chamber of Commerce of the United States as *Amicus Curiae* in Support of Defendants-Appellees and Affirmance 2-6, *Davis v. Salesforce.com, Inc.*, N.D. Cal., No. 21-15867 (2021).
[7] Brief of Amicus Curiae Chamber of Commerce of the United States of America in Support of Defendants' Motion to Dismiss, *Carrigan v. Xerox Corp*., D. Conn., No. 21-1085 (2021).
[8] Dan Dudis, *The Chamber of Secrets*, Public Citizen, Sept. 13, 2017, *available at* https://chamberofcommercewatch.org/wp-content/uploads/2017/09/Chamber_of_Secrets_members_report.pdf.
[9] *See* Letter from Sen. Sheldon Whitehouse & Rep. Henry Johnson to Hon. John Bates & Hon. Jay Bybee 6 (Nov. 10, 2021).

**User Name:** Chas Papirmeister
**Date and Time:** Thursday, December 9, 2021 9:00:00 AM EST
**Job Number:** 159535532

## Document (1)

1. *1:21cv541, In Re American National Red Cross Erisa Litigation*

**Client/Matter:** -None-
**Search Terms:** number(1:21-cv-00541)
**Search Type:** Terms and Connectors
**Narrowed by:**

| Content Type | Narrowed by |
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| Dockets | Case Status: Open,Unknown,Closed; Court: District of Columbia Federal U.S. District Courts (Civil); Case Classification: Civil |

# *1:21cv541, In Re American National Red Cross Erisa Litigation*

US District Court Docket

United States District Court, District of Columbia

(Washington, DC)

**This case was retrieved on 12/09/2021**

## Header

**Case Number:** 1:21cv541
**Date Filed:** 03/02/2021
**Assigned To:** Judge Emmet G. Sullivan
**Nature of Suit:** ERISA (791)
**Cause:** Breach of Fiduciary Duties
**Lead Docket:** None
**Other Docket:** 1:21cv00620
**Jurisdiction:** Federal Question

**Class Code:** Open
**Statute:** 29:1109
**Jury Demand:** Plaintiff
**Demand Amount:** $150,000
**NOS Description:** ERISA

## Participants

### Litigants

AMERICAN NATIONAL RED CROSS ERISA LITIGATION
**In Re**

DIANA F. TRACY
**Plaintiff**

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| # | Date | Proceeding Text | Source |
|---|---|---|---|
| | | COMMERCE OF THE UNITED STATES OF AMERICA. (Attachments: # 1 Proposed Amicus Brief)(Santos, Jaime) (Entered: 11/12/2021) | |
| 31 | 11/12/2021 | NOTICE of Proposed Order by CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA re 30 MOTION for Leave to File Amicus Curiae Brief (Santos, Jaime) (Entered: 11/12/2021) | |
| 32 | 11/26/2021 | RESPONSE re 30 MOTION for Leave to File Amicus Curiae Brief Plaintiffs' Opposition to Motion of Chamber of Commerce to File Amicus Curiae filed by DAVID E. BAGENSTOSE, STACY M. MOXLEY, JASON L. RICHARD, LISA SCARAMUZZO, DIANA F. TRACY. (Gyandoh, Mark) (Entered: 11/26/2021) | |
| | 12/03/2021 | MINUTE ORDER construing 29 Proposed Stipulated Briefing Schedule as a Motion for Briefing Schedule. Plaintiffs' opposition to Defendants motion to dismiss the Amended Consolidated Complaint shall be filed by no later than January 3, 2022. Defendants shall file their reply by no later than February 15, 2022. Signed by Judge Emmet G. Sullivan on 12/3/2021. (lcegs1) (Entered: 12/03/2021) | |
| | 12/06/2021 | Set/Reset Deadlines: Plaintiffs' Opposition to Defendants Motion To Dismiss The Amended Consolidated Complaint due by 01/03/2022. Defendants Reply due by 02/15/2022. (mac) (Entered: 12/06/2021) | |
| | 12/07/2021 | MINUTE ORDER denying 30 Motion for the Chamber of Commerce of the United States of America for Leave to Participate as Amicus Curiae. "An amicus curiae, defined as friend of the court,... does not represent the parties but participates only for the benefit of the Court." United States v. Microsoft Corp., No. 981232, 2002 WL 319366, at *2 (D.D.C. 2002)(internal quotations omitted). Thus it is within the discretion of the Court to determine the fact, extent, and manner of participation by the amicus. Id. "'An amicus brief should normally be allowed when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the amicus to intervene and become a party in the present case), or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide. Otherwise, leave to file an amicus curiae brief should be denied.'" Jin v. Ministry of State Sec., 557 F. Supp. 2d 131, 137 (D.D.C. 2008) (quoting Ryan v. Commodity Futures Trading Comm'n, 125 F.3d 1062, 1064 (7th Cir. 1997)). | |

| # | Date | Proceeding Text | Source |
|---|---|---|---|
| | | See also Local Civil Rule 7(o). The Court, in its discretion, finds that (1) movants have not shown that a party is not adequately represented, and (2) several of movant's arguments are duplicative of those in the defendants' motion to dismiss. Signed by Judge Emmet G. Sullivan on 12/7/2021. (lcegs1) (Entered: 12/07/2021) | |



End of Document

# Congress of the United States
Washington, DC 20510

November 10, 2021

Honorable John D. Bates
Chair, Judicial Conference Committee on Rules of Practice and Procedure
333 Constitution 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

Re: Improving Rule 29's *Amicus* Disclosure Requirements

Dear Judge Bates and Judge Bybee,

We write to commend the Advisory Committee on Appellate Rules and its "AMICUS Act" Subcommittee for your thoughtful and productive work thus far on the issue of *amicus* funding disclosure. The draft language considered at the Committee's October 7th meeting is an encouraging step toward ensuring effective transparency in our judiciary. Below, we suggest three changes that would improve upon the draft language's framework.

We also write to respond to the concerns raised by the U.S. Chamber of Commerce (the Chamber) in its recent letter to you.[1] Not only are these arguments misplaced, the Chamber itself is Exhibit A for why robust changes are needed to make existing rules effective and fair.

## I. The Committee Should Address the Major Shortcomings in the Judiciary's Current *Amicus* Disclosure Regime.

Our letter to Judge Bates earlier this year discussed in detail how groups have exploited flaws in the judiciary's disclosure regime to the detriment of the courts and the public.[2] Since the Chamber's letter did not address any of these issues, we briefly review them here.

[1] *See* Letter from Daryl Joseffer, Exec. Vice President & Chief Couns., U.S. Chamber of Com. Litigation Ctr., to Hon. John Bates (Oct. 6, 2021) (Chamber Letter).
[2] *See* Letter from Sen. Sheldon Whitehouse & Rep. Henry Johnson to Hon. John Bates (Feb. 23, 2021) (Congressional Letter).

Rule 29 generally requires disclosure whenever either a party (or their counsel) or a third party helps fund an *amicus* brief submitted in litigation. The stated purpose of these requirements, modeled on the Supreme Court's Rule 37.6, is to "deter counsel from using an *amicus* brief to circumvent page limits on the parties' briefs."[3] The Clerk of the Supreme Court also explained that "[b]y requiring the disclosure of those who make a monetary contribution specifically intended for a particular amicus brief, the rule provides information about funding directly aimed at advocating specific positions" in court.[4] Unfortunately, Rule 29 fails to accomplish either of these goals because parties and non-parties alike can easily circumvent it. They can do so by funding an *amicus* brief without earmarking those funds toward the specific brief; by narrowly reading the rule to cover only the funding of administrative filing costs; or whenever they are a "member" of an organizational *amicus*, such as a trade association like the Chamber. Virtually anyone—a party included—can "surreptitiously 'buy[]' what amounts to a supplemental merits brief, disguised as an *amicus* brief."[5] The current regime thus frustrates a judge's ability—in the words of Advisory Committee member and Ninth Circuit Judge Paul Watford—"to know, in a more general sense, how closely aligned is this party with the amicus so [the judge] can make a decision about how much weight to give to the brief or not."[6]

The disclosure regime also leaves hidden the connections between the ever-growing flotillas of *amicus* briefs that now inundate the courts.[7] While less data is available on *amicus* filings in circuit courts, filings in the Supreme Court have skyrocketed. The average number of *amicus* briefs filed in the Supreme Court has almost doubled since 2010, with more briefs being filed despite a shrinking caseload.[8]

Our prior letter detailed just some of the documented cases of multiple *amici*—making the same arguments in favor of the same parties—receiving substantial funding from the same sources. In at least two cases, the same foundation funded both numerous *amici* and the organizations representing the litigants the *amici* supported.

Rule 29's shortcomings prevent us from knowing the full extent to which *amici*, parties, and their funders engage in these practices, but more than a few notable instances are already well documented.[9] Recent reporting based on hacked documents indicates that the National Rifle

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[3] Fed. R. App. P. 29 advisory comm. notes.
[4] Letter from Scott S. Harris, Clerk, U.S. Sup. Ct., to Sen. Sheldon Whitehouse 1 (Feb. 27, 2019) (Harris Letter).
[5] Congressional Letter, *supra* note 2, at 2 (citing *Supreme Court Rule Puts a Crimp in Crowd-Funded Amicus Briefs*, Law.com (Dec. 10, 2018), https://www.yahoo.com/now/supreme-court-rule-puts-crimp-075351473.html?guccounter=1).
[6] Mike Scarcella, *Judiciary Panel Weighs Expanding Disclosure Rule for Amicus Filers,* Reuters (Oct. 8, 2021), https://www.reuters.com/legal/litigation/judiciary-panel-weighs-expanding-disclosure-rule-amicus-filers-2021-10-08/.
[7] The Supreme Court has asked the Committee to consider changes to Rule 29 "in light of the similarity of" Rule 29 to Supreme Court Rule 37.6 and to "provide helpful guidance on whether an amendment to Supreme Court Rule 37.6 would be appropriate." Accordingly, the Committee should consider the amicus practices at both the Circuit Court and Supreme Court levels in order to provide this guidance.
[8] Anthony J. Franze & R. Reeves Anderson, *Amicus Curiae at the Supreme Court: Last Term and the Decade in Review*, Nat'l L. J., Nov. 18, 2020, at 4, https://www.arnoldporter.com/-/media/files/perspectives/publications/2020/11/*amicuscuriae*-at-the-supreme-court.pdf.
[9] *See* Congressional Letter, *supra* note 2, at 3-6.

Association (NRA) paid an attorney to write *amicus* briefs on behalf of the NRA's New York State affiliate and litigation partner in cases before the Supreme Court in 2019 and earlier this year.[10] The attorney did not disclose this connection in either instance, and it is not clear whether Rule 37.6 required him to do so.

As Judge Watford's comment underscores, the current *amicus* practice undermines judges' ability to place the arguments before them in their proper context, such as whether a legal argument or factual contention is widely agreed upon. Courts' increasing reliance on *amicus* briefs, including taking note of the number of briefs filed in support of a position, makes these concerns all the more worrisome.[11] These rules must be updated to meet the transparency challenges and public concerns facing the courts today. The public and our judges should not have to rely on Russian hackers to ensure fairness and transparency in our courtrooms.

## II. The Draft Language Would Be Improved By Expanding the Covered *Amicus* Funders and Applying New Rules Across the Board.

The Subcommittee's draft language would be a major step toward solving these problems and bringing more transparency to our courtrooms. Under the draft language, parties who fund briefs could no longer circumvent disclosure rules through unduly narrow readings of Rule 29 or by the simple fact of the party's membership in the *amicus curiae*. The draft language's new ownership interest and gross annual revenue thresholds would ensure that transparency is expanded beyond direct funding of a particular brief. These thresholds also satisfy the Committee's preference for a clear, administrable rule. We offer three suggestions for further strengthening Rule 29: applying new rules to both non-party and party-donors, strengthening the rule to ensure it uncovers all the most substantial *amicus* funders, and eliminating membership exceptions.

### a. Changes to Rule 29 Should Apply to Non-Party Donors as Well as Party Donors.

We strongly encourage the Committee to recommend that any new disclosure rules be applied to party and non-party *amicus* donors alike.[12] A rule that reveals only parties' funding of *amici* would leave hidden the web of financial connections that tie together many *amici*, and which often tie the *amici* to the party.

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[10] Will Van Sant, *The NRA Paid a Gun Rights Activist to File SCOTUS Briefs. He Didn't Disclose it to the Court.*, The Trace (Nov. 3, 2021), https://www.thetrace.org/2021/11/scotus-nra-foundation-david-kopel-nysrpa-v-bruen-documents/.

[11] Paul M. Collins, Jr. & Lisa A. Solowiej, *Interest Group Participation, Competition, and Conflict in the U.S. Supreme Court*, 32 L. & Soc. Inquiry 955, 961 (2007); Paul M. Collins, Jr., Pamela C. Corley & Jesse Hammer, *The Influence of Amicus Curiae Briefs on U.S. Supreme Court Opinion Content*, 49 L. & Soc'y Rev. 917, 920, 922 (2015) (finding, using "computer assisted content analysis techniques," that *amicus* briefs "affect[] the substance" of opinions and that Justices "seldom adopt information from amicus briefs into their opinions for the purpose of criticizing that information"); Paul M. Collins, Jr. & Wendy L. Martinek, *Judges and Friends: The Influence of Amici Curiae on U.S. Court of Appeals Judges*, 43 Am. Politics Rsch. 255 (2015).

[12] In that spirit, we have taken to heart the subcommittee's feedback on our AMICUS Act's repeat-filer requirement, which made the bill's disclosure requirements applicable only to those amici who filed three or more briefs in a year. To ensure a rule that treats all parties equally, the bill we intend to introduce this Congress will remove this requirement.

Contrary to the Chamber's view, the government's interest in uncovering these connections is more than sufficient to justify such a rule. When these connections are left undisclosed, judges are unable to draw proper inferences about an *amicus*'s motivations or the representativeness of its position in the marketplace of ideas. The Subcommittee correctly recognized that the Supreme Court's recent decision in *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021) (*AFPF*), acknowledged the importance of these types of considerations.[13] As the First Circuit emphasized in the immediate aftermath of the *AFPF* decision, "there is plainly an informational interest served" by laws requiring identification of a speaker's donors, as "[c]itizens rely ever more on a message's source as a proxy for reliability and a barometer of political spin."[14] This information may also be relevant to recusal decisions. As the Supreme Court affirmed, the state has a "vital" interest in "maintain[ing] the integrity of the judiciary and the rule of law," as well as guarding against threats to "public confidence in the fairness and integrity of the nation's . . . judges." *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 889 (2009) (citation omitted). These interests are directly implicated by the *amicus* disclosure issues at hand. The appearance that the wealthiest interests can misleadingly convince a judge to give more weight and credibility to their arguments by funding a plethora of *amicus* briefs threatens to undermine the public's faith that our courts will provide fair, impartial justice.

In order to vindicate each of these substantial interests, disclosure reforms should target only individuals who, by way of their direct investment in a brief, or considerable investment in an *amicus* organization, are most likely to be interested in, have a say in, and agree with an *amicus*'s positions. Such reforms would strike an appropriate balance between the government's transparency interests and the First Amendment rights that might be implicated. These changes would advance the underlying aims of the First Amendment. Numerous federal judges have complained in recent years that "too many *amicus* briefs do not even pretend to offer value and instead merely repeat . . . a party's position" and "serve only as a show of hands on what interest groups are rooting for what outcome."[15] Thus, to the extent these changes would help courts and the public assess duplicative arguments from essentially the same entities, the changes would enhance—not "discourage[]"—"this nation's vibrant public discourse."[16]

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[13] Memorandum from AMICUS Act Subcomm. to Advisory Comm. on Appellate Rules 14, n.3 (Sept. 8, 2021) (AMICUS Memorandum).

[14] *Gaspee Project v. Mederos*, No. 20-1944, slip op. at 8-9 (1st Cir. Sept. 14, 2021) (quoting *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 57 (1st Cir. 2011)).

[15] *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 976 F.3d 761, 763 (7th Cir. 2020) (Scudder, J., in chambers). *See also Sierra Club, Inc. v. E.P.A.*, 358 F.3d 516, 518 (7th Cir. 2004) ("Courts value submissions not to see how the interest groups line up, but to learn about facts and legal perspectives that the litigants have not adequately developed."); *Voices for Choices v. Illinois Bell Telephone Co.*, 339 F.3d 542, 545 (7th Cir. 2003) (Posner, J., in chambers) ("[I]t is very rare for an *amicus curiae* brief to do more than repeat in somewhat different language the arguments in the brief of the party whom the *amicus* is supporting."); *Ryan v. CFTC*, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, J., in chambers) ("The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made by 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.").

[16] Chamber Letter, *supra* note 1, at 6.

### b. Changes to Rule 29 Should Ensure that It Adequately Uncovers The Most Substantial *Amicus* Funders.

In this same vein, any changes recommended by the Committee should be thorough enough to uncover all relevant individuals and organizations that have committed substantial funds to *amici* and their briefs. The draft language's ownership and revenue thresholds would, to a great extent, further this goal by exposing an *amicus*'s most significant funders. However, as the Subcommittee noted, any funding threshold will inevitably be somewhat arbitrary because it is impossible to craft a bright-line rule that will apply perfectly to every scenario. Thus, the Committee should seriously consider additional amendments that would serve these same purposes but that could also act as a "backstop" to the ownership and revenue thresholds.

One possible amendment would be the inclusion of an additional contribution threshold rule tied to a specific dollar amount, such as our AMICUS Act's $100,000 contribution threshold. This bright-line provision would be easily administrable and fulfill the same "backstop" role that the Subcommittee's draft standard was intended to serve. This provision would be especially useful when applied to organizations with many members, like the Chamber, wherein no one donor may meet 10% ownership or revenue thresholds but whose contributions may nonetheless be significant enough to influence or direct the organization's briefs.

### c. Rule 29 Should Not Contain a Membership Exception.

Finally, the Committee should remove Rule 29's "membership" exception. As already mentioned, Rule 29 does not require *amici* to disclose any *amicus* "members" that funded the *amicus* brief, even if a member is a party or counsel to the litigation at issue. Commendably, the Subcommittee's draft language would address this loophole by requiring *amici* to identify members who funded the *amicus* brief if they are parties or counsel. However, the draft language would still shield from disclosure all other *amicus* members who fund specific briefs, and members who would otherwise be disclosed under the proposed new ownership and revenue thresholds.

To truly ensure that Rule 29 effectively discloses those who substantially fund a brief, these exceptions must be removed. The government's interests are no less substantial when the funder of an *amicus* or a specific brief happens to be a "member" of that *amicus*, and concerns about impinging First Amendment rights are overstated. The Court and the Chamber are apparently concerned that without a membership exception, "a strict reading of the rule might require" the disclosure of "member lists or lists of general donors to the organization."[17] Absent every member of an *amicus* earmarking their funding for a specific brief, it is difficult to imagine such a scenario. The judiciary could craft a rule that strikes a more appropriate balance by eliminating the membership exception, and, if necessary, clarifying that the rule does not generally require disclosure of entire membership or donor lists. Any member who was substantially involved in the preparation, funding or approval of the brief should be identified.

At minimum, the exception for members who directly fund a particular brief should be eliminated—regardless of whether the member is a party or counsel. For those worried about a

[17] Scott Letter, *supra* note 4, at 1-2.

means-ends analysis or "implicit[ly] attribut[ing] . . . views that may not be held by every single member,"[18] these concerns are entirely nonexistent when focused only on a member's deliberate funding of a specific brief.

## III. No One Has Benefitted More from Disclosure Loopholes than the Chamber of Commerce.

The Chamber of Commerce opposes these proposed rules changes because it uses the loopholes in the current regime to obscure its members' influence on the courts. Because the Chamber does not disclose its members, courts are blind to the Chamber's connections to parties and other *amici*. However, investigative reporting has revealed some of the companies who comprise the Chamber's vast membership.[19] Over the past two years, the Chamber filed *amicus* briefs supporting several of these companies at both the circuit court and Supreme Court levels, but it did not disclose these relationships in any of these briefs.[20] Under the current rules, it would not need to disclose that information even if the member companies directly funded, wrote, approved, or even requested the brief.

The Chamber also staunchly disputes our characterization of massive, anonymous *amicus* efforts as "judicial lobbying." Since 2010 alone, the Chamber's Institute for Legal Reform (ILR) has spent almost $270 million on lobbying efforts,[21] and for decades has been considered "Washington's Biggest Lobbyist."[22] During this same time, few, if any, organizations have been

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[18] Chamber Letter, *supra* note 1, at 3.

[19] Dan Dudis, *The Chamber of Secrets*, Public Citizen, Sept. 13, 2017, *available at* https://chamberofcommercewatch.org/wp-content/uploads/2017/09/Chamber_of_Secrets_members_report.pdf (listing known Chamber members).

[20] Brief of the Chamber of Com. et al. as *Amici Curiae* Supporting Petitioners, *Johnson & Johnson v. Fitch*, No. 21-348 (*petition for cert. filed* Aug. 30, 2021); Brief of the Chamber of Com. et al., *Monsanto Co. v. Hardeman*, No. 21-241 (*petition for cert. filed* Aug. 16, 2021); Brief of the Chamber of Com. as *Amici Curiae* in Support of Petitioners, *AbbVie Inc. v. FTC*, No. 20-1293 (*petition for cert. denied* Jun 21, 2021); Brief of the Chamber of Com. as *Amicus Curiae* in Support of Petitioners, *Chevron Corp. v. City of Oakland*, No. 20-1089 (*petition for cert. denied* Jun 14, 2021); Brief for *Amici Curiae* Chamber of Com. et al., *Facebook Inc. v. Duguid*, 592 U.S. __ (2021) (No. 19-511); Brief for *Amici curiae* the Chamber of Com. et al., *Bank of America Corp. v. City of Miami*, 140 S. Ct. 1259 (2020) (No. 19-675); Brief for *Amici Curiae* the Chamber of Com. et al., *Wells Fargo & Co. v. City of Miami*, 140 S. Ct. 1259 (2020) (No. 19-688); Brief for the Nat'l Ass'n of Mfrs. et al., *Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 140 S. Ct. 768 (2020) (No. 18-1116); Brief of the Chamber of Com. and the Pharm. Rsch. and Mfrs. of America as *Amici Curiae* in Support of Defendant-Appellant/Cross-Appellee, *Hardeman v. Monsanto Co.*, 997 F.3d 941 (2021) (No. 19-16636, -16708); Brief for the Chamber of Com. as *Amicus Curiae* in Support of Appellees, *FTC v. AbbVie Inc.*, 976 F.3d 327 (2020) (Nos. 18-2621, 18-2748, 18-2758); Brief of *Amicus Curiae* Chamber of Com. in Support of Appellees' Petition for Rehearing En Banc, *City of Oakland v. BP*, 969 F.3d 895 (2020) (No. 18-16663); Motion of Chamber of Com. for Leave to File an *Amicus Curiae* Brief Supporting Appellee, *Duguid v. Facebook Inc.*, 926 F.3d 1146 (2019) (No. 17-15320); Brief of the Chamber of Com. as *Amicus Curiae* Supporting Appellees' Petition for Rehearing En Banc, *City of Miami v. Bank of America*, 923 F.3d 1260 (2019) (No. 14-14543); Brief of the Chamber of Com. as *Amicus Curiae* Supporting Appellees' Petition for Rehearing En Banc, *City of Miami v. Wells Fargo Bank & Co.*, 923 F.3d 1260 (2019) (No. 14-14544).

[21] *Client Profile: US Chamber of Commerce*, https://www.opensecrets.org/federal-lobbying/clients/summary?cycle=2010&id=D000019798.

[22] Brody Mullins & Alex Leary, *Washington's Biggest Lobbyist, the U.S. Chamber of Commerce, Gets Shut Out*, Wall St. J. (May 2, 2019), https://www.wsj.com/articles/washingtons-biggest-lobbyist-the-u-s-chamber-of-commerce-gets-shut-out-11556812302.

as relentless in their *amicus* practice as the Chamber, which filed over one hundred more *amicus* briefs than any other organization at the Supreme Court from 2005 to 2016.[23] Often, these parallel efforts have advocated for the same goals. For example, it is difficult to see a difference between the Chamber's hostility to the Consumer Financial Protection Bureau (CFPB) outside the courtroom and its hostility to the agency in its *amicus* briefs. The Chamber spent $2 million on advertisements, created a "Stop the CFP[B]" website, and coordinated a "grassroots outreach" campaign in opposition to the CFPB's creation.[24] Once the CFPB was established, the Chamber dedicated itself to undermining and opposing it at every step.[25] When it was unable to achieve its ideal results through legislative lobbying, the Chamber turned to the courts. In *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183 (2020), the Chamber filed an *amicus* brief supporting the petitioners who challenged the constitutionality of the agency's structure and who asked the Court to invalidate the entire CFPB.[26] The Chamber ignores these connections by adopting a strained view of "lobbying," but it is impossible to see the Chamber as engaged in anything but a multifaceted campaign to achieve its desired results in every possible forum.

This critique is not to suggest that organizations may not simultaneously lobby their elected officials and advance arguments in the courtroom. That is their right. But the Committee should be clear-eyed about the lines the Chamber attempts to draw between its different roles as advocates, as well as the context of its opposition to improving Rule 29. The judiciary should guard jealously against the incursion of raw, dark-money politics into its dockets. And it should not require less disclosure than is required for raw legislative lobbying.

## IV. Conclusion

A final word on lawyers: in our view, lawyers who are engaged in deliberate subterfuge to obscure from courts, parties, and the public the true party in interest whose arguments they are presenting are doing a grave disservice to the judicial branch and to their profession. This may seem like fun and games to lawyers engaged in this masquerade, but it degrades the transparency and integrity of judicial proceedings, weakens citizens' ability to discern what is really going on in our popular democracy, and risks bringing grave discredit on the judicial system whenever

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[23] Adam Feldman, *The Most Effective Friends of the Court*, Empirical SCOTUS (May 11, 2016), https://www.empiricalscotus.com/the-most-effective-friends-of-the-court/.

[24] Brody Mullins, *Chamber Ad Campaign Targets Consumer Agency*, Wall St. J. (Sept. 8, 2009), https://www.wsj.com/articles/SB125236911298191113. *See also* Ganesh Sitaraman, *The Political Economy of the Removal Power*, 134 Harv. L. Rev. 352, 358 (2020); Press Release, U.S. Chamber of Com., *U.S. Chamber Intensifies Campaign for Bipartisan Financial Regulatory Reform* (Mar. 25, 2010), https://www.uschamber.com/press-release/us-chamber-intensifies-campaign-bipartisan-financial-regulatory-reform.

[25] *See, e.g.*, Sean Hackbarth, *Out of Control: CFPB Renovation Costs Balloon Nearly 400%*, U.S. Chamber Com. (July 2, 2014), https://www.uschamber.com/above-the-fold/out-control-cfpb-renovation-costs-balloon-nearly-400; Gary Rivlin & Susan Antilla, *No Protection for Protectors*, The Intercept (Nov. 18, 2017), https://theintercept.com/2017/11/18/wall-street-wants-to-kill-the-agency-protecting-americans-from-financial-scams/; Jared Bennett, *Who Is Killing the CFPB's Arbitration Rule?*, Ctr. Pub. Integrity (July 28, 2017), https://publicintegrity.org/inequality-poverty-opportunity/who-is-killing-the-cfpbs-arbitration-rule/.

[26] Brief of the Chamber of Com. as *Amicus Curiae* in Support of Petitioner, *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183 (2020) (No. 17-56324); Reply Brief for the Petitioner, *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183 (2020) (No. 17-56324).

these subterfuges are ultimately disclosed, by Russian hackers or otherwise. The judiciary has an obligation to clean this up.

For the foregoing reasons, the Committee should not "wait for . . . guidance" in the form of more litigation on disclosure and the First Amendment.[27] The Committee should instead be guided by the warnings of James Madison:

> A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps, both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors must arm themselves with the power which knowledge gives.[28]

In order to meet these challenges, the Committee and Subcommittee should work to ensure that Rule 29 is updated to accommodate *amici*'s First Amendment rights while also sufficiently achieving the public's interest in transparency. At a time when faith in our institutions is lacking, it is critical that the judiciary demonstrate that it is capable of meeting challenges that threaten to undermine the public's faith in it. We thank you again for the serious attention you have devoted to this concern.

Sincerely,

Sheldon Whitehouse
United States Senator

Henry C. "Hank" Johnson, Jr.
Member of Congress

[27] Chamber Letter, *supra* note 1, at 1, 6.
[28] Letter from James Madison to W.T. Barry (Aug. 4, 1822), in *The Writings of James Madison* (Gaillard Hunt ed.).

U.S. CHAMBER OF COMMERCE

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October 6, 2021

Honorable Jay S. Bybee
Chair, Advisory Committee on Appellate Rules
Lloyd D. George U.S. Courthouse
333 Las Vegas Boulevard South
Las Vegas, Nevada 89101-7065

Re: Potential Amendments to Rule 29

Dear Judge Bybee:

I write to express the views of the Chamber of Commerce of the United States of America regarding the AMICUS Act Subcommittee's recommendations on potential amendments to the amicus disclosure requirements of Rule 29. As described below, Rule 29 strikes an appropriate balance between the interest in disclosing those who fund or control amicus briefs and the interest in protecting the First Amendment rights of a wide variety of associational organizations, including business and labor groups, environmental and landowner organizations, plaintiffs' lawyer and defense counsel associations, and any number of different religious, civil rights, and civil liberties organizations.

The Supreme Court's decision last Term in *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373, 2382 (2021), underscores that broader disclosure requirements would, at a minimum, raise serious constitutional questions. And for no clear, much less compelling, benefit. Disclosure requirements should remain anchored to situations where an amicus receives a monetary contribution for the preparation or submission of a particular brief. The Chamber opposes proposals that would trigger disclosure of general financial support for organizations filing amicus briefs.

Congress, of course, retains authority to legislate rules for the federal courts of appeals—as consistent with the Constitution. The Advisory Committee, however, should hew to the basic framework established in the current version of Rule 29, and decline to adopt the overbroad disclosure requirements being considered. Moreover, given the Supreme Court's recent decision in *Americans for Prosperity Foundation,* it is possible if not likely that there will be additional litigation over disclosure requirements, which would establish additional guidance on the constitutional limits in this area. At the very least, the Advisory Committee should wait for such guidance before proposing any new disclosure rules.

### A. The Existing Disclosure Requirements Of Rule 29 Protect Against Misuse And Assure That Amicus Briefs Reflect The Views Of Amici

Since 2010, Rule 29 has required that all amicus briefs submitted on appeal indicate whether "a party's counsel authored the brief in whole or in part; a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and 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[.]" Fed. R. App. P. 29(a)(4)(E). This disclosure requirement was "modeled on Supreme Court Rule 37.6," which imposes similar disclosure requirements. Fed. R. App. P. 29 advisory comm. notes; *see* Sup. Ct. R. 37.6.

Rule 29 "serves to deter counsel from using an amicus brief to circumvent page limits on the parties' briefs. It also 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." Fed. R. App. P. 29 advisory comm. notes (citation omitted). In this way, the rule assures that amicus briefs reflect the views and interests of the amicus submitting the brief—not those of a party to the case, or some other entity or person, that is writing or paying for the brief.

Supreme Court Rule 37.6 reflects the same purpose. As Scott Harris, the Clerk of the Supreme Court, recently explained in correspondence with Senator Whitehouse, Supreme Court Rule 37.6 "provides information about funding directly aimed at *advocating specific positions*" in court. Letter from Sen. Sheldon Whitehouse & Rep. Henry C. Johnson to Hon. John D. Bates at 1 (Feb. 23, 2021) (Whitehouse Letter) (quoting Letter from Scott S. Harris, Clerk, U.S. Supreme Court, to Sen. Sheldon Whitehouse (Feb. 27, 2019)) (emphasis added).

### B. Recent Concerns Expressed To This Committee Are In Tension With The Core Purposes Of Rule 29 And The First Amendment

Senator Whitehouse and Representative Johnson recently wrote to Judge Bates to request that the Committee on Rules of Practice and Procedure establish a working group "to address the problem of inadequate funding disclosure requirements for organizations that file *amicus curiae* briefs in the federal courts." Whitehouse Letter at 1. Although the Whitehouse Letter criticizes Rule 29 and Supreme Court Rule 37.6 for failing to "[a]chieve [t]heir [i]ntended [g]oals," *id.* at 2, many of the goals identified in the Whitehouse Letter are not only unrelated—or even hostile—to the purposes underlying Rule 29, but also raise significant First Amendment concerns.

As a general matter, the Whitehouse Letter suggests that amicus briefing is itself somehow suspect, asserting that federal courts "are susceptible to [the] influence" of "those who seek to shape the law through the courts." *Id.* at 2-3. Among other things, the letter attacks "sophisticated repeat players" for using amicus briefing to engage in "anonymous judicial lobbying." *Id.* at 6. The Letter specifically criticizes the Chamber for declining to "disclose its members to the public." *Id.*

In our view, this critique reflects a flawed understanding of the purpose and practice of amicus briefing, as well as the First Amendment. Senator Whitehouse and Representative Johnson seem to treat amicus briefing as a form of influence peddling. But courts are not legislatures, and amicus briefs are not an analogous form of "judicial lobbying." To the contrary, they are a well-accepted—and widely lauded—form of legal advocacy in the appellate system in particular. The point of an effective amicus brief is to "bring[ ] to the attention of the Court relevant matter not already brought to its attention by the parties." Sup. Ct. R. 37.1. Amicus briefs seek to persuade judges through legal argument and by putting individual cases in their broader context—not by blunt reference to the power or influence of the amicus. And opposing parties have an opportunity to respond to amicus briefs; there is nothing secretive about them.

Indeed, amicus briefs are public, not anonymous. They are publicly filed and widely available, and the names of the amicus or amici whose views are represented appear on the cover page of the brief, as do the names of the lawyers who authored the brief. As noted, under the existing Rule 29, an amicus brief also must identify any "person—other than the amicus curiae, its members, or its counsel—[who] contributed money that was intended to fund preparing or submitting the brief[.]" Fed. R. App. P. 29(a)(4)(E).

The names of the persons who financially support the general operations of the amicus are not disclosed. But such persons typically do not participate in the exchange of the brief and are often unaware of the arguments presented. Mandating the disclosure of an organization's general contributors in amicus briefing would create a false impression of the purpose of amicus briefs, spurring an appearance of lobbying where none exists. That is especially true with respect to large organizations like the Chamber, which has hundreds of thousands of members and engages in far more (First Amendment-protected) activities than just amicus briefs. Not every member of the Chamber always agrees with, or even cares about, the position taken by the Chamber as amicus in every case. Disclosure of an organization's members in an amicus brief would result in an implicit attribution of views that may not be held by every single member. As discussed below, such a draconian disclosure requirement also would chill core First Amendment interests.

Furthermore, there is nothing surprising (or sinister) about the fact that many amici are "sophisticated repeat players" that promote various "long-term interests." The courts are a co-equal branch of our government that frequently decide issues of great public importance. It is natural and desirable for groups to file amicus briefs seeking to educate the courts on the practical implications of their decisions. The courts, as well as the broader public, benefit from that process. That is true regardless of the particular interests pursued by particular organizations. The amicus process is rightly one that is available for all comers, with different perspectives. It is a good, not bad, thing that groups of all backgrounds—ranging from civil rights groups like the NAACP to business groups like the Chamber—have sophisticated amicus capabilities.

Moreover, under Rule 29(a)(4)(D), amici are required to include "a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file." Organizational amici who appear regularly in the federal courts are therefore open about their interests and their organization. The Chamber, for example, states in each of its amicus briefs that it represents approximately 300,000 direct members, and regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community. Other leading amici are similarly candid about their membership and interests. *See, e.g.*, Br. for the Electronic Frontier Foundation et al. as Amici Curiae in Support of Petitioners at 1, Americans for Prosperity Foundation v. Bonta, 141 S. Ct. 2373 (2021) (No. 19-251), 2021 WL 842009 (noting that the EFF represents "more than 34,000 members" and "has become a leading authority on First Amendment issues" as it "work[s] to ensure that rights and freedoms are enhanced and protected as our use of technology grows"); Br. Amici Curiae of the American Civil Liberties Union, Inc. et al. in Support of Petitioners at 1, Americans for Prosperity Foundation v. Bonta, 141 S. Ct. 2373 (2021) (No. 19-251), 2021 WL 826687 (noting that the ACLU is a "nationwide, nonpartisan organization with nearly 2 million members dedicated to defending the principles of liberty and equality embodied in the Constitution and the nation's civil rights laws"); *id.* at 2 (noting that the "NAACP Legal Defense and Educational Fund, Inc. . . . is a non-profit, non-partisan legal organization founded in 1940 to achieve racial justice and to ensure the full, fair, and free exercise of constitutional and statutory rights for Black people and other communities of color").

Far from a novel development, such amicus efforts are a long-accepted—and justly celebrated—aspect of litigation in American courts. *See, e.g.*, Tomiko Brown-Nagin, *In Memoriam: Justice Ruth Bader Ginsburg, The Last Civil Rights Lawyer on the Supreme Court*, 56 Harv. C.R.-C.L. L. Rev. 15, 15 (2021) (noting that the "ACLU's Ginsburg-led campaign during the 1970s to dismantle laws that classified by sex followed the blueprint of the NAACP's [Thurgood] Marshall-led campaign during the 1940s and 50s to dismantle laws that classified by race"); Stephen L. Wasby, Civil Rights Litigation By Organizations: Constraints and Choices, 68 Judicature 337 (1985). Amicus briefs representing the interests and perspectives of all corners of American life have made an invaluable contribution to the judicial process, and to the country.

The Whitehouse Letter's insistence that an organization like the Chamber must "disclose its members to the public" so as to reveal "who is influencing the positions the Chamber takes in litigation," Whitehouse Letter at 6, not only misunderstands the purposes of Rule 29 but also disregards important First Amendment principles. "[C]ompelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action." *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373, 2382 (2021) (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958)). Because "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association," and because there is a "vital relationship between freedom to associate and privacy in one's associations," *id.* (quoting *Patterson*, 357 U.S. at 460, 662), the First Amendment demands "exacting scrutiny" of rules that compel associations to disclose their members or supporters, *id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 64 (1976)).

The kind of broad disclosure requirements proposed in the Whitehouse Letter cannot withstand such scrutiny. For one thing, it is doubtful that the disclosure rule proposed by the Whitehouse Letter is backed by any "substantial government interest." *Id.* at 2386 (quoting *Schaumburg v. Citizens for Better Environment*, 444 U.S. 620, 636 (1980)). As noted above, there is no reason why the identities of an organization's financial supporters or members are relevant to the authorship of a particular amicus brief: absent direct participation in the drafting of an amicus brief, or specified financial support for the amicus brief, many of an organization's members or supporters are unlikely to be aware of any one brief. Indeed, in the amicus context, some members may disagree in certain respects with the litigation position taken by the amicus, while others may be indifferent. Mandating disclosure of an organization's members in such instances is more likely to mislead than inform, misattributing the views of the amicus to the supporters or members of the organization. Whatever the fear or speculation driving such proposals, they are unsupported by real-world evidence of an actual problem tied to the lack of the disclosure of membership rolls.

In addition, even assuming that there is a substantial government interest with respect to such disclosure, the rules advocated by the Whitehouse Letter and the AMICUS Act are far from narrowly tailored: the AMICUS Act would compel the identification of any person who has contributed at least three percent of the gross revenues of the amicus, or more than $100,000, in the previous calendar year. *See* S. 1411 § 2(b), 116th Cong. (2019). That disclosure rule is almost certain to sweep in many members or donors who have had no role in "influencing the positions the [amicus] takes in litigation," especially in litigation concerning discrete issues. Whitehouse Letter at 6. As the Supreme Court has explained, such "[b]road and sweeping state inquiries" are likely to "discourage citizens from exercising rights protected by the Constitution," *Americans for Prosperity Foundation*, 141 S. Ct. at 2384 (quoting *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6 (1971) (plurality opinion)), such as presenting their views in a publicly filed amicus brief.

The Whitehouse Letter recognizes that disclosure rules of the kind proposed in the AMICUS Act "may implicate associational and/or speech rights, such as those at issue in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958))." It nevertheless contends that not "*all* membership organizations" are entitled to such rights, and suggests that "business networks" like the Chamber may be freely compelled to divulge their membership. Whitehouse Letter at 6. But, of course, the First Amendment emphatically rejects drawing lines based on a group's views, beliefs, or perspectives, whether they be business-oriented or otherwise.

Indeed, in *Patterson* itself the Supreme Court recognized that it is "immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters": any restrictions on such association, no matter the character of the association, are subject "to the closest scrutiny." *Patterson*, 357 U.S. at 460-61. And the Supreme Court recently reaffirmed that principle in *Americans for Prosperity Foundation*, noting that the disclosure rules addressed in that case imposed an unconstitutional "deterrent effect" on associations "span[ning] the ideological spectrum, and indeed the full range of human endeavors." 141 S. Ct. at 2388. The fact that only some of those organizations represented "uniquely sensitive causes" did not detract from, but rather "underscored," the "gravity of the privacy concerns in this context." *Id.* If anything, the argument for intrusive disclosure requirements is especially weak as applied to an organization like the Chamber whose interests are fully transparent.

### C. The AMICUS Act Subcommittee's Recommendations Go Too Far In Accommodating The Concerns Voiced In The Whitehouse Letter

The AMICUS Act Subcommittee correctly recognizes that "the most fundamental concern expressed in the [Whitehouse Letter] and underlying the AMICUS Act"—namely, that "the current disclosure rules allow deep-pocketed persons or organizations to wield outsize influence through amicus briefs"—erroneously "treats the filing of amicus briefs as akin to lobbying," and disregards the constitutional "right to participate anonymously in the public square." *See* AMICUS Act Subcommittee Memorandum Re: AMICUS Act and Potential Amendments to Rule 29, at 6 (Mar. 12, 2021) (Subcommittee Memo). The Subcommittee Memo also properly recognizes that the kind of broad and virtually open-ended disclosure favored by the Whitehouse Letter and proposed in the AMICUS Act would "raise concerns regarding freedom of association." *Id.* at 9 (citing *Patterson*, 357 U.S. at 449). The Chamber agrees with those conclusions, as well as with the Subcommittee's view that because "rules of procedure typically apply evenhandedly to all participants in litigation," the Advisory Committee should reject the AMICUS Act's proposal discriminating between "repeat filers" and other amici with respect to the imposition of disclosure rules. Subcommittee Memo at 7.

But the Chamber opposes the Subcommittee's suggestion—made before the Court's recent decision in *Americans for Prosperity Foundation*—that amici should be compelled to disclose an association with a litigating party or party's counsel in any circumstance where the party or party's counsel has a 10% or greater ownership interest in the amicus, or where a party or party's counsel has contributed 10% or more of the gross annual revenue of the amicus during the twelve-month period preceding the filing of the amicus brief. *See* Subcommittee Memo at 8-9. If any change is to be made, the Chamber agrees that adopting a percentage-based approach is more sensible than an arbitrary monetary figure (given that an amount that might be significant to one organization and trivial to another). Although this proposal is more measured than the broad-scale disclosure requirements proposed in the Whitehouse Letter, the 10% trigger—not tied to contributions made to the brief itself—still is not sufficiently tailored to address the constitutional questions raised by

such a rule. Moreover, there is no evidence of any actual problem that would be addressed by such an amendment to Rule 29.

Compelled disclosure of an association between a private advocacy organization and its members implicates the First Amendment principles discussed above. *See supra* at 4-5. Compelled disclosure of a party's earmarked financial contribution to fund an amicus brief is one thing. But the additional disclosure requirement contemplated by the Subcommittee would require disclosure of associational ties in many cases where such ties are *not* directed at a particular amicus brief, or even at advocacy of legal positions at all, and thus are not intended to evade the disclosure rules set out in the current version of Rule 29.

Under the Subcommittee's proposal, members and donors who wish to remain anonymous might withhold funding from an advocacy organization to avoid disclosure, even though their interest in participating in the organization had nothing to do with amicus briefs. That would put organizations to the Hobson's choice of foregoing amicus activity altogether or risk losing members and donors for other, First Amendment-protected advocacy activities, such as lobbying and voter education. In short, the disclosure requirement contemplated by the subcommittee is overbroad because it would chill associational rights in a substantial number of applications judged in relation to its "legitimate sweep." *Americans for Prosperity Foundation*, 141 S. Ct. at 2387 (quoting *United States v. Stevens*, 559 U.S. 460, 473 (2010)).

Moreover, the chilling effect would have knock-on effects for the presentation of amicus briefing to the courts in ways that run counter to the policy goals of Rule 29. It is not unreasonable to assume that, if the rule suggested by the Subcommittee were put into practice, at least some regular litigants would cut their contributions to advocacy organizations with which they are generally aligned for fear of triggering the amicus disclosure rules, even when funding is not tied to amicus briefs. To the extent that such cuts reduce the resources and the briefing capacity of such advocacy groups, the result will be less speech, in the form of a decrease in the number amicus briefs filed in the appellate courts. But Rule 29 and Supreme Court Rule 37 are built on the principle that amicus briefs are generally helpful—and the more the better so long as they present distinct arguments and authorities to the reviewing court. *See* Sup. Ct. R. 37.1 ("An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court."). Such advocacy is a vital part of this nation's vibrant public discourse and should be celebrated, not discouraged.

* * * * *

No disclosure system will perfectly address the policy concerns that motivate the disclosure rules set out in Rule 29. But the current disclosure regime strikes an appropriate and time-tested balance between the interest in protecting the integrity of the amicus process and the protection of associational rights. The AMICUS Act and proposals made in the Whitehouse Letter, meanwhile, rest on a basic misconception of the role of amicus briefing in federal litigation and contravene important First Amendment associational rights. In considering whether and how to modify the disclosure rules set out in Rule 29, the Advisory Committee should adhere to the purposes behind the current set of disclosure rules, and reject broad disclosure rules that needlessly raise constitutional problems recently highlighted by *Americans for Prosperity Foundation*. In this situation, the Committee is better served by continuing to monitor the situation rather than rushing ahead with the material amendments that have been proposed to Rule 29.

Thank you for your consideration.

Respectfully,

Daryl Joseffer
Executive Vice President and Chief Counsel
U.S. Chamber Litigation Center

# TAB 6D

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Amicus Subcommittee

Re: Standards for Judicial Disqualification Based on Amicus (20-AP-G)

Date: February 28, 2022

As amended in 2018, Federal Rule of Appellate Procedure 29(a)(2) provides:

> **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 or if the brief states that all parties have consented to its filing, but a court of appeals may prohibit the filing of or may strike an amicus brief that would result in a judge's disqualification.

Alan Morrison notes that there are no guidelines for what triggers disqualification based on an amicus brief and therefore on what causes a brief to be struck. Indeed, the Committee Note to the 2018 amendment explicitly states, "The amendment does not alter or address the standards for when an amicus brief requires a judge's disqualification." He contends that this poses a problem not only for judges but also for potential amici (and counsel to potential amici) who wish to do what they can to avoid creating the kind of conflict that leads to a brief being struck. He points to recent cases where briefs were struck, observing that it is unclear why the briefs were struck, or even which judge's connection triggered the rule. He suggests that this Committee, "or perhaps the AO or the FJC, undertake a study with the view toward recommending guidelines that the judicial conference could adopt, after allowing for public comment as is done for the rules process generally."

This suggestion was referred to the Amicus Subcommittee. The subcommittee has concluded that if there is a problem here, it is better addressed by a body other than the Advisory Committee on the Federal Rules of Appellate Procedure. If the Judicial Conference thinks the matter deserves further attention, it can ask another body (perhaps the Committee on Codes of Conduct) to examine the matter. As the subcommittee sees it, any attempt to avoid the striking of a brief would require telling judges that there are circumstances in which they may not (or at least should not) recuse. That is, if a judge concludes that recusal is called for if a brief is not struck, then the only way to avoid striking the brief is to tell the judge to sit on the case anyway. Even if that power is within the scope of the Rules Enabling Act, the subcommittee does not believe that it is wise to exercise it.

# TAB 6E

From: Alan Morrison
Date: Thu, Dec 10, 2020 at 9:19 AM
Subject: Proposal for Appellate Rules Committee
To: Rebecca Womeldorf

Attention Judge Jay Bybee, Chair.

Federal Rule of Appellate Procedure 29(a)(2) provides for the filing of amicus briefs on appeal as follows: **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 or if the brief states that all parties have consented to its filing, *but a court of appeals may prohibit the filing of or may strike an amicus brief that would result in a judge's disqualification.*

Before the italicized portion was added in 2018, I submitted comments and addressed the Appellate Rules Committee orally, to explain my concerns about the proposal. My objections were not followed, and I am not moving for rehearing. However, the attached article from the National Law Journal, discussing two recent cases in which the Rule was invoked to strike previously filed amicus briefs prompted me to write to the committee to make a suggestion.

The rules on judicial disqualification in 28 USC 455 are reasonably clear when there is a potential for a conflict of interest or the appearance of one because of a relationship of some kind to a party (and in some circumstances to a party's counsel). But there is nothing in that statute that speaks to a similar problem when the relationship is to an amicus, or perhaps to a member of an amicus when the amicus is a trade association or some other entity. I am also unaware of any other rules or even guidelines to assist judges and also counsel for a potential amicus who wishes to avoid coming close to the line in Rule 29(a)(2). Indeed, it is unclear from the published article or any court order in those cases which appellate judge's connection caused the briefs to be stricken or on what basis.

To my thinking, the root of the problem is that there are no guidelines for what a judge should do when the potential basis for recusal in a case is an amicus or its counsel. My suggestion is that your committee or perhaps the AO or the FJC undertake a study with the view toward recommending guidelines that the judicial conference could adopt, after allowing for public comment as is done for the rules process generally. I am sure that all federal judges want to do "the right thing" when faced with issues of recusal, but they need guidance when the potential source of a recusal is not a party, but an amicus.

I am happy to assist the committee or others on the project if that would be helpful.

Respectfully, Alan B. Morrison

# 4th Circuit Scraps McDermott Amicus Brief in Rare Nod to Recusal Rule

A panel of Fourth Circuit judges in August ruled for the Trump administration—reversing a district judge's nationwide injunction—but the court on Thursday night said it would rehear the dispute. Minutes before the court announced its plans, an order striking the McDermott amicus brief was issued.

By **Marcia Coyle** | December 04, 2020 at 02:23 PM

The U.S. Court of Appeals for the Fourth Circuit on Wednesday **barred** an amicus brief on behalf of more than 100 companies in a closely watched Trump administration immigration case, after concluding the filing would have caused one of the court's 15 judges to sit on the sidelines for an upcoming hearing.

The law firm McDermott Will & Emery had **filed the brief** earlier this year on behalf of 104 businesses and organizations that were backing a challenge to the Trump administration's "public charge" rule. The administration's new definition of a "public charge"—a person who receives 12 months of benefits in a three-year window—would hinder admissibility of certain immigrants, critics assert.

A panel of Fourth Circuit judges in August **ruled** for the Trump administration—reversing a district judge's nationwide injunction—but the full court on Thursday night said it would rehear the dispute. Minutes before the court announced its plans, an order striking the McDermott amicus brief was issued. The brief immediately was removed from the court docket.

Scrapping the McDermott brief, the appeals court acted under **local appellate procedure rule 29(a).** The rule states that the court will strike an amicus brief if it would result in the recusal "of a member of the en banc court from a vote on whether to hear or rehear a case en banc." It also applies to potential recusal of panel members.

"We were surprised when the court struck the brief, but we understand the basis for the policy," said McDermott partner Paul Hughes, who was on the brief with partner Michael Kimberly and counsel Matthew Waring. Hughes and Kimberly are the co-leaders of the firm's Supreme Court and appellate group.

Many courts have similar local rules; the federal judiciary at large adopted a similar rule just a couple of years ago. There was some pushback over the rule, whose application appears to occur infrequently.

Gibson, Dunn & Crutcher also felt the sting of a similar local rule and the new federal rule—29(a)(2)—last year when its amicus brief in a challenge involving the Affordable Care Act was **struck** at the panel stage in the Fifth Circuit.

The Fifth Circuit, like the Fourth Circuit, did not give any reason about which judge would have had to recuse. A judge's connection to a law firm, or tie to a group or company that is participating as an amicus, might give rise to a recusal. At least one new member on the Fifth Circuit had earlier worked at Gibson Dunn, but it was not clear that the law firm connection drove the court's order.

Two of Trump's three appointees to the Fourth Circuit arrived from law firms, but not from McDermott. Allison Rushing Jones **arrived** from Williams & Connolly, and A. Marvin Quattlebaum from Nelson Mullins Riley & Scarborough. Julius Richardson was an assistant U.S. attorney prior to his arrival to the bench.

McDermott's Hughes said he did not know which Fourth Circuit judge would have faced recusal because of the firm's amicus brief. The brief was on behalf of 104 businesses and organizations, including Levi Strauss & Co., Microsoft Corp., Twitter and LinkedIn Corp.

It's possible a financial conflict arose, where a judge had a personal stake in the business of one of the amicus companies. "Many of the companies were not publicly traded but others were. Or, there may be an equity interest in one of the non-public companies," Hughes said.

Their amicus brief, which supported the district court's injunction, also was filed in at least three other circuit courts reviewing the legality of the rule, according to Hughes. It argued that the rule will impede hiring by American employers and impose onerous compliance burdens of workers and employers.

The local and federal rules allowing the strike of amicus briefs that could result in recusals were enacted mainly to prevent strategic filing of briefs. The federal rule drew some opposition at the proposal stage.

In a **2017 letter** to the Judicial Conference's Committee on Rules of Practice and Procedure, Alan Morrison of George Washington University law school expressed some of those objections.

At the panel stage, Morrison wrote, there was no evidence of any significant number of cases in which recusal had been required, or an amicus brief was filed for the strategic reason of recusing a particular judge. Those courts could almost always find a replacement for a recused judge at that stage, he added. Barring the brief denied amici an opportunity to be heard and denied judges information that could be useful.

The en banc stage was somewhat different, according to Morrison. But he thought the rule should be limited to new filings at the en banc consideration stage because there was some possibility of filing a brief in order to obtain recusal of a specific judge.

Hughes said his personal view was for a broad standard for federal judges that would require them to place their assets in a blind trust or index mutual funds. “All things being equal, avoiding recusal on the basis of financial holdings would be optimal, but we appreciate that’s not the current ethics or recusal rule,” he said

# TAB 6F

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Subcommittee on Costs on Appeal

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

Date: February 28, 2022

This subcommittee was created to explore if any amendments to Federal Rule of Appellate Procedure 39 might be appropriate in light of the Supreme Court's decision in *City of San Antonio v. Hotels.com*, 141 S. Ct. 1628 (2021). There, the Court held that Rule 39 does not permit a district court to alter a court of appeals' allocation of the costs listed in subdivision (e) of that Rule.

Rule 39 provides:

**(a) Against Whom Assessed.** The following rules apply unless the law provides or the court orders otherwise:

**(1)** if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;

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

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

**(4)** if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders.

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

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

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

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

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

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

**(e) Costs on Appeal Taxable in the District Court.** The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule:

**(1)** the preparation and transmission of the record;

**(2)** the reporter's transcript, if needed to determine the appeal;

**(3)** premiums paid for a bond or other security to preserve rights pending appeal; and

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

Drawing on its own experience as well as input from circuit clerks, the subcommittee believes that taxable costs on appeal are usually modest and that disputes about these costs arise rarely. See *Hotels.com*, 141 S. Ct. at 1636 ("Most appellate costs are readily estimable, rarely disputed, and frankly not large enough to engender contentious litigation in the great majority of cases.").

But disputes do arise, and the premium paid for a bond to preserve rights pending appeal (traditionally known as a supersedeas bond) can be considerable. In *Hotels.com*, the bill of costs was for more than $2.3 million, most of which was the premium for the bond. As the Court noted, "We recognize that supersedeas bond premiums are a bit of an outlier in that they can grow quite large." *Hotels.com*, 141 S. Ct. at 1636 (citing *[Baker] v. Exxon Mobil Corp.*, 568 F.3d 1077 (9th Cir. 2009) (more than $60 million)).

The subcommittee recommends creation of a clearer procedure for a party to raise arguments to the court of appeals about the proper allocation of costs, but only if Civil Rule 62 is also amended to require at least disclosure (and perhaps district court approval) of the premium paid.

**Clearer procedure.**

In *Hotels.com*, The Supreme Court stated:

> San Antonio worries 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. We agree 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, but this does not lead to the conclusion that a district court can reallocate those costs.
>
> Rule 27 sets forth a generally applicable procedure for seeking relief in a court of appeals, and a simple motion "for an order" under Rule 27 should suffice to seek an order under Rule 39(a). Compare Fed. Rule App. Proc. 39(a) ("The following rules apply unless ... the court orders otherwise") with Rule 27(a) ("An application for an order ... is made by motion unless these rules prescribe another form"). The OTCs [online travel companies] also identify instances where parties have raised their arguments through other procedural vehicles, including merits briefing, see Rule 28, objections to a bill of costs, see Rule 39(d)(2), and petitions for rehearing, see Rule 40. Brief for Respondents 42, nn. 9–11. We do not foreclose litigants from raising their arguments in any manner consistent with the relevant federal and local Rules.

141 S. Ct. at 1638.

Two of the cases cited in the referenced footnotes in the Brief for Respondents involved supersedeas bonds. *Baker v. Exxon Mobil*, 568 F.3d 1077 (9th Cir. 2009), and *Guse v. J. C. Penney Co.*, 570 F.2d 679 (7th Cir. 1978).[1]

*Exxon Mobil* was before the court of appeals on remand from the Supreme Court. The court of appeals left each party bearing its own costs because each side won something and lost something on appeal. While it was clear that the reason for the battle over costs was the size of the premium for the supersedeas bond, nothing in the court's reasoning turned on that.

[1] Cited cases using a motion or objection to a bill of costs involved issues such as the costs of a supplemental appendix, the costs of using a word processor, and whether to not award costs because the losing appellee had limited resources. Some of the cited cases using substantive briefing involved requests for imposition of costs that should have been raised by a separate motion under Rule 38. Another cited case arose in the context of a petition for rehearing and involved costs in favor of the United States in a FOIA case.

*Guse* was before the court of appeals on a petition for rehearing. As in *Exxon Mobil*, it was also clear that the reason for the battle over costs was the size of the premium for the supersedeas bond. The court of appeals left it to the district court to exercise discretion over the costs taxed in the district court, explaining:

> The plaintiffs advance several reasons in support of their position that this court should in its discretion amend the award of costs so as substantially to reduce, if not eliminate, the costs for which the named plaintiff Guse might be liable. They point out that the suit below was a good faith one and that their interpretation of Title VII was one which had been approved by the Equal Employment Opportunity Commission and by every circuit which had resolved the issue; that the named plaintiff would be unable because of her financial condition to assume in any way the payment of the costs; that the plaintiffs' attorneys were employed by a federally funded legal services program; and that the plaintiffs were not in any way responsible for the defendant having to incur the expense of a bond.
>
> Some of these matters are factual in nature and this court is scarcely in a position either to determine what are the true facts or to evaluate them as would be the district court.

570 F. 2d at 680–81.

Neither of these cases illustrate a particularly good way for an appellee to raise concerns about having to bear the cost of a premium paid for a bond. One arose on remand from the Supreme Court and the other arose on a petition for rehearing and left the determination to the district court.

In formulating a clearer procedure, the subcommittee considered several aspects of existing procedure.

First, the mandate of the court of appeals must not be delayed for taxing costs. Rule 39(d)(3). That means that the court of appeals is likely to return jurisdiction to the district court before resolving any disputes about costs that are taxable in the court of appeals itself. Under Rule 39(d), a bill of costs is due in the court of appeals 14 days after judgment, and objections are due 14 days later; by contrast, the mandate typically issues 21 days after judgment. Rule 41(b).

Second, for costs taxable in the district court under Rule 39(e), the relevant bill of costs would be filed in the district court after issuance of the mandate.

Third, by the time the party who prevailed in the court of appeals has filed a bill of costs in the district court, the time to seek rehearing—and even more the time to file merits briefs—is long past.

Taken together, these make it awkward at best to use any of the currently available mechanisms to raise objections in the court of appeals to the allocation of the premium paid for a supersedeas bond after the bill of costs seeking payment of that premium has been filed.

The subcommittee considered the possibility of an explicit authorization of a motion in the court of appeals after the bill of costs has been filed in the district court, but this would mean that proceedings involving that bill of costs would be pending in both the district court and the court of appeals at the same time.

The subcommittee also considered the possibility of empowering the district court to do what the Supreme Court held that the current rule does not allow: allocate the costs itself. But this would mean that the district court (which had just been reversed) would be evaluating the relative success of the parties in the court of appeals.

The subcommittee concluded that the best approach would be to empower a party to seek review in the court of appeals of that court's allocation of costs generally. This could be done by motion in the court of appeals within fourteen days of the judgment.

The major difficulty presented by this approach is that the party who prevailed in the district court may not know the premium paid for the supersedeas bond at that time. Under the current rules, disclosure of the premium paid might not be made until the party who lost in the district court but prevailed on appeal files the bill of costs in the district court on remand.

To deal with this problem, Civil Rule 62—which already requires the district court to approve the bond or other security before the stay takes effect—could be amended to require that the premium paid for the bond be disclosed before the bond is approved. That way, the prevailing party in the district court would know well in advance the cost it might be facing if the court of appeals reverses. Such knowledge might induce the prevailing party to suggest lower cost options or even waive the requirement for a bond. It might also encourage parties to negotiate not only over the face value of the bond, but perhaps even agree on some "other security," FRCP 62(b), that protects the interests of the district court winner at little or no out-of-pocket cost to the district court loser. Negotiations might be more fruitful if the district court's approval of the cost of the premium were required as well.

Advance knowledge of the premium paid for a supersedeas bond is crucial to making the subcommittee's proposal work. For that reason, the subcommittee's recommendation is contingent on an amendment to the Civil Rules that would provide such advance knowledge.

Here is the text of the subcommittee's recommendation:

## Rule 39. Costs

**(a) Against Whom Assessed.** The following rules apply unless the law provides or the court orders otherwise:

**(1)** if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;

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

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

**(4)** if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders.

A party may seek reconsideration of the allocation of costs by filing a motion within 14 days after entry of judgment.

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

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

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

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

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

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

**(e) Costs on Appeal Taxable in the District Court.** The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule:

**(1)** the preparation and transmission of the record;

**(2)** the reporter's transcript, if needed to determine the appeal;

**(3)** premiums paid for a bond or other security to preserve rights pending appeal; and

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

The style consultants will likely object to the unnumbered dangling section, but that stylistic concern can be addressed later in the process if the Advisory Committee agrees with the approach of the subcommittee.

**Premium for bond as a cost and 28 U.S.C. § 1920.**

The Supreme Court in *Hotels.com* also dropped a footnote to mention an issue that it was not deciding:

> As the United States points out, see Brief for United States as *Amicus Curiae* 19, n. 4, we have interpreted Rule 54(d) to provide for taxing only the costs already made taxable by statute, namely, 28 U.S.C. § 1920. See *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 441–442 (1987). Supersedeas bond premiums, despite being referenced in Appellate Rule 39(e)(3), are not listed as taxable costs in § 1920. San Antonio has not raised any argument that Rule 39 is inconsistent with § 1920 in this respect. We accordingly do not consider this issue.

*Hotels.com*, 141 S. Ct. at 1636 n.4.

The inclusion of the premium for a supersedeas bond as a recoverable cost has been a part of the Federal Rules of Appellate Procedure since their promulgation in 1967. The Advisory Committee at the time noted:

> Provision for taxation of the cost of premiums paid for supersedeas bonds is common in the local rules of district courts and the practice is established in the Second, Seventh, and Ninth Circuits. *Berner v. British Commonwealth Pacific Air Lines, Ltd.*, 362 F.2d 799 (2d Cir. 1966); *Land Oberoesterreich v. Gude*, 93 F.2d 292 (2d Cir., 1937); *In re Northern Ind. Oil Co.*, 192 F.2d 139 (7th Cir., 1951); *Lunn v. F. W. Woolworth*, 210 F.2d 159 (9th Cir., 1954).

Just a few years before the promulgation of the Federal Rules of Appellate Procedure, the Supreme Court had upheld Judge Weinfeld's exercise of discretion under Civil Rule 54 to decline to tax certain costs. It wrote:

> Items proposed by winning parties as costs should always be given careful scrutiny. Any other practice would be too great a movement in the direction of some systems of jurisprudence, that are willing, if not indeed anxious, to allow litigation costs so high as to discourage litigants from bringing lawsuits, no matter how meritorious they might in good faith believe their claims to be. *Therefore, the discretion given district judges to tax costs should be sparingly exercised with reference to expenses not specifically allowed by statute.* Such a restrained administration of the Rule is in harmony with our national policy of reducing insofar as possible the burdensome cost of litigation. We therefore hold that Judge Weinfeld's order assessing only appropriate expenses should have been affirmed by the Court of Appeals.

*Farmer v. Arabian Am. Oil Co.*, 379 U.S. 227, 235–36 (1964) (emphasis added).

The italicized sentence certainly seemed to endorse the power of district judges to use Civil Rule 54 to tax costs not specifically authorized by statute. It would also seem to apply equally to Appellate Rule 39. However, in *Crawford*, the Court rejected an argument that relied on this sentence:

> The sentence relied upon is classic *obiter*: something mentioned in passing, which is not in any way necessary to the decision of the issue before the Court. We think the dictum is inconsistent with the foregoing analysis, and we disapprove it.

*Crawford*, 482 U.S. at 443.

The "foregoing analysis" rejected the argument that "the discretion granted by Rule 54(d) is a separate source of power to tax as costs expenses not enumerated in" 28 U.S.C. § 1920. *Crawford*, 482 U.S. at 441. "If Rule 54(d) grants courts discretion to tax whatever costs may seem appropriate, then § 1920, which enumerates the costs that may be taxed, serves no role whatsoever." *Id.* The Court held "that § 1920 defines the term 'costs' as used in Rule 54(d). Section 1920 enumerates expenses that a federal court may tax as a cost under the discretionary authority found in Rule 54(d). It is phrased permissively because Rule 54(d) generally grants a federal court discretion to refuse to tax costs in favor of the prevailing party." *Id.* at 441–42; *see also Rimini Street, Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873, 878 (2019) ("Our cases, in sum, establish a clear rule: A statute awarding 'costs' will not be construed as authorizing an award of litigation expenses beyond the six categories listed in §§ 1821 and 1920, absent an explicit statutory instruction to that effect.").

Despite the potential argument that Rule 39(e)(3) is inconsistent with 28 U.S.C. § 1920, the subcommittee does not recommend repealing Rule 39(e)(3). That provision has been a part of the Federal Rules of Appellate Procedure for more than fifty years.

The Court of Appeals for the Seventh Circuit has treated Rule 39(e)(3) as valid under the supersession clause of the Rules Enabling Act,[2] stating that "Congress approved Rule 39 after it passed § 1920." "In short, because Rule 39(e) expressly authorizes the taxation of supersedeas bond costs, it is binding on district courts regardless of whether § 1920 authorizes an award of those costs. By contrast, Rule 54(d) does not outline any specific costs taxable by the district court, and therefore, as discussed in *Crawford*, remains limited by § 1920." *Republic Tobacco Co. v. N. A. Trading Co., Inc.*, 481 F.3d 442, 448 (7th Cir. 2007). *But see Winniczek v. Nagelberg*, 400 F.3d 503, 504 (7th Cir. 2005) ("The counterpart to Rule 54(d) of the civil rules is Rule 39 of the appellate rules, and since section 1920 applies to all federal courts, Rule 39 should likewise be subject to that statute.").

Wright and Miller takes the position that *Republic Tobacco* represents the better view:

> 28 U.S.C.A. § 1920 provides a statutory basis for the recovery of certain costs on appeal. Rule 39(e) contemplates the taxation of some other costs besides those listed in Section 1920; it provides that "premiums paid for a bond or other security to preserve rights pending appeal" are "taxable in the district court." Though the Supreme Court held in the *Crawford Fitting* case that Civil Rule 54(d)'s directive that "costs" should generally be allowed to the prevailing party does not permit a district court to include among those costs items not listed in Section 1920, and though one court has applied the *Crawford Fitting* approach to Appellate Rule 39, the better view is that Appellate Rule 39 merits a different approach: The rulemakers, when they adopted and later amended Rule 39, were well aware that Section 1920 did not list the cost of a bond, and they nonetheless deliberately specified that cost in Rule 39(e).

16AA Fed. Prac. & Proc. Juris. § 3985 (5th ed.) (footnotes omitted).

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[2] 28 U.S.C § 2072 ("Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.").

# TAB 6G

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: IFP Subcommittee

Re: Possible Simplification of Form 4

Date: February 25, 2022

This subcommittee has been considering a suggestion submitted by Sai to establish more consistent criteria for granting IFP status and to revise the FRAP 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.

The subcommittee informally gathered some information about IFP practice in the courts of appeals. Our sense is that IFP status is rarely denied due to the applicant having too much wealth or income and that Form 4 could be substantially simplified while still providing the courts of appeals with enough detail to decide whether to grant IFP status. In creating this draft, the subcommittee drew upon existing and proposed forms created for similar purposes.

Included with this report is a draft of a revised Form 4 for the Advisory Committee's consideration and discussion. At this point, the subcommittee is not recommending that the Advisory Committee seek publication and public comment on this draft. Before making that recommendation, the subcommittee would seek the reaction of the circuit clerks to the revision. In addition, because Supreme Court Rule 39.1 calls for the use of Appellate Form 4 by applicants for IFP status in the Supreme Court, we would want to confer with the Clerk of the Supreme Court before recommending publication.

In evaluating this draft, the Advisory Committee should bear in mind the governing statute. As noted in an earlier report, 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 statute 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 6H

# 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 docket fees of my appeal or post a bond for them. I believe I am entitled to redress. 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 legal issue on appeal. Please state your issues on appeal. (Attach additional pages if necessary.)

| My issues on appeal are: |
|---|
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| |
| |
| |

| | | |
|---|---|---|
| 1. | Do you receive SNAP (Supplemental Nutrition Assistance Program)? | Yes No |
| 2. | Do you receive Medicaid? | Yes No |
| 3. | Do you receive SSI (Supplemental Security Income)? | Yes No |
| 4. | What is your monthly take home pay from work? | $_____ |
| 5. | What is your monthly income from any other source? | $_____ |
| 6. | How much are your monthly housing costs (such as rent and utilities)? | $_____ |
| 7. | How much are your monthly costs for other necessary expenses (such as food, medicine, childcare, and transportation)? | $_____ |
| 8. | What are your total assets (such as bank accounts, investments, market value of car or house)? | $_____ |
| 9. | How much debt do you have (such as credit cards, mortgage, student loans)? | $_____ |
| 10. | How many people (including yourself) do you support? | |

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 affects your ability to pay the filing fee, please feel free to explain below. (Attach additional pages if necessary.)

# TAB 7

# TAB 7A

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett, Reporter

Re: Joint Projects

Date: February 28, 2022

There are three joint projects currently underway. The first involves possible adjustment of the deadline for electronic filing. The second involves a possible response to the Supreme Court's decision in *Hall v. Hall*, 138 S. Ct. 1118 (2018) (holding that consolidated cases retain their separate identity for appeal purposes and that complete disposition of one such case is immediately appealable). The third involves possible changes to make electronic filing by pro se litigants more broadly available.

I have nothing new to report on the first two projects.

The third project was referred to the reporters acting jointly. We have met and discussed the various ways in which pro se electronic filing presents different issues in bankruptcy courts, in district courts, and in courts of appeals. We have another reporters meeting scheduled after the material for this agenda book is due, but prior to the March meeting of the Advisory Committee. I will update the Committee as appropriate at the March meeting.

# TAB 8

# TAB 8A

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett, Reporter

Re: New Suggestions (21-AP-G, 21-AP-H, 22-AP-A)

Date: February 28, 2022

As noted in the report from the Amicus Subcommittee regarding amicus disclosures, we have received three comments on that project. But because nothing has yet been published for public comment, the three comments have been docketed as new suggestions.

The Amicus Subcommittee has considered these submissions as they were intended, as comments on the issues before that subcommittee. I suggest formally referring these suggestions to the Amicus Subcommittee.

# TAB 9

# TAB 9A

| Effective Date | Rule | Summary |
|---|---|---|
| December 2018 | 8, 11, 39 | The proposed amendments to Rules 8(a) and (b), 11(g), and 39(e) conform 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 | The proposed 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 | Changed 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. |