Minutes of the Fall Meeting of the

Advisory Committee on the Appellate Rules

April 10, 2024

Denver, CO

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, April 10, 2024, at approximately 9:00 a.m. MDT.

In addition to Judge Bybee, the following members of the Advisory Committee on the Appellate Rules were present in person: Linda Coberly, Professor Bert Huang, Justice Leondra Kruger, Judge Sidney Thomas, and Lisa Wright.

George Hicks, Judge Carl J. Nichols and Judge Richard C. Wesley attended via Teams. Solicitor General Elizabeth Prelogar was represented by Mark Freeman, Director of Appellate Staff, Civil Division, Department of Justice; he attended via Team.

Also present in person were: Judge John D. Bates, Chair, Standing Committee on the Rules of Practice and Procedure; Judge Daniel Bress, Member, Advisory Committee on the Bankruptcy Rules and Liaison to the Advisory Committee on the Appellate Rules; Andrew Pincus, Member, Standing Committee on the Rules of Practice and Procedure, and Liaison to the Advisory Committee on the Appellate Rules; Molly Dwyer, Clerk of Court Representative; H. Thomas Byron, Secretary to the Standing Committee, Rules Committee Staff (RCS); Alison Bruff, Counsel, RCS; Shelly Cox, Management Analyst, RCS; Zachary Hawari, Rules Law Clerk, RCS; Rakita Johnson, Administrative Assistant, RCS; Professor Catherine T. Struve, Reporter, Standing Committee on the Rules of Practice and Procedure; and Professor Edward A. Hartnett, Reporter, Advisory Committee on the Appellate Rules.

Professor Daniel R. Coquillette, Consultant, Standing Committee on the Rules of Practice and Procedure; Bridget M. Healy, Counsel, RCS; Scott Myers, Counsel, RCS; and Tim Reagan, Federal Judicial Center, attended via Teams.

I. Introduction and Preliminary Matters

Judge Bybee opened the meeting and welcomed everyone, particularly Linda Coberly, who was attending her first meeting in person, and Rakita Johnson, a new RCS staff member. He also welcomed the observers, both those in person and those online.

Mr. Byron called attention to the rules tracking chart and noted that the Supreme Court had approved the latest round of amendments, scheduled to go into effect on December 1, 2024. (Agenda book page 21). These amendments have been sent to Congress for review and include the substantial revisions of Rules 35 and 40 that this Committee put a lot of work into.

Mr. Hawari noted that the pending legislation chart now focused on legislation that would directly or effectively amend the Federal Rules. (Agenda book page 29).

Judge Bybee noted the draft minutes of the meeting of the Standing Committee and pointed to the pages involving the Appellate Rules. (Agenda book pages 49-52).

II. Approval of the Minutes

The minutes of the October 19, 2023, Advisory Committee meeting were approved. (Agenda book page 80).

III. Discussion of Joint Committee Matters

Professor Struve provided an update regarding electronic filing and service for unrepresented parties, noting that she expects that the working group will meet over the summer and have a proposal at the fall meeting.

Mr. Byron presented an update concerning privacy matters. The reporters' working group has been considering the suggestion by Senator Wyden that courts require the complete redaction of social security numbers, not simply redaction of all but the last four digits. A draft rule to accomplish that in the Civil Rules and Criminal Rules is in the material. (Agenda book page 100). Other suggestions have also been received regarding privacy matters, including one from the Department of Justice regarding the use of pseudonyms rather than initials for minors. (Agenda book page 108). Rather than implement the Wyden suggestion in isolation and end up amending the privacy rules twice in rapid succession, the working group is inclined to consider a more general review of privacy concerns across all four sets of rules all at once.

This committee might want to appoint its own subcommittee, wait for another Advisory Committee to take the lead, or ask the Standing Committee to appoint a joint subcommittee, although that might be premature. Mr. Byron invited feedback, either at this meeting or afterwards.

He also noted that the Federal Judicial Center is working on an undated report on the prevalence of unredacted Social Security Numbers in court filings; that report should be available in time for the June Standing Committee meeting and before this committee in the fall. Two other phases of the FJC research will focus on other personal information, such as dates of birth, in court filings, and Social Security

Numbers in court opinions. He also anticipates that there will be a report to Congress this year pursuant to the E-Government Act.

IV. Discussion of Matters Published for Public Comment

A. Costs on Appeal (21-AP-D)

Judge Bybee thanked Judge Nichols for his work as the chair of the subcommittee dealing with costs on appeal. He noted that Judge Nichols was presiding over a trial today and was joining the meeting via Teams whenever possible.

The Reporter presented the report of the subcommittee. (Agenda book page 111). Proposed amendments to Rule 39 were published for public comment. (Agenda book page 119). The proposed amendments codify the holding of *Hotels.com* that the allocation of costs by the court of appeals governs in both the court of appeals and in the district court. The proposed amendments also provide the clarity of procedure that the Supreme Court noted was lacking for a party who wishes to ask the court of appeals to change that allocation.

We have received three comments, two positive, one negative. The negative comment suggests that costs should never be assessed against a litigant proceeding IFP. Considering that the statute governing IFP status allows for costs against litigants proceeding IFP, the subcommittee does not recommend any change but instead recommends final approval as published.

The Committee, without objection, gave its final approval to the amendments.

B. Bankruptcy Appeals

The Reporter presented the report of the bankruptcy subcommittee. (Agenda book page 127). These proposed amendments to Rule 6 arose from suggestions from the Bankruptcy Rules Committee and were published for public comment. (Agenda book page 129).

They address two different circumstances. First, they clarify how certain post judgment motions interact with the time to appeal when a district court hears a bankruptcy case itself rather than referring it to a bankruptcy court. Second, they provide rules governing direct appeals from a bankruptcy court to the court of appeals. The existing rules treat such cases like other requests for permission to appeal under Rule 5. But Rule 5 is not a good fit, because it is designed for situations where the question is whether an appeal will be allowed at all, while direct bankruptcy appeals involve situations where there will be an appeal, and the question is which court will hear that appeal. The amendments benefited from the work of Danielle Spinelli, an experienced bankruptcy appeals lawyer who was on the

subcommittee but whose term has now expired. They were also worked out with the close cooperation of the reporters for the Bankruptcy Rules Committee.

We have received only one comment, and it was positive. The reporters for the Bankruptcy Rules Committee did not receive any additional comments.

The subcommittee recommends final approval as published.

The Committee, without objection, gave its final approval to the amendments.

V. Discussion of Matters Before Subcommittees

A. Amicus Briefs—Rule 29 (21-AP-C; 21-AP-G; 21-AP-H; 22-AP-A; 23-AP-B; 23-AP-I; 23-AP-K)

Judge Bybee presented the report of the amicus subcommittee. (Agenda book page 152). He noted that we have been working on this since 2019. We have had good discussions here and at the Standing Committee. The subcommittee recommends that the Committee ask the Standing Committee to publish a proposed rule for public comment.

Our consideration of this matter has already produced a number of comments, including at least one received after the agenda book was put together. Because the public comment period has not opened, they have been docketed as separate suggestions. He expects a great deal more comment once something is published for public comment. Don't expect this to be like Rule 39 and Rule 6 that we just approved. Some will think that we have gone too far; others will think that we have not gone far enough.

Before opening the floor for discussion, Judge Bybee noted the ways in which the draft produced by the subcommittee differs from the draft last seen by the Advisory Committee. (Agenda book 158).

The Supreme Court no longer requires either leave of court or the parties' consent for the filing of an amicus brief. The subcommittee decided not to follow the Supreme Court's lead, but instead to require a motion. This decision was a response to a concern raised at our last meeting by a judge member that amicus briefs submitted without motions can cause recusal problems. In addition, since our last meeting, the Supreme Court has announced that its members will not recuse because of amicus briefs. That's not the practice in the courts of appeals, where a court can deny leave to file an amicus brief or strike the brief if recusal would otherwise be required.

Another issue that arose at our last meeting was what term to use in Rule 29(b)(4) to describe the funds of an amicus. After looking at various IRS forms, the subcommittee settled on the term "total revenue."

In Rule 29(e), the subcommittee decided to reduce the action level from $1000 to $100 for earmarked contributions. Stylistic changes were also made.

Judge Bybee then opened the floor for discussion, first as to the text of the proposed rule.

A judge member thanked the subcommittee for eliminating the consent option for amicus briefs. On further reflection after our last meeting, he grew concerned that amicus briefs without court permission can cause recusal problems at the panel stage, not just at the rehearing stage. The clerk's office does a comprehensive conflict check, and if an amicus brief is filed during the briefing period with the consent of the parties, it would knock out a judge without the judge even knowing. By eliminating the consent option, the motion will be forwarded to the panel. If there is somebody who would be recused, they can deny the motion, but at least we've got judges involved so they can make a decision without being automatically recused. He had been planning to suggest what the subcommittee did.

A liaison member said that the elimination of the consent option may be contentious, but it made sense to publish the proposal and get comments. It will create an additional burden on those seeking to file an amicus brief, but not a huge one.

He also raised two more minor issues. First, 29(b)(2) uses the phrase "intended to pay" while 29(e) says simply "pay"; for consistency, 29(e) should also say "intended to pay." Second, 29(b), should refer to "an amicus" rather than "the amicus," because it is common for a single amicus brief to be submitted on behalf of a number of persons.

Judge Bates suggested that 29(e) could be shortened by deleting most of the sentence that begins with the word "But" and combining it with the prior sentence, linked by the conjunction "unless."

Mr. Freeman raised a concern about the proposed change in the length of an amicus brief from one-half the length of a party's principal brief to 6,500 words, noting that while Rule 32(a)(7) sets the length of a principal brief to 13,000 words, some circuits have retained the prior length limit of 14,000 words. The Reporter replied that current Rule 29(a)(5) refers to one-half the length "authorized by these rules," which seems to be a reference to the Federal Rules of Appellate Procedure, not one-half the length authorized by local rules. And at least one court of appeals reads the rule that way: the Court of Appeals for the Seventh Circuit has a local rule that provides that an amicus brief need not comply with Rule 29(a)(5) but can contain

7,000 words. In response to a concern about whether a court of appeals can allow for longer amicus briefs, Professor Struve pointed out that Rule 32(e) permits a court of appeals to accept documents that do not meet "the length limits set by these rules," referring to all of the Federal Rules of Appellate Procedure.

Mr. Freeman noted that yellow briefs—an appellant's brief in a cross appeal that combines both the response in the cross appeal and the reply in the initial appeal—can be 15,300 words. A fixed limit of 6,500 may result in more motions by an amicus to permit longer briefs.

A lawyer member turned attention to Rule 29(e) and the protection from disclosure of earmarked contributions by members of an amicus formed within the past 12 months. Does this open up a loophole that might lead some to create a new entity to avoid disclosure?

A liaison member responded that this was a compromise. What to do with a new organization? It might seem draconian to require the disclosure of all members. If an organization is newly formed, that will be flagged and the brief may get less credence. The lawyer who raised the question added that an organization might want to recruit new members to fund a brief.

Judge Bybee observed that there had been a lot of back and forth on this issue. But by requiring a new organization to disclose the date of its creation, judges would know that fact and individual judges could take that into account. We will hear more about this in the comment period.

Discussion then turned to the Committee Note. The Reporter called attention to an editing error in the last paragraph discussing subdivision (b) and that it should be corrected by changing "Non-tax-exempt entities are" to "A non-tax-exempt entity is." (Agenda book page 164, line 223). He then noted that Professor Struve had raised the question of whether the second and fourth paragraphs of the Committee Note belonged in the Committee Note or were better left to the report to the Standing Committee. (Agenda book page 161). The second paragraph explains the genesis of our consideration of this issue; while Committee Notes sometimes have a passage like this—as the Committee Note to Rule 39 that was just approved discusses *Hotels.com*—this is somewhat different. The fourth paragraph explains an approach not taken. In some parts of the Committee Note, such a discussion is relevant to the narrow tailoring of the rule, but that does not seem to be so here.

A liaison member suggested greater elaboration of the constitutional issue. The *Americans for Prosperity* Case lays out a standard that could be spelled out, especially regarding 29(e).

Judge Bybee asked whether this should be added to the Committee Note or to the report to the Standing Committee. The liaison member said the Committee Note,

observing that there is already some discussion of burdens in the Committee Note, and adverting to the associational burdens would be helpful, as well as more elaboration of the ends sought to be furthered.

Professor Coquillette said that he is a textualist regarding the rules. Some people don't read the Committee Notes. Put it in the report, not the Committee Notes. In response to a question from the Reporter focused on whether a First Amendment discussion belonged in the Committee Note, Professor Coquillette noted that some might read the Committee Note with the First Amendment concerns in mind. There is no right answer. Professor Struve observed that this is an interesting question, and that she could not think of other rules where this came up.

Judge Bates expressed his concern that more attention be paid to the First Amendment issue, suggesting that the report to the Standing Committee include the Advisory Committee's assessment of these concerns. The Reporter emphasized that the subcommittee and the Advisory Committee has been focused on these concerns at every step of the way. Whether the reports in the agenda books cited the cases or not, the focus was always on closely examining the purposes sought to be served, the burdens that might be imposed, and minimizing any unnecessary burdens.

Mr. Freeman added that it was an imperfect analogy, but that the Department of Justice generally advises that such discussions be left out of an organic rule. Acknowledge in the Committee Note that these concerns have been the focus of everyone's consideration, but not the detailed discussion.

Judge Bybee noted that such a discussion would look like an advisory opinion—but we are an advisory committee. A detailed discussion runs risks. We can acknowledge the issue and let the rule speak for itself. Our deliberate decisions to be constrained because of these concerns are reflected in the drafting of the rule. There will be public comment.

A judge member turned to the second paragraph of the discussion of subdivision (e), suggesting that the first sentence make clear that the Committee considered the disclosure of nonparties who make "any" significant contributions to an amicus, "whether earmarked or not," by adding the words in quotes.

Hearing no further discussion, Judge Bybee turned to voting on the various suggestions that had been made. These changes were shown in real time on a projector screen in the room and shared via Teams with those who were remote.

In the heading of 29(b), the Committee voted, without dissent, to change the phrase "the Amicus" to "an amicus."

In the heading of 29(e), the Committee voted, without dissent, to change the phrase "the Amicus" to "an amicus."

Turning to the difference between 29(b)(2) using the phrase "intended to pay" and 29(e) using the phrase "to pay," a liaison member favored changing 29(e) because the language of 29(b)(2) is in the existing rule and we do not want to suggest a change in meaning there. A judge member added that "intended to" covers the situation where money is intended to pay for something but isn't spent for that purpose because not needed. The Committee voted, without dissent, to change the phrase "to pay" to "intended to pay."

The Committee voted, without dissent, to change:

> An amicus brief must name any person—other than the amicus or its counsel—who contributed or pledged to contribute more than $100 intended to pay for preparing, drafting, or submitting the brief. But an amicus brief need not disclose a person who has been a member of the amicus for the prior 12 months.

to read:

> An amicus brief must name any person—other than the amicus or its counsel—who contributed or pledged to contribute more than $100 intended to pay for preparing, drafting, or submitting the brief, unless the person has been a member of the amicus for the prior 12 months.

The Committee voted, with one opposed, to delete paragraphs two and four of the proposed Committee Note.

The Committee voted, without dissent, to change the cross-reference in the last sentence of the passage discussing subdivision (a) from "Rule 32(g)" to "Rule 32(g)(1)."

The Committee voted, without dissent, to change the word "who" to "which" in the last clause of the first paragraph discussing subdivision (b).

The Committee voted, without dissent, to correct an editing error in the last paragraph discussing subdivision (b) and change "Non-tax-exempt entities are" to "A non-tax-exempt entity is." (Agenda book page 164, line 223).

The Committee voted, without dissent, to change the second paragraph of the discussion of subdivision (e) from "the disclosure of nonparties who make significant contributions to an amicus," to "the disclosure of nonparties who make any significant contributions to an amicus, whether earmarked or not."

Having deleted the second and third paragraphs of the proposed Committee Note, the Committee then revisited what would now be the opening paragraphs of the Committee Note.

A liaison member suggested saying more about the First Amendment and about other substantial interests at stake. A statement about protecting the integrity of court processes and rules could be added. As the Supreme Court sees it, it's not the interest in disclosure; it's the interest that disclosure is furthering. An academic member suggested that interests supporting the proposed amendment could be added to the paragraph that begins on line 117 of the agenda book. Mr. Freeman suggested that we might be getting out over our skis, urging that the Committee Note be general rather than try to track current First Amendment tests, which have been known to change. Given the discussion in the Committee Note of substantial interest, narrowly tailored, and avoiding unnecessary burdens, no one would be confused if we left out express mention of the First Amendment. Professor Coquillette reminded the Committee of the reasons to disfavor case citations in Committee Notes: Cases get reversed and overruled and we can't change a Committee Note without changing the Rule. These citations don't violate that principle. In response to a question whether the draft Committee Note would get in the way of a possible Department of Justice defense of these amendments, Mark Freeman said that he would prefer to omit the case citations but is not troubled by their inclusion. He added that it was a funny string cite.

A judge member asked if we need the first paragraph at all, observing that we are laboring a lot over this one paragraph. A liaison member suggested deleting all the case citations. A different judge member expressed concern that the first paragraph sounds like we are weighing some interest against the First Amendment, suggesting that instead of "the competing interests," the paragraph should refer to the "relevant First Amendment interests." This judge also suggested using the word "promote" rather than "protect."

An academic member called attention to the phrase "competing interests," and a lawyer member suggested "various interests" instead. A liaison member suggested "unjustified burdens" rather than "unnecessary burdens."

A lawyer member suggested that the first sentence of the Committee Note is too restrictive in referring to court processes and rules. A different lawyer member noted that the first sentence is about the disclosure requirements but doesn't say anything about the change to the consent provision.

The Committee, without dissent, approved the changes to the Committee Note just discussed.

The Reporter then suggested that the citation in the discussion of subdivision (e) should also be deleted and that "6500" should be changed to "6,500" in the table of length limits on page 171 of the agenda book. The Committee voted to approve the first without dissent and accepted the second without objection.

An academic member then returned the discussion to the point a lawyer member had made that the first sentence is about disclosure and doesn't say anything about the change to the consent provision. Judge Bates suggested adding the word "primarily" to the first sentence. A liaison member noted that the Committee Note does provide a pretty full discussion of that change. A lawyer member suggested a new first sentence, before the existing first sentence: "The amendments to Rule 29 make changes to the procedure for filing amicus briefs, including to the disclosure requirements." With this change, the phrase "to Rule 29" would be removed from what would now be the second sentence. The Committee approved this addition without objection.

The resulting text then read:

Committee Note

> The amendments to Rule 29 make changes to the procedure for filing amicus briefs, including to the disclosure requirements.
>
> The amendments seek primarily to provide the courts and the public with more information about an amicus curiae. Throughout its consideration of possible amendments, the Advisory Committee has carefully considered the relevant First Amendment interests.
>
> Some have suggested that information about an amicus is unnecessary because the only thing that matters about an amicus brief is the merits of the legal arguments in that brief. At times, however, courts do consider the identity and perspective of an amicus to be relevant. For that reason, the Committee thinks that some disclosures about an amicus are important to promote the integrity of court processes and rules.
>
> Careful attention to the various interests and the need to avoid unjustified burdens is reflected throughout these amendments. * * *

Judge Bates reminded the Committee that approval at this stage is only for publication.

No further changes were suggested. The Committee voted, without dissent, to approve the proposed amendment and Committee Note as amended and ask the Standing Committee to publish it for public comment.

The Committee then took a short break before resuming at approximately 11:20 a.m.

B. Form 4 (19-AP-C; 20-AP-D; 21-AP-B)

Lisa Wright presented the report of the IFP subcommittee. (Agenda book page 173). She noted that the agenda book included a prior report from the IFP subcommittee as well as a proposed revised Form 4. (Agenda book page 175, 179).

We have received suggestions to standardize the criteria for IFP status and to make the form less intrusive. We have not attempted to standardize the criteria but to simplify the form.

The proposed new form is a major simplification and, after consultation with the clerks and senior staff attorneys, includes what the subcommittee thinks is useful while omitting that which is not useful. It is ready for publication, notice, and comment.

Judge Bybee noted that a lot of hours have gone into this project. Ms. Dwyer added that this is a great improvement. It provides the information we need in a much faster and easier way. Thank you.

The Committee voted, without dissent, to approve the proposed revised Form 4 and its Committee Note and ask the Standing Committee to publish it for public comment.

Two members were added to the IFP subcommittee to be in place to consider any public comments: Professor Huang and Justice Kruger.

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

Judge Bybee noted that we are at an early stage of this project and invited a full discussion.

Mr. Freeman presented the report of the intervention on appeal subcommittee. (Agenda book page 182). He thanked the Reporter for the memo and draft rule. At our last meeting, we discussed this issue. There is currently no Appellate Rule governing intervention, so appellate courts look to the policies of Civil Rule 24. A subcommittee was created to try to put together a possible rule.

It is not clear that we should go ahead with any rule at all. But the philosophy of the working draft produced by the subcommittee includes the following:

- Continue, as current case law does, to treat intervention on appeal as rare
- Avoid reproducing the ambiguities of Civil Rule 24
- Do not take a position on the proper interpretation of Civil Rule 24
- Define the interests that support intervention

- Leave the ultimate question of intervention to the discretion of the court of appeals, so that there is no intervention as of right in the court of appeals, except as provided by statute

The working draft of the rule is presented in table form, with a description of the questions that the subcommittee is grappling with alongside particular provisions of the rule. Mr. Freeman highlighted the most significant of these questions.

One question relates to Rule 15(d), which provides that a motion to intervene in a proceeding to review or enforce an order of an administrative agency must be made within 30 days after the petition is filed. It does not, however, set a standard for intervention. Should a new rule set a standard for those proceedings as well, or be limited to cases on appeal from a trial court? Should a new rule be limited to civil cases? The Federal Rules of Criminal Procedure do not have a provision dealing with intervention, so a new rule might open up new possibilities in criminal cases.

Another question deals with timeliness. The draft rule has two timeliness provisions, (a)(1) dealing with the stage of the appellate proceedings, and (b)(1) dealing with the whole litigation. In this draft, the word "timely" is used rather than "promptly," drawing on Civil Rule 24. Is that helpful or not?

Subsection (b) sets forth criteria that must be met. One criterion, (b)(3), is drawn from Civil Rule 24. Is that appropriate in an appellate rule? The precedential effect of many appellate decisions might have practical effects on many people. The criteria in (4) through (7) are relatively uncontroversial.

Subsection (c) deals with the kind of legal interests that an intervenor must have to warrant intervention. There was a lot of discussion last fall about how to frame this provision and what the particular provisions mean. We grappled with these issues as a subcommittee. Paragraphs (1) and (2) are classic grounds for intervention, and this draft moves them up to the beginning. Paragraphs (3) through (5) look to the relationship between the claim or defense of the intervenor regarding the existing parties. They are drawn from an article by Caleb Nelson that focused on intervention in the district courts.

Subsection (d) adds tribal governments. It also makes clear that governmental parties can also rely on the other provisions for intervention, eliminating the risk that such parties might not be considered "persons" within the meaning of the rule.

Subsection (e) provides for the various ways that a court of appeals can dispose of a motion to intervene, including transferring it to the district court. It also makes clear that denial of intervention does not preclude the filing of an amicus brief.

Judge Bybee opened the floor for discussion, noting that there was no need to proceed in a particular order and that people should raise whatever concerns they have.

A liaison member wondered whether the detailing of legal interests in subsection (c) was necessary, and whether (c)(5) is sufficient to cover the situation where a private party needs to intervene when the government changes its position in litigation. Ms. Dwyer noted that the timing of a motion to intervene can cause recusal problems. A lawyer member also questioned the need for (c)(5) to be so specific, emphasizing the importance of (c)(7)—that the precedential effect of a decision is not a sufficient legal interest—and suggesting that it might be made a part of subsection (a).

Mr. Freeman stated that after the subcommittee meeting, he met with the Solicitor General and the heads of other sections. The memo did a very nice job highlighting the big picture questions, leading the DOJ to have both philosophical and pragmatic concerns. After some soul searching, the DOJ is unsure whether the rule is a good idea. There is a real risk that it will lead to the filing of more motions to intervene. Right now, they are exceedingly rare, and we do not want to give the impression that they should be made more often. While the draft rule has language to discourage such motions, so do the rehearing rules, and there are lots of petitions for rehearing filed.

There are three other concerns to highlight.

The first is the nature of an appeal compared to the nature of a district court proceeding. An intervenor in the district court files its own pleadings, is involved in discovery, and has a role in defining and narrowing the controversy. Parties make tactical and strategic choices about these things in the district court.

An appeal is different. The question is whether there was error in the district court decision. It does not present an opportunity to redesign the controversy or to bring in new claims or defenses. Someone shouldn't be able to just pop in at that stage and, without bearing the risks of being a party in the district court, reshape the controversy. An appeal should be tightly tied to the judgment or order on appeal. An intervenor can file its own lawsuit. There is a risk of skewing incentives, so that a person might choose not to intervene in the district court and instead try later. He worries about gatekeeping, despite the language in the draft rule.

The second is party autonomy, bracketing the classic basis for intervention in (1) and (2). The parties get to decide whether to appeal at all and what issues to raise. An appellant can, under Rule 3, make a deliberate decision to restrict the scope of the appeal. Frequent litigants decide whether to appeal, whether to seek cert., etc., considering whether they are better off living with the result or risking a worse result on appeal. The Committee's consideration of intervention is shaped by a few high-

profile cases where there is a change in administration and a resulting change in position. That is a difficult and important problem, but it is not typical. More typical is a party deciding not to go up.

The third is more pragmatic and deals with timing. Some of the current desire to intervene is driven by courts issuing universal remedies such as injunctions and vacatur. If remedies are limited to particular parties, nonparties can simply file their own lawsuits. There may be movement in the Supreme Court regarding universal remedies, so we might want to wait to see if the concerns about intervention have any staying power.

The DOJ appreciates all the work that has been done on this issue and appreciates the opportunity to present its views.

Judge Bybee noted that this Committee had considered the issue previously, in 2010, and tabled it.

A liaison member noted that the end of the memo suggests possible research about the circumstances where motions to intervene arise. He is not so sure universal remedies are going away. Plus, state attorneys general also change position.

A judge member said that he has seen motions to intervene in a case involving a dispute about packing labels. The likely result of a rule would be more motions to intervene. A different judge member noted that sometimes an amicus with a more tangible interest is given argument time. He added that the timing issue is really important. There is a risk of gamesmanship, including motions to intervene after a decision when someone wishes that they had intervened earlier. Now, we see very few motions. The first judge added that some may move late in the game, simply to seek cert. It really hurts the parties.

Judge Bybee asked if there might be an intermediate solution to deal with cases involving a change in administration. A judge member responded that intervention is allowed in such cases. Mr. Freeman added that this can turn on the state law question of capacity to represent the state. Those cases are sui generis. The cases involving beneficiaries of trusts and class members feel different than a situation where someone is coming in and trying to add new claims; in a sense, they have been parties all along. Perhaps cases involving changes in administration could be viewed through that lens.

Judge Bybee added that where independent state officers are involved, there can be cases where the state Secretary of State and Attorney General disagree. Such cases present questions of state law. Is there a way to capture that in a rule?

Judge Bates suggested that it may be time to return to basics. What's the problem? Does the proposed rule address that problem? What are the risks of

unintended consequences? There seem to be seven different explanations of the problem.

The Reporter stated his sense that many decisions on motions to intervene would not be reported in Lexis or Westlaw and asked whether others thought that was accurate. A judge member said it was accurate, and he suggested getting data from the Ninth Circuit. A liaison member suggested data beyond the Ninth Circuit. Ms. Dwyer said that she could reach out to other circuits. Marie Leary stated that she could speak to her colleagues at the FJC about getting data from ECF; a formal request from Judge Bybee would be best. Judge Bates noted that Judge Bybee and the Reporter should make a specific request.

An academic member suggested gathering information from the D.C. Circuit in agency cases. Mr. Freeman responded that things go relatively smoothly in many such cases: the party aggrieved by the agency decision petitions for review and others who were before the administrative agency intervene to defend the agency action. He would gather anecdotal information, not hard numbers, about circumstances in which intervention is allowed, both in cases where the DOJ handles the case and where an agency has independent litigating authority. Judge Bybee noted that it would be good to get information on circumstances where someone sought intervention, thinking it appropriate, but was denied.

A liaison member noted that he sees a lot of intervention in agency cases. Mr. Freeman stated that the existing FRAP 15 says nothing about the standard for intervention and that the circuits vary. For example, the Eighth Circuit borrows from Civil Rule 24, while the D.C. Circuit in some cases allows a notice of intervention as of course. A different liaison member said that FRAP 15 cases are categorically distinct in that the proceeding in the court of appeals is the first judicial proceeding, not an appeal from a full judicial proceeding in the district court. A lawyer member observed that motions to intervene on appeal are common in class actions.

The Committee took a lunch break at approximately 12:15, with Judge Bybee noting that the discussion of intervention could continue after lunch. When the Committee resumed at approximately 1:00, the Reporter recapped the information that we would try to obtain for the next meeting: 1) Ms. Dwyer would gather information from the Ninth Circuit and ask other Clerks of other Circuits; 2) Mr. Freeman would gather information from the DOJ; 3) Judge Bybee and the Reporter would draft a formal request to the FJC. Judge Bybee added that we might also do research on published opinions and law review articles focused on intervention on appeal. In order to have time for the subcommittee to consider this information in time for inclusion in the fall agenda book, we are looking to have this information before August 1.

VI. Discussion of Recent Suggestions

A. Comments on Amicus Disclosure (23-AP-I, 23-AP-K; 24-AP-A)

The Reporter referred to two comments about amicus disclosure submitted by Senator Whitehouse and Representative Johnson and an article about expert information in amicus briefs submitted by Professor David DeMatteo. (Agenda book page 194). Because there is not yet a proposal published for public comment, these have been docketed as new suggestions.

He recommended that they be referred to the amicus subcommittee, and they were.

B. PACER Access (23-AP-J)

The Reporter presented a suggestion by Andrew Shaw to make access to PACER free. (Agenda book 232). While this may be a good idea, it is not a matter for rule making.

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

C. Rule 15

The Reporter presented a suggestion contained in an opinion by Judge Randolph that the Committee consider amending Rule 15 in a way similar to the 1993 amendment of Rule 4. (Agenda book page 237).

Prior to the 1993 amendment of Rule 4, notices of appeal that were filed before certain post-judgment motions in the district court self-destructed, requiring a party to file a new notice of appeal after the district court decided the motion. In 1993, Rule 4 was amended to deal with this problem.

A similar problem exists under Rule 15 in agency cases. If a petition for review of agency action is filed before a motion for reconsideration by the agency, the petition is "incurably premature," and a party must file a new petition for review.

The Reporter suggested the appointment of a subcommittee to deal with this matter. Judge Bybee appointed Bert Huang, Mark Freeman, and Andrew Pincus, with Professor Huang serving as chair.

VII. Review of Impact and Effectiveness of Recent Rule Changes

The Reporter directed the Committee's attention to a table of recent amendments to the Appellate Rules. (Agenda book page 244). This matter is placed

on the agenda to provide an opportunity to discuss whether anybody has noticed things that have gone well or gone poorly with our amendments. No one raised any concerns.

VIII. Old Business

The Reporter stated that in the spring of 2018, the Committee had decided not to act on a concern that appendices were too long and contained irrelevant information and to put the matter off for three years in the hope that changing technology might solve the problem with briefs that cite to the electronic record of the district court. In the spring of 2021, the Committee again put the matter off for three years for similar reasons. Three more years have gone by. The Reporter suggested that the Committee decide whether to form a subcommittee to address the issue, put it off again, or remove the matter from the agenda, leaving it to anyone who chooses to raise the issue again in the future.

Ms. Dwyer stated that the easily produced electronic record isn't easily produced. The Fifth Circuit appears to be most successful. There, district courts are required to create an electronic record and store it on SharePoint so the parties have access to it. But district courts in the Ninth Circuit have been less cooperative. In the Second and Ninth Circuits, there may be a new case management system built that could help. A modern cloud-based system is in the works at the AO, but it is still a couple of years off.

A judge member noted his great appreciation for the level of professionalism of Ms. Dwyer and the Clerk of his court. He's been a federal judge for 20 years and has never worked on paper. With a new filing system coming, this might be premature. He suggested that he speak to them and report back at a future meeting. Ms. Dwyer noted the resistance of solo practitioners.

A lawyer member noted differences in the practices in different circuits. When creating an appendix in the Seventh Circuit, think about what you would want the judges to have with them on the train to read. In the Second Circuit, an appendix might take up an entire shelf in an office. Risk averse lawyers over include, making it useless. If it's a substitute for the entire record, it's large and unwieldy. Just cite the ECF number. Having to create hyperlinks is a tremendous headache and very costly because of the time needed to check them. That would be a real barrier for self-represented litigants. A judge member suggested keeping an eye on the issue; maybe in the future we can just use the district court docket. Bookmarks in a PDF let him get to significant documents.

Ms. Dwyer stated that a major issue is who creates the electronic record: the lawyer, the district court, the court of appeals? There is too much divergence if done by lawyers. The Fifth Circuit does it best, with district courts doing it, enabling the briefs to link to the record.

A judge member stated that until we are further along electronically, the circuits will vary. The Court of Appeals for the Fifth Circuit bludgeoned the district courts. Mr. Freeman added that in the Fifth Circuit, so long as one uses the precisely specified citation format, software generates the hyperlinks. In the Sixth Circuit, one cites directly to the ECF; he wonders what that is like on the user end.

Judge Bybee asked Ms. Dwyer to do a survey of the circuits for the next meeting. A judge member offered his help. At a future meeting, we may create a subcommittee or postpone it again for a few more years, but for now, let's get a little bit more information.

IX. New Business

No member of the Committee raised new business.

X. Adjournment

Judge Bybee announced that the next meeting will be held on October 9, 2024, in Washington, D.C.

Judge Bates thanked Judge Bybee, noting that it would probably be Judge Bybee's last meeting. Judge Bates added that Judge Bybee had done a fantastic job and urged him to stay in touch.

Judge Bybee said that it was an honor to be a part of this Committee. He said that he would give his standard closing this one last time: He thanked everyone, noting that these are expensive meetings in that people put in a lot of time that they could use to do other things. But it is important. Litigation can impose great costs. If we can save some of those costs, then every minute we spend with this Committee is well worth it.

The Committee adjourned at approximately 1:30 p.m., with applause for Judge Bybee.