COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

OF THE

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

MEMORANDUM

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

FROM: Judge Jay Bybee, Chair
Advisory Committee on Appellate Rules

RE: Report of the Advisory Committee on Appellate Rules

DATE: May 11, 2023

I. Introduction

The Advisory Committee on Appellate Rules met on Wednesday, March 29, 2023, in West Palm Beach, Florida. The draft minutes from the meeting accompany this report.

The Advisory Committee seeks final approval of proposed amendments to Rules 35 and 40 dealing with rehearing, along with conforming amendments to Rule 32 and the Appendix on Length Limits. (Part II of this report.)

It also seeks publication of two proposed amendments, one to Rule 39, dealing with costs on appeal, and one to Rule 6, dealing with appeals in bankruptcy cases. (Part III of this report.)

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

- expanding disclosures by amici curiae;
- requiring disclosure of third-party litigation funding;
- regularizing the criteria for granting in forma pauperis status and revising Form 4;
- in conjunction with other Advisory Committees, making the deadline for electronic filing earlier than midnight;
- in conjunction with other Advisory Committees, expanding electronic filing by self-represented litigants;
- a new suggestion to provide greater protection for Social Security numbers in court filings;
- a new suggestion to create a rule dealing with intervention on appeal; and
- a new suggestion to eliminate the requirement of party consent or court permission for filing an amicus brief.

The Advisory Committee also considered two items and removed them from the Advisory Committee's agenda (Part V of this report):

- a suggestion to create a rule dealing with decisions on unbriefed grounds; and
- a new suggestion to permit all persons to practice law, absent a compelling reason for restriction.

II. Action Item for Final Approval—Rules 35 and 40 (18-AP-A)

The Advisory Committee began a comprehensive review of Rule 35, dealing with hearing and rehearing en banc, and Rule 40, dealing with panel rehearing, in the spring of 2018. In the spring of 2021, the Advisory Committee approved a modest set of proposed changes to those Rules and asked the Standing Committee to publish them for public comment. At the June 2021 meeting of the Standing Committee, however, members of the Standing Committee asked about several provisions of those Rules. The Advisory Committee's defense of most of the questioned provisions was that they were in the existing Rules and that the Advisory Committee was attempting to minimize the changes proposed.

The Standing Committee remanded the matter to the Advisory Committee with instructions to take a freer hand in improving the Rules. The Advisory Committee did so, producing proposed amendments transferring the content of Rule 35 to Rule 40, thereby bringing together in one place the relevant provisions dealing with rehearing. These proposed amendments clarify the distinct criteria for rehearing en banc and panel rehearing and eliminate much redundancy.

In January of 2022, the Standing Committee approved the comprehensive revision for publication, and in June of 2022, it also approved a minor correction for publication. The comprehensive revision, as corrected, was published in the summer of 2022 and accompanies this report. The Advisory Committee reviewed the public comments and unanimously recommends final approval without change.

The Advisory Committee received five formal comments. Three comments broadly critique basic aspects of en banc process. They object that rehearing en banc should be widely available, should not be disfavored, and that oral argument should be allowed on the question whether to grant a petition.

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

One of the earliest concerns with which this project started was that courts were inappropriately foreclosing subsequent petitions. The Advisory Committee decided not to broadly endorse the very power that was the target of concern in the first place. At earlier stages in this multi-year process, the Advisory Committee struggled with the issue of drawing a line between the kinds of amendments that would permit a new petition and those that would not. It was never comfortable with

a place to draw the line and decided, as the committee note explains, to rely on the ability of a court to easily deny frivolous petitions, to shorten the time to file a petition or the time to issue the mandate, and, when necessary, to invoke Rule 2. The good sense of litigants and counsel will prevent most rehearing petitions when the amendment to the panel decision is trivial, particularly with the stringent criteria for both forms of rehearing specified together in the amended rule. Courts can readily reject frivolous rehearing petitions without calling for a response, and no vote need be taken on a petition for rehearing en banc unless a judge calls for one.

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

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

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

The Advisory Committee concluded that this change is unnecessary. While Rule 32(a) requires that a brief bear a cover, Rule 32(c)(2) governs other papers, "including a petition for panel rehearing and a petition for hearing or rehearing en banc," and specifically states that a "cover is not necessary if the caption and signature page of the paper together contain the information required by Rule 32(a)(2)." Rule 32(c)(2)(A). In addition, Rule 32(e) explicitly permits local variation. Thus while amended Rule 40(d)(2) does not itself contain a local option provision, the rule that it incorporates—Rule 32(a)—does contain one.

For these reasons, the Advisory Committee unanimously recommends final approval of these amendments as published.

The following is to be added after the text of Rule 32 and its Committee Note as published:

Changes Made After Publication and Comment

None.

The following is to be added after the text of Rule 35 and its Committee Note as published:

Changes Made After Publication and Comment

None.

Summary of Public Comment

See Rule 40.

The following is to be added after the text of Rule 40 and its Committee Note as published:

Changes Made After Publication and Comment

None.

Summary of Public Comment

Claudi Barber (AP-2022-0001-0003): The rule should not provide that rehearing en banc is not favored. Petitions for rehearing should be freely granted when something unjust appears in the record.

Andrew Straw (AP-2022-0001-0004): There should be no discretion. Every petition for en banc review should have a merits decision.

Anonymous (AP-2022-0001-0008): It is somewhat unprofessional for an appellate court to determine that a certain type of hearing is unfavorable. It would be prudent to allow oral argument on whether or not to grant a petition.

J. Krell (AP-2021-0001-0005): The proposed amendments are minor and largely unobjectionable. Combining Rules 35 and 40 seems appropriate given the degree to which petitions for panel rehearing and for rehearing en banc have become intertwined, and others seem reasonable. But the rules should codify the practice of the simultaneously amending the opinion, denying rehearing en banc, and ordering that no further petitions for panel or en banc rehearing will be entertained, perhaps a caution that this should be done only if the

amendment is so minor that any subsequent petition would be obviously frivolous or dilatory.

National Association of Criminal Defense Lawyers (AP-2022-0001-0009): The NACDL supports the proposed amendments, with one suggestion for improvement. Local flexibility regarding the physical presentation of rehearing petitions should be permitted, similar to the local flexibility for length and time limits.

III. Action Items for Approval for Publication

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

Rule 39 governs costs on appeal. Some costs are taxable in the court of appeals, while others are taxable in the district court. In *City of San Antonio v. Hotels.com*, 141 S. Ct. 1628 (2021), the Supreme Court held that Rule 39 does not permit a district court to alter a court of appeals' allocation of costs, even those costs that are taxed by the district court. The Court also observed that "the current Rules and the relevant statutes could specify more clearly the procedure that such a party should follow to bring their arguments to the court of appeals." *Id.* at 1638.

The Advisory Committee seeks publication of proposed amendments to Rule 39. The proposal is designed to accomplish several things:

First, it clarifies the distinction between (1) the court of appeals deciding which parties must bear the costs and, if appropriate, in what percentages and (2) the court of appeals, the district court (or the clerk of either) calculating and taxing the dollar amount of costs upon the proper party or parties. It uses the term "allocated" for the former and the term "taxed" for the latter. Rule 39(a) established default rules for the allocation of costs; these default rules can be displaced by party agreement or court order.

Second, it codifies the holding in *Hotels.com*, providing that the allocation of costs by the court of appeals applies to both the costs taxable in the court of appeals and the costs taxable in the district court.

Third, it responds to the need identified in *Hotels.com* for a clearer procedure that a party should follow if it wants to ask the court of appeals to reconsider the allocation of costs. It does this by providing for a motion for reconsideration of the allocation. To prevent delay, it provides that the mandate must not be delayed while awaiting determination of such a motion for reconsideration while making clear that the court of appeals retains jurisdiction to decide the motion.

Fourth, it makes Rule 39's structure more parallel. The current Rule lists the costs taxable in the district court but not the costs taxable in the court of appeals. The proposed amendment lists the costs taxable in the court of appeals.

The proposal does not, however, deal with one significant issue. Most costs on appeal are modest. The Advisory Committee learned that some parties do not even bother to file bills of costs because the price of lawyer time to do so exceeds the value of the costs themselves. But one cost on appeal—indeed, the cost involved in *Hotels.com*—can be quite significant: the premium paid for a supersedeas bond. Because of the bond premium, the bill of costs in *Hotels.com* was for more than $2.3 million.

The Advisory Committee was unable to come up with a good way to make sure that the judgment winner in the district court is aware of the cost of the supersedeas bond early enough to ask the court of appeals to reallocate the costs. Allowing a party to move for reallocation in the court of appeals after the bill of costs is filed in the district court would mean that both courts are dealing with the same costs issue at the same time. Creating a long period to seek reallocation in the court of appeals would mean that the case would be less fresh in the judges' minds and begin to look like a wholly separate appeal. Requiring disclosure in the bill of costs filed in the court of appeals would be odd because those costs are not sought in the court of appeals. Plus, a party might forego the relatively minor costs taxable in the court of appeals and care only about costs taxable in the district court. It would be possible to have the court of appeals tax the costs itself, but that would be a major departure from the principle, endorsed by the Supreme Court in *Hotels.com*, that the court closest to the cost should tax it.

For this reason, the Appellate Rules Committee believes that the easiest and most obvious time for disclosure is when the bond is before the district court for approval. It has requested the Civil Rules Committee to consider amending Civil Rule 62 to require that disclosure.

Even without such an amendment to Civil Rule 62, however, the Appellate Rules Committee believes that the following proposed amendment to Appellate Rule 39 is worthwhile and therefore asks the Standing Committee to publish it for public comment. The proposal has been revised since the Advisory Committee's March 2023 meeting in accordance with the suggestions of the style consultants.

Rule 39. Costs

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

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

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

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

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

(b) Reconsideration. Once the allocation of costs is established by the entry of judgment, a party may seek reconsideration of that allocation by filing a motion in the court of appeals within 14 days after the entry of judgment. But issuance of the mandate under Rule 41 must not be delayed awaiting a determination of the motion. The court of appeals retains jurisdiction to decide the motion after the mandate issues.

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

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

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

(1) **Costs Taxable.** The following costs on appeal are taxable in the court of appeals for the benefit of the party entitled to costs:

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

(B) the docketing fee; and

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

~~(c)~~(2) **Costs of Copies.** Each court of appeals must, by local rule, set~~fix~~ the maximum rate for taxing the cost of producing necessary copies of a brief or appendix, or copies of records authorized by Rule 30(f). The rate must not exceed that generally charged for such work in the area where the

clerk's office is located and should encourage economical methods of copying.

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

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

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

~~(3)~~(C) The clerk must prepare and certify an itemized statement of costs for insertion in the mandate, but issuance of the mandate must not be delayed for taxing costs. If the mandate issues before costs are finally determined, the district clerk must—upon the circuit clerk's request—add the statement of costs, or any amendment of it, to the mandate.

~~(e)~~(f) **Costs on Appeal Taxable in the District Court.** The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs ~~under this rule~~:

(1) the preparation and transmission of the record;

(2) the reporter's transcript, if needed to determine the appeal;

(3) premiums paid for a bond or other security to preserve rights pending appeal; and

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

Committee Note

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

Subdivision (a). Both the heading and the body of the Rule are amended to clarify that allocation of the costs among the parties is done by the court of appeals. The court may allow the default rules specified in subdivision (a) to operate based on the judgment, or it may allocate them differently based on the equities of the

situation. Subdivision (a) is not concerned with calculating the amounts owed; it is concerned with who bears those costs, and in what proportion. The amendment also specifies a default for mixed judgments: each party bears its own costs.

Subdivision (b). The amendment specifies a procedure for a party to ask the court of appeals to reconsider the allocation of costs established pursuant to subdivision (a). A party may do so by motion in the court of appeals within 14 days after the entry of judgment. The mandate is not stayed pending resolution of this motion, but the court of appeals retains jurisdiction to decide the motion after the mandate issues.

Subdivision (c). Codifying the decision in *Hotels.com*, the amendment also makes clear that the allocation of costs by the court of appeals governs the taxation of costs both in the court of appeals and in the district court.

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

Subdivision (e). The amendment specifies which costs are taxable in the court of appeals and clarifies that the procedure in that subdivision governs the taxation of costs taxable in the court of appeals. The docketing fee, currently $500, is established by the Judicial Conference of the United States pursuant to 28 U.S.C. § 1913. The reference to filing fees paid in the court of appeals is not a reference to the $5 fee paid to the district court required by 28 U.S.C. § 1917 for filing a notice of appeal from the district court to the court of appeals. Instead, the reference is to filing fees paid in the court of appeals, such as the fee to file a notice of appeal from a bankruptcy appellate panel.

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

B. Appeals in Bankruptcy Cases

The Advisory Committee on Bankruptcy Rules has asked the Advisory Committee on Appellate Rules to consider amendments to Appellate Rule 6 dealing with appeals in bankruptcy cases. Two different concerns led to this request.

Resetting time to appeal. The first concern involves resetting the time to appeal in cases where a district court is exercising original jurisdiction in a bankruptcy case. Federal Rule of Appellate Procedure 4(a)(4)(A) resets the time to appeal if various post-judgment motions are timely made in the district court. To be timely in an ordinary civil case, the motion must be made within 28 days of the judgment. Fed. R. Civ. P. 50(b), 52(b), 59. But in a bankruptcy case, the equivalent

motions must be made within 14 days of the judgment. Fed. R. Bankr. P. 7052, 9015(c), 9023.

So what happens if a district court itself—rather than a bankruptcy court—decides a bankruptcy proceeding in the first instance and a post-judgment motion is made on the 20th day after judgment? Does the motion have resetting effect or not?

The Court of Appeals for the First Circuit has said no. *In re Lac-Mégantic Train Derailment Litigation*, 999 F.3d 72, 84 (1st Cir. 2021). The Bankruptcy Rules and their time limits apply to a bankruptcy case heard in the district court.

This result, while sensible, is not obvious from the text of the Federal Rules of Appellate Procedure. That's because Rule 6 provides:

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

And Rule 4(a)(4)(A) gives resetting effect to motions that are filed "within the time allowed" by "the Federal Rules of Civil Procedure"—which is 28 days, not 14 days .

The Bankruptcy Rules Committee considered amending Bankruptcy Rules 7052, 9015(c), and 9023 to provide 28 days for the motions if the proceeding is heard by the district court, but that would undermine the goal of expedition and disrupt the uniformity of bankruptcy rules. It considered asking the Appellate Rules Committee to consider amending Appellate Rule 4(a)(4)(A) to acknowledge the different timing rules, but that would complicate an already quite complicated rule with material that doesn't apply to non-bankruptcy cases. It settled on asking the Appellate Rules Committee to consider amending Appellate Rule 6(a)—the rule that deals with bankruptcy appeals where the district court exercised original jurisdiction—to acknowledge the different timing rules.

The Appellate Rules Committee agreed.[1] It proposes to add a sentence to Appellate Rule 6(a): "But the reference in Rule 4(a)(4)(A) to the time allowed for motions under certain Federal Rules of Civil Procedure must be read as a reference to the time allowed for the equivalent motions under the applicable Federal Rule of Bankruptcy Procedure, which may be shorter than the time allowed under the Civil

[1] At the meeting, the Committee agreed in principle and asked the subcommittee to refine the language and provide a Committee Note for its consideration by email. The subcommittee did so, and the full Advisory Committee without dissent approved the proposal below.

Rules." The Committee Note provides a table of the equivalent motions and the time allowed under the current version of the applicable Bankruptcy Rule.

Direct appeals. The second concern involves direct appeals in bankruptcy cases. Appeals in bankruptcy are governed by 28 U.S.C. § 158. The default rule for appeals from an order of the bankruptcy court is that such appeals go either to the district court for the district where the bankruptcy court is located or (in the circuits that have established a bankruptcy appellate panel (BAP)) to the BAP for that circuit. Under § 158, the losing party then has a further appeal as of right to the court of appeals from a final judgment of the district court or BAP.

The bankruptcy appeal process thus creates a redundancy whenever an appeal is taken to the court of appeals under § 158(d)(1), and the two-tiered procedure can be quite time-consuming. That can be problematic in the bankruptcy context, where quick resolution of the parties' disputes is sometimes critical.

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

> (A) The appropriate court of appeals shall have jurisdiction of appeals described in the first sentence of subsection (a) if the bankruptcy court, the district court, or the bankruptcy appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree described in such first sentence, or all the appellants and appellees (if any) acting jointly, certify that—
>
> > (i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;
> >
> > (ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or
> >
> > (iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken;
>
> and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.

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

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

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

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

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

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

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

28 U.S.C. § 158(d)(2).

Under this statute, any order of the bankruptcy court—final or interlocutory—can be certified for direct appeal to the court of appeals if it meets the remaining statutory requirements. Those requirements are similar to, but looser than, the standards for certification under 28 U.S.C. § 1292(b), which permits courts of appeals to hear appeals of interlocutory orders of the district courts in certain circumstances. Moreover, the certification can be made by the bankruptcy court, district court, BAP, or the parties. Under the Bankruptcy Rules, even if a bankruptcy court order has been certified for direct appeal to the court of appeals, the appellant must still file a notice of appeal to the district court or BAP in order to render the certification effective. As with § 1292(b), the court of appeals must also authorize the direct appeal.

Under this structure, a court of appeals' decision to authorize a direct appeal does not determine whether an appeal will go forward, but instead in what court the appeal will be heard. The party asking that the appeal from the bankruptcy court be heard directly in the court of appeals might be an appellee rather than an appellant.

Accordingly, the Bankruptcy Rules Committee seeks a clarifying amendment to Bankruptcy Rule 8006(g) providing that any party to the appeal may file a request that the court of appeals authorize a direct appeal:

> **(g) Request After Certification for a Court of Appeals To Authorize a Direct Appeal.**
>
> Within 30 days after the certification has become effective under (a), any party to the appeal may ask the court of appeals to authorize a direct appeal by filing a petition with the circuit clerk in accordance with Fed. R. App. P. 6(c).

Current Appellate Rule 6(c), which governs direct appeals, largely relies on Rule 5, which governs appeals by permission. But the proposed amendment to the Bankruptcy Rules revealed that Appellate Rule 5 is not a good fit for direct appeals in bankruptcy cases. That's because Rule 5 was designed for the situation in which the court of appeals is deciding whether to allow an appeal at all. But in the direct appeal context, that's not the question. Instead, in the direct appeal context, there is an appeal; the question is which court is going to hear that appeal.[2]

More generally, experience with direct appeals shows considerable confusion in applying the Appellate Rules. This is primarily due to the manner in which Rule 6(c) cross-references Rule 5 and to its failure to take into account that an appeal of the bankruptcy court order in question is already proceeding in the district court or BAP, which results in uncertainty about precisely what steps are necessary to perfect an appeal after the court of appeals authorizes a direct appeal.

For these reasons, the Appellate Rules Committee proposes to overhaul Rule 6(c) and make it largely self-contained. Parties will not need to refer to Rule 5 unless expressly referred to a specific provision of Rule 5 by Rule 6(c) itself. Rule 6(c) makes Rule 5 inapplicable except to the extent provided for in other parts of Rule 6(c).

The proposed amendments also spell out in more detail how parties should handle initial procedural steps in the court of appeals once authorization for a direct appeal is granted, taking into account that an appeal from the same order will already be pending in the district court or BAP. The proposed Rule 6(c)(2) permits any party to the appeal to ask the court of appeals to authorize a direct appeal. It also adds provisions governing contents of the petition, answer or cross-petition, oral argument,

[2] A caveat: 28 U.S.C. § 158(a)(3) allows appeals from a bankruptcy court to a district court (or BAP) of otherwise unappealable interlocutory orders with leave of court. Authorization of a direct appeal under § 158(d)(2) subsumes leave to appeal. Fed. R. Bankr. P. 8004(e). ("If leave to appeal an interlocutory order or decree is required under 28 U.S.C. § 158(a)(3), an authorization of a direct appeal by the court of appeals under 28 U.S.C. § 158(d)(2) satisfies the requirement.").

form of papers, number of copies, and length limits. It also makes clear that no notice of appeal to the court of appeals needs to be filed, and provides for calculating time, notification of the order authorizing a direct appeal, and payment of fees. It adds a provision governing stays pending appeal, makes clear that steps already taken in pursuing the appeal need not be repeated, and provides for making the record available to the circuit clerk. It requires all parties, not just the appellant or applicant for direct appeal, to file a representation statement. Additional changes in language are made to better match the relevant statutes.

None of these are intended to make major changes to existing procedures but to clarify those procedures. The proposal has been revised since the Advisory Committee's March 2023 meeting in accordance with the suggestions of the style consultants.

Rule 6. Appeal in a Bankruptcy Case or Proceeding

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

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

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

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

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

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

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

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

(A) **Motion for Rehearing.**

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

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

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

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

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

(ii) An appellee who believes that other parts of the record are necessary must, within 14 days after being served with the

appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included.

(iii) The record on appeal consists of:

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

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

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

(ii) All parties must do whatever else is necessary to enable the clerk to assemble the record and make it available. When the record is made available in paper form, the court of appeals may provide by rule or order that a certified copy of the docket entries be made available in place of the redesignated record. But at any time during the appeal's pendency, any party may request ~~at any time during the pendency of the appeal~~ that the redesignated record be made available.

(D) **Filing the Record.** When the district clerk or bankruptcy-appellate-panel clerk has made the record available, the circuit clerk must note that fact on the docket. The date as noted ~~on the~~

~~docket~~ serves as the filing date of the record. The circuit clerk must immediately notify all parties of that ~~the filing~~ date.

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

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

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

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

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

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

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

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

(i) the certification; and

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

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

(D) **Form of Papers; Number of Copies; Length Limits.** Rule 5(c) governs the required form, number of copies to be filed, and

length limits applicable to the petition and any answer or cross-petition.

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

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

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

(ii) Within 14 days after the order authorizing the direct appeal is entered, the appellant must pay the bankruptcy clerk any unpaid required fee, including:

- the fee required for the appeal to the district court or bankruptcy appellate panel; and
- the difference between the fee for an appeal to the district court or bankruptcy appellate panel and the fee required for an appeal to the court of appeals.

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

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

~~(A)~~(H) **The Record on Appeal**. Bankruptcy Rule 8009 governs the record on appeal. If a party has already filed a document or completed a step required to assemble the record for the appeal to the district court or bankruptcy appellate panel, the party need not repeat that filing or step.

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

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

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

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

Committee Note

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

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

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

Motions for relief under Civil Rule 60 in bankruptcy cases or proceedings are governed by Bankruptcy Rule 9024. Appellate Rule 4(a)(4)(A)(vi) provides that a motion for relief under Civil Rule 60 resets the time to appeal only if the motion is

made within the time allowed for filing a motion under Civil Rule 59. In a bankruptcy case or proceeding, motions under Civil Rule 59 are governed by Bankruptcy Rule 9023, which, as noted above, requires such motions to be filed within 14 days of entry of judgment.

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

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

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

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

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

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

Specifically, § 158(d)(2) grants the court of appeals jurisdiction of appeals from any order, judgment, or decree of the bankruptcy court if (a) the bankruptcy court, the district court, the bankruptcy appellate panel, or all parties to the appeal certify that (1) "the judgment, order, or decree involves a question of law as to which there

is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance"; (2) "the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions"; or (3) "an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken" *and* (b) "the court of appeals authorizes the direct appeal of the judgment, order, or decree." 28 U.S.C. § 158(d)(2).

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

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

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

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

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

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

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

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

Subdivision (c)(2)(B). Subdivision (c)(2)(B) is a new provision that specifies the contents of a petition to authorize a direct appeal. It provides that, in addition to the material required by Rule 5, the petition must include an attached copy of the certification under § 158(d)(2) and a copy of the notice of appeal to the district court or bankruptcy appellate panel.

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

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

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

serves as the date of the notice of appeal for the purpose of calculating time under the Appellate Rules.

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

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

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

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

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

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

Subdivision (c)(2)(I). Subdivision (c)(2)(I) was formerly subdivision (c)(2)(B). It continues to provide that Bankruptcy Rule 8010 governs provision of the record to the court of appeals. It adds a sentence clarifying that when the court of appeals authorizes the direct appeal, the bankruptcy clerk must make the record available to the court of appeals.

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

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

IV. Other Matters Under Consideration

A. Amicus Disclosures—FRAP 29 (21-AP-C; 21-AP-G; 21-AP-H; 22-AP-A)

In October 2019, after learning of a bill introduced in Congress that would institute a registration and disclosure system for amici curiae like the one that applies to lobbyists, the Advisory Committee appointed a subcommittee to address amicus disclosures. In February of 2021, after correspondence with the Clerk of the Supreme Court, Senator Whitehouse and Congressman Johnson wrote to Judge Bates requesting the establishment of a working group to address the disclosure requirements for organizations that file amicus briefs. Judge Bates was able to respond that the Advisory Committee on the Federal Rules of Appellate Procedure had already established a subcommittee to do so.

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

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

The Advisory Committee has not yet decided whether to propose any amendments in this area. As previously reported to the Standing Committee, the Advisory Committee believes that changes to the disclosure requirements of Rule 29 are within the purview of the rulemaking process under the Rules Enabling Act, but public registration and fines are not, and that any change to Rule 29 should not be limited to those who file multiple amicus briefs. It also resists treating amicus briefs as akin to lobbying. Lobbying is done in private, while an amicus filing is made in public and can be responded to.

The question of amicus disclosures involves important and complicated issues. One concern is that amicus briefs filed without sufficient disclosures can enable parties to evade the page limits on briefs or produce a brief that appears independent of the parties but is not. Another concern is that, without sufficient disclosures, one person or a small number of people with deep pockets can fund multiple amicus briefs and give the misleading impression of a broad consensus. There are also broader concerns about the influence of "dark money" on the amicus process. Any disclosure requirement must also consider First Amendment rights of those who do not wish to disclose themselves. *See, e.g., Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

At the January 2023 meeting of the Standing Committee, the Advisory Committee presented a discussion draft of a possible amendment to Rule 29 to provide a basis for a focused discussion of the issues. While the Standing Committee was not asked to, and did not, make any decisions at that point, it did provide important feedback. In particular, the Standing Committee seemed reasonably comfortable with a 25% threshold for disclosure of non-earmarked contributions by a party to an amicus. There was some concern expressed about how easily a 12-month lookback period could be administered. And there was considerable concern expressed about significant expansion of disclosure requirements regarding contributions by nonparties to an amicus.

The Advisory Committee continued its consideration of these issues, informed by the Standing Committee's feedback. Below is an updated discussion draft. While the Advisory Committee is still not proposing any amendments, it sees little reason to revisit the 25% threshold discussed at length in the past. Instead, it is focused on two major issues, one dealing with the relationship between parties and an amicus, the other dealing with the relationship between nonparties and an amicus.

Parties. The Advisory Committee has given further consideration to how easily a 12-month lookback period could be administered and the drawbacks of a different period, such as the prior calendar year.

There is no doubt that it would be easier to administer a rule that required an amicus to review only its prior calendar year contributions. But the Advisory Committee fears that such a disclosure rule would be too easy to evade. It would fail to capture contributions that are of most concern: those made right at the time that the amicus brief is filed.

And the Advisory Committee does not believe that the administrative burdens are that great. First, it is crucial to see that only parties to the case are at issue. An amicus need not check to see if anyone at all has hit the 25% threshold in the past 12-months; it needs to check only whether a party to the case has done so. Second, as

a mathematical matter, only a very small number of contributors could possibly hit the 25% threshold.

For these reasons, the discussion draft includes a 12-month lookback period rather than a prior calendar year period.

Nonparties. It is important to emphasize that the current rule requires disclosure of any contribution earmarked for a particular brief—no matter how small the amount—unless the contributor is the amicus itself, its members, or its counsel. That is, the current rule broadly requires the disclosure of earmarked contributions by a nonparty.

The discussion draft includes two different options. One option, named beta in the draft, is essentially the same as the current rule with some modest changes to clarify and prevent evasion. The other option, named alpha in the draft, would make two more significant changes.

First, it would eliminate the exception for members of the amicus. The reason to do so would be to avoid the easy evasion available under the current rule to anyone who wants to make an earmarked contribution to an amicus brief: simply become a member. There are downsides, however, to eliminating the member exception: members of an amicus speak through the amicus, contributions and amicus briefs might be chilled by disclosure, and there would be a differential impact on organizations depending on whether they budget for amicus briefs in advance or pass the hat if and when they see a need to file a particular amicus brief.

To counterbalance these concerns and more narrowly tailor the disclosure requirement, this option would also set a dollar threshold below which an earmarked contribution would not have to be disclosed. Such a threshold would also enable crowdfunding of briefs. The current rule works to prevent crowdfunding unless the crowdfunding platform prevents anonymous contributions. As it emerged from the subcommittee, the threshold was set at $1000. But several members of the Advisory Committee think that this is too low, and that a $10,000 threshold would both reduce the burden of the disclosure requirement and achieve the purpose of identifying those with significant control over a brief and distinguishing such briefs from briefs more broadly supported by the membership of an amicus.

These two changes are linked: To eliminate the member exception without creating a dollar threshold runs the risks of imposing unnecessary burdens and chilling contributions and amicus briefs. But to establish a dollar threshold without removing the member exception would result in less disclosure than the current rule

In addition to possible amendments to the disclosure requirements, the Advisory Committee is also considering eliminating the requirement that an amicus

receive consent of the parties or permission from the court to file. The Supreme Court made such a change to its own rules. Supreme Court Rule 37.2 (effective January 1, 2023). The Advisory Committee does not see any reason not to follow the Supreme Court's lead here, and the discussion draft includes language drawn from the Supreme Court's rule. Further refinement may lead to language designed to avoid possible encouragement of amicus briefs raising waived or forfeited issues, and some provision dealing with amicus briefs at other stages, such as stay applications.

Here is the discussion draft:

Rule 29. Brief of an Amicus Curiae

(a) During Initial Consideration of a Case on the Merits.

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

(2) **When ~~Permitted~~ Authorized**. An amicus curiae brief that brings to the court's attention relevant matter not already brought to its attention by the parties may be of considerable help to the court. An amicus curiae brief that does not serve this purpose burdens the court, and its filing is not favored. ~~The United States or its officer or agency or a state may file an amicus brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing, but a court of appeals may prohibit the filing of or may strike an amicus brief that would result in a judge's disqualification.~~

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

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

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

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

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

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

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

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

(E) unless the amicus is the United States or its officer or agency or a state, the disclosures required by Rule 29(b) and (d) ~~curiae is one listed in the first sentence of Rule 29(a)(2), a statement that indicates whether:~~

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

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

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

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

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

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

(6) **Time for Filing.** An amicus curiae must file its brief~~, accompanied by a motion for filing when necessary,~~ no later than

7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed. A court may grant leave for later filing, specifying the time within which an opposing party may answer.

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

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

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

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

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

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

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

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

(d)[alternative α] Disclosing a Relationship Between the Amicus and a Nonparty. An amicus brief must name any person—other than the amicus or its counsel—who contributed or pledged to contribute more than [$1000] [$10,000] intended to fund (or intended as compensation for) preparing, drafting, or submitting the brief.

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

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

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

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

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

~~(4) **Contents, Form, and** **Length.** Rule 29(a)(4) applies to the amicus brief.~~ The brief must not exceed 2,600 words.

~~(5)~~(3) **Time for Filing.** An amicus curiae supporting the petition for rehearing or supporting neither party must file its brief~~, accompanied by a motion for filing when necessary,~~ no later than 7 days after the petition is filed. An amicus curiae opposing the petition must file its brief~~, accompanied by a motion for filing when necessary,~~ no later than the date set by the court for the response.

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

The Advisory Committee on Civil Rules has been looking into the issue of third-party litigation funding for years. The Advisory Committee on Appellate Rules does not think that there is anything for it to do at this point. It will await further developments from Civil.

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

The Committee has been considering suggestions 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 Advisory Committee has produced a working draft of a simplified Form 4. Because Supreme Court Rule 39.1 calls for the use of Appellate Form 4 by applicants for IFP status in the Supreme Court, the Advisory Committee plans to confer with the Clerk of the Supreme Court before recommending publication.

D. Joint Projects

The Advisory Committee has nothing new to report regarding:

- the joint subcommittee considering whether the deadline for electronic filing should be moved to some time prior to midnight; and

- the joint project dealing with electronic filing by pro se litigants.

It defers to the Reporter for the Standing Committee for any update.

E. New Suggestions

The Advisory Committee has received new suggestions that remain under consideration.

First, it has received a suggestion from Senator Ron Wyden that the judiciary should be doing more to protect Social Security numbers from appearing in court filings. (22-AP-E). The Advisory Committee on Appellate Rules believes that this is primarily a matter for the Bankruptcy Rules Committee and that Committee is giving the matter close attention. The Appellate Rules piggyback on other rules governing privacy protections. Appellate Rule 25(a)(5) was just amended to extend to Railroad Retirement Act cases the privacy protections provided in Social Security cases. It is keeping this item on its agenda awaiting any action by the Bankruptcy Rules Committee.

Second, it received suggestions from Professor Stephen Sachs (a former member of the Advisory Committee) and Professor Judith Resnik to consider adding a rule governing intervention on appeal. (22-AP-G, 23-AP-C). About a dozen years ago, the Advisory Committee explored the issue and decided not to take any action. Since then, the Supreme Court has observed that there is no appellate rule on this question. *Cameron v. EMW Women's Surgical Ctr.*, 142 S. Ct. 1002, 1010 (2022). A case currently pending at the Supreme Court involves intervention on appeal, and an amicus brief submitted by Professor Judith Resnik and others urges the Court not to use the case as a vehicle for creating rules governing intervention on appeal but to leave that to the rule making process. *Arizona v. Mayorkas*, 22-592. A subcommittee has been appointed to consider this issue.

Third, it received suggestions that the Advisory Committee follow the Supreme Court's lead in permitting the filing of amicus briefs without requiring the consent of the parties or the permission of the court. (23-AP-A, 23-AP-B). These suggestions have been referred to the amicus disclosure subcommittee, and the idea has already been incorporated into the working draft of Rule 29 above.

V. Items Removed from the Advisory Committee Agenda

A. Decisions on Unbriefed Grounds (19-AP-B)

In 2019, the American Academy of Appellate Lawyers suggested rulemaking to deal with decisions on unbriefed grounds. The Advisory Committee decided against rulemaking, leaving it to the then-chair of the Advisory Committee, Judge Michael Chagares, to send a letter to the chief judges of the circuits alerting them to the concern.

But the Committee also decided to revisit the matter in the spring of 2023. Upon doing so, the Committee decided that this is not an appropriate area for rulemaking, and voted without opposition to remove the item from its agenda.

B. Bar Admission (22-AP-F)

The Advisory Committee received a new suggestion that Rule 46 be amended to permit all persons to practice law, absent a compelling reason for restriction. The Committee voted without opposition to remove the item from its agenda.