Minutes of the Fall Meeting of the

Advisory Committee on the Appellate Rules

October 13, 2022

Washington, D.C.

Judge Jay Bybee, Chair, Advisory Committee on the Appellate Rules, called the meeting of the Advisory Committee on the Appellate Rules to order on Thursday, October 13, 2022, at 9:00 a.m. EDT.

In addition to Judge Bybee, the following members of the Advisory Committee on the Appellate Rules were present in person: Justice Leondra R. Kruger, Judge Carl J. Nichols, and Lisa Wright. Solicitor General Elizabeth Prelogar was represented by Mark Freeman, Director of Appellate Staff, Civil Division, Department of Justice. Professor Bert Huang and Judge Richard C. Wesley attended via Teams.

Also present in person were: Judge John D. Bates, Chair, Standing Committee on the Rules of Practice and Procedure; Andrew Pincus, Member, Standing Committee on the Rules of Practice and Procedure, and Liaison to the Advisory Committee on the Appellate Rules; Judge Bernice Donald, Member, Advisory Committee on the Bankruptcy Rules and Liaison to the Advisory Committee on the Appellate Rules; H. Thomas Byron III, Chief Counsel, Rules Committee Staff (RCS); Bridget M. Healy, Counsel, RCS; Allison A. Bruff, Counsel, RCS; Scott Myers, Counsel, RCS; Christopher Pryby, Rules Law Clerk, RCS; Shelly Cox, Management Analyst, RCS; Nicole Teo, Intern, RCS; Professor Edward A. Hartnett, Reporter, Advisory Committee on the Appellate Rules; and Professor Catherine T. Struve, Reporter, Standing Committee on the Rules of Practice and Procedure.

Professor Daniel R. Coquillette, Consultant, Standing Committee on the Rules of Practice and Procedure; Molly Dwyer, Clerk of Court Representative, Advisory Committee on the Appellate Rules; Tim Reagan and Marie Leary, both of the Federal Judicial Center, attended via Teams.

I. Introduction

Judge Bybee opened the meeting and welcomed everyone, particularly new members and staff. He invited those participating in the meeting to introduce themselves.

II. Approval of the Minutes

The Reporter corrected a date from 2020 to 2010 in the draft minutes of the March 30, 2022, Advisory Committee meeting. (Agenda book page 121). With that corrected, the minutes were approved.

III. Discussion of Matter Published for Public Comment

Judge Bybee presented information about the proposed amendments to Rules 35 and 40 that have been published for public comment. (Agenda book page 124). So far, we have received few comments, and none of the comments received to date warranted a meeting of the subcommittee. We expect more comments before the deadline on February 16, 2023.

To be prepared to consider any comments, we need to replace members of the subcommittee that are no longer available. Judge Wesley and Mark Freeman will join Danielle Spinelli on this subcommittee.

IV. Discussion of Matters Before Subcommittees

A. Amicus Disclosures (21-AP-C)

Danielle Spinelli, the chair of the subcommittee, was unable to attend the meeting. The Reporter presented the report of the amicus subcommittee. (Agenda book page 152). After emphasizing that, as before, the subcommittee is not yet proposing amendments but instead providing a working draft to help guide the Committee's discussion, he walked through draft Rule 29(c).

That provision deals with disclosure of the relationship between an amicus and a party. The major differences between the current rule and this draft are that the draft would require whether a party or its counsel have a majority ownership or control of an amicus, and whether a party or its counsel contributed 25% or more of the revenue of the amicus during the twelve-month period preceding the filing of the amicus brief.

The Reporter invited discussion of the appropriate percentage, noting that some have argued for a 50% threshold.

A judge member wondered about the workability of the draft rule. Would it be easy to evade? Difficult to administer? Another judge member noted that this provision deals only with parties and asked whether there is a problem there that needs to be addressed. Judge Bybee responded that that the materials submitted raised one such example. The judge member added that he concurs with the subcommittee that requiring disclosure regarding parties is a lot less problematic from a First Amendment perspective than requiring disclosure regarding nonparties.

A liaison member asked for the theory behind the percentage. The Reporter stated that a judge member at a prior meeting had suggested something in the range of 25% to 33%. Judge Bybee added that there was no great place to copy from, noting that the Amicus Act uses a 3% threshold.

A different liaison member stated that, in the real world, briefs don't get filed if they would require the disclosures called for in the current rule. Whatever percentage is chosen will send the message that briefs at that threshold will be viewed skeptically and therefore such briefs will rarely if ever be filed. Mr. Freeman added that this rings true.

Judge Bates asked if there has been an assessment of how this draft would impact briefs that are filed. The Reporter stated that it is very difficult to make such an assessment, precisely because these disclosures are not currently required.

In response to a question by a lawyer member whether briefs with the disclosures would never get filed, the liaison member said not never, but that some funders will not want to disclose and that there will be concern about the credibility of a brief with these disclosures. Judge Bybee noted that this raised a policy question of how much is lost if briefs are not filed.

The liaison member explained that organizations with a broad funding base won't be hurt, but organizations with a narrower focus might be caught. If there is so much skepticism, will the brief be discounted? Other briefs are filed pro bono and won't be affected.

Mr. Freeman noted that in the intellectual property area, there may be broad based funding but still a fear of Astro-turfing. On the one hand, judges may find a brief valuable, but on the other, disclosure could deter some Astro-turfing.

Judge Bates noted that there is a trade-off between getting the information from the disclosure and not getting the brief. A judge member observed that an amicus always has to state its interest, why it has skin in the game. Why not require the disclosure of a dominant role, leaving it to them to decide if they are deterred? Judge Bates, noting that the focus at this point is on parties, stated that the question is how much do we lose in that context.

Another judge member suggested that there might be a way to signal that the percentage chosen is not a threshold beyond which a brief is discounted: require disclosure in various percentage bands.

In response to a question from the Reporter whether it was the existence of a disclosure rule or the underlying funding that would lead to discounting a brief, Mr. Freeman said that he would want to know about funding and the funding would cast doubt on a brief. A liaison member said that that would be especially true if an amicus

purported to speak for an industry but a party was a key funder of the amicus. An academic member suggested articulating the purpose of a rule, at least in the committee note, and that disclosure can be viewed as an extension of the statement of interest.

Judge Bybee invited discussion of the idea of disclosure bands. A liaison member suggested that there should be a band (such as under 25%) where no disclosure is required, and that bands can suggest that disclosure doesn't mean that your goose is cooked. An academic member asked if disclosure could affect the nature of the briefs, perhaps the balance between "me, too" briefs and briefs that provide different information. The liaison member responded that it is hard to tell. Some others think more is better; perhaps disclosure could reduce the arms race. An amicus that made a disclosure could use its statement of interest to counterbalance the disclosure.

Mr. Byron stated that the concern we are trying to address may be broader than money. There are lots of discussions and shared interests. A lawyer member agreed that discussions take place; there are common interests, but also different interests if an amicus is independent. The concern is if there is some kind of control by a party, so the brief is not ultimately one from the amicus. A judge member agreed. There is no need to get into the weeds of conversations between an amicus and a party. Control is important, so we are aware if the amicus is an echo of the party.

Judge Bybee asked about the percentage. A judge member said that there is no science here, but that someone with 25% will be heard.

The Reporter asked for views of the sliding scale approach. In response to a question about how that would work, the judge who floated the idea suggested that each judge could decide independently when the percentage is significant. The inquiring judge saw the virtue of an approach that leaves this determination to individual choice.

A different judge member asked about the relationship between (c)(3)—which deals with ownership or control—and (c)(4)—which deals with funding. The Reporter stated that there could be funders, even at the 50% or higher level, that would not be covered by the ownership or control provision. A liaison member added that ownership or control is not equivalent to percentage of contribution. He also stated that it would be useful to say in the committee note that the idea of the disclosure is not that such a brief would be useless, but that the information might be relevant to a judge. Mr. Freeman suggested that there should be some way to say that the contribution level is zero. The liaison member noted that an amicus can say that in its statement of interest.

The Reporter invited discussion of the look-back period. A calendar year might be easier to administer, but easier to evade. In response to a question about data relevant to this question, the Reporter noted that we would learn through the comment period. Professor Coquillette agreed that we will learn a lot when we publish, and urged that alternatives be included in any publication to avoid the need to republish.

A liaison member suggested adding "or promise to contribute" to paragraph (4). Mr. Freeman suggested building in some "reasonable effort" or "reasonable knowledge" provision because it could be costly to figure out exactly if someone is just on one side or the other of a line.

An academic member asked about requiring disclosure of the date of formation of an amicus and why it was formed. The Reporter stated that the subcommittee had concluded that this would be more burdensome than helpful; one subcommittee member stated that she recalls liking the idea.

The Reporter discussed paragraph (d), which would require a party who is aware that an amicus has failed to make a required disclosure to make that disclosure.

After a short break around 10:30, the Committee resumed its discussion of amicus disclosures. The Reporter described Rule 29(e) of the working draft, which addresses disclosure of the relationship between an amicus and a nonparty. The major changes would be to (1) require disclosure of earmarked contributions by members of the amicus, and (2) to set a $1000 threshold for earmarked contributions whether by a member or nonmember.

A liaison member stated that this provision would have different practical effects on different kinds of organizations. Organizations with more established amicus programs would not be affected because they raise money from general contributions. Organization with less established amicus programs, and who pass the hat for an amicus brief, would be captured. Some may be reluctant to contribute. The existing rule that distinguishes between members and nonmembers seems to work.

In response to a question from Judge Bybee, the liaison member noted that some organizations wouldn't file under this provision because the brief would be perceived as less credible, and some members wouldn't put money in the hat because they did not want their contributions disclosed. Some organizations may change their fundraising structure, but organizations with more established and regular fundraising structures would be more favorably treated by this provision compared to those who don't come to court much.

An attorney member observed that money is fungible and therefore would favor something like (c)(3) and (4) for nonparties as well, perhaps at a higher

percentage. Transparency helps the public have faith in the judiciary. Without a disclosure requirement, when such information is revealed by the media, it looks like the judiciary either doesn't care or was fooled. The member exception in the current rule should be deleted.

The liaison member stated that lawyers are pretty careful; perhaps the phrase "directly or indirectly" would get at the problem. The rule law clerk noted that the text of the New York Court of Appeals amicus disclosure rule does not have an exception for members.

Judge Bates stated that the nonparty issue is important and was the genesis of the suggestion by Senator Whitehouse and Representative Johnson. Most of their examples involved nonparties and would not be captured without robust nonparty disclosure.

The Reporter directed attention to the issue of the exception for members of the amicus. A liaison member said that there is a big difference between members and nonmembers in the existing rule. Is the amicus brief really the view of the organization—as opposed to the view of someone else? Is the organization speaking or is it being used as a front? Was the contributor really a member before the brief was even considered? Perhaps what should matter is the percentage of the cost of the brief.

The Reporter directed attention to the issue of whether there should be a parallel to (c)(3) and (4) for nonparties. At the last meeting, there did not seem to be much support for that idea and the working draft does not include such a provision, but the Committee has not rejected the idea.

A liaison member noted that lots of foundations and wealthy individuals give lots of money to progressive causes. A parallel to (c)(3) would not capture a lot, and it is not clear how it would apply to a nonparty. A parallel to (c)(4) would require significant disclosures not tied to the filing of an amicus brief and would be pretty significant for a lot of organizations. If the concern is with those who join an organization right around the filing of an amicus brief, the member exception could be limited to longstanding members. If an organization doesn't have an amicus budget, it would either reconfigure its budget or not file an amicus brief.

Professor Struve picked up on the idea of a member look-back. One question is how broad-based the organization is; a different question is who the person making the contribution is. Some information can be obtained from tax forms.

Judge Bates posed the question: how relevant is the information that would be disclosed by adding a provision like (c)(4) to (e)?

A judge member responded that it is hard to say. He always takes an industry brief with a grain of salt. The interest is obvious because the viewpoint is obvious. The concern is where control is with a party. A liaison member agreed. Judge Bybee said that he doesn't get a lot of amicus briefs and recognizes the biases. If a case is big enough to attract amici, the principal briefs are usually good.

Judge Bates noted that the Committee had not yet considered the recusal issues that a nonparty relationship to an amicus might raise. The Reporter noted that a suggestion involving amicus briefs and recusals is a later item on the agenda.

He asked if there were any more comments on the question of a parallel to (c)(4) for nonparties. A liaison member noted that such a provision would impact non-business filers and true advocacy organizations. Mr. Freeman expressed doubts about its efficacy: a very wealthy funder in the background could create several different shell organizations for each amicus brief. The liaison member added that it would be possible to structure an 801(c)(4) organization so as not have to disclose, explaining that a single individual could fund several organizations and the Form 990 is not public. A lawyer member observed that layers may protect against disclosure. A judge said that a challenge for the subcommittee is that people find a way.

A different judge member emphasized that there are two different concerns: The first is that appellate judges might be misled about who is really behind a brief; does that really happen in a significant number of cases? The second is whether, as a matter of administering justice, the court and the public should know who is really behind a brief. It is important to be precise about the different concerns.

Judge Bybee responded that, in contrast to the Supreme Court, he doesn't see that many amicus briefs. He is interested in their content.

The judge member wondered, if the disclosure is not of much benefit to judge, whether it is worth running the risks of disclosure.

A different judge member responded that disclosure has relevance to the public and its perspective, even if it doesn't affect the judicial decision. The prior judge agreed, but reiterated that it is important to focus on which justification is being relied on. While the public has an interest in knowing who really is participating, there are countervailing concerns.

The Reporter added that it is important not only to be clear about the reasons supporting any disclosure requirement, but also to focus on narrowly tailoring any disclosure requirement to those reasons.

B. Costs on Appeal—Rule 39 (21-AP-D)

Judge Nichols presented the report of the subcommittee on costs on appeal. (Agenda book page 203). He began by noting that the Supreme Court in the *Hotels.com* case had indicated that rule governing costs on appeal could be cleaned up to better handle the interplay between the court of appeals (which decides who bears the costs on appeal) and the district court (which taxes some of those costs). Sometimes, as in *Hotels.com*, there is a very significant supersedeas bond; the cost of that bond is taxed in the district court, but the district court cannot reallocate who pays the cost. Instead, a party who seeks a different allocation must ask the court of appeals to do so.

At the last meeting, the Advisory Committee discussed how to make it clear that parties should ask the court of appeals and the appropriate timing for such a request. Because the other party and the district court may not always know of the cost of the bond, the subcommittee had previously recommended that an amendment to Appellate Rule 39 be made in conjunction with an amendment to Civil Rule 62 requiring disclosure of the bond premium at the time the bond is approved. But at the last meeting, the Advisory Committee thought that while an amendment to Civil Rule 62 would be valuable, amending Appellate Rule 39 would be worthwhile even without an amendment to Civil Rule 62.

The subcommittee was charged with focusing on two issues: first, where in Rule 39 should an amendment be placed and, second, the timing of a request to the court of appeals to reallocate the costs.

The subcommittee concluded that the best place for an amendment would be as a new, separate subdivision 39(b), immediately following the allocation principles of 39(a).

The subcommittee concluded that while there was no perfect deadline for asking the court of appeals to reallocate the costs, it landed on 14 days after entry of judgment, the same as for filing the bill of costs in the court of appeals. A drawback of a short deadline that is before or simultaneous with the filing of the bill of costs in the court of appeals is that there isn't a target. A drawback of a later deadline is that it runs into the deadline for issuance of the mandate, which shouldn't be delayed for costs.

The subcommittee also thought that it worthwhile to clean up some language in what would become 39(e) to make clear that the bill of costs filed in the court of appeals deals only with the costs taxable in the court of appeals, not the costs taxable in the district court.

In response to a question by Judge Bybee, Judge Nichols explained that setting a deadline after the bill of costs is filed in the court of appeals wouldn't help because

the bill of costs filed in the court of appeals does not include the costs taxable in the district court. Absent an amendment to the Civil Rules, a party may not know the cost of the supersedeas bond until the bill of costs is filed in the district court. It would be possible to allow a party to request the court of appeals to reallocate the costs after everything is done, but that would invite a second round of litigation about costs.

The Reporter echoed the point that the cost of the supersedeas bond is sought in the bill of costs filed in the district court, and that it is worthwhile keeping the concept of the allocation or assessment of costs between the parties separate from the calculation of what those costs are.

A liaison member suggested that the bill of costs filed in the court of appeals could include a good faith estimate of the costs to be sought in the district court and allow some time thereafter. Judge Nichols agreed that could be done, but also noted the prior recommendation that the Civil Rule be amended to require disclosure of the premium paid for the bond at a much earlier date.

Judge Bates asked when the costs are assessed. The Reporter stated that the proposed amendment sought to clarify that the initial assessment of costs is done under Rule 39(a) and that the new 39(b) would allow for reconsideration of that assessment. Judge Nichols added that the assessment is done in the court of appeals opinion or judgment, either by virtue of the default rules of 39(a) or court ordering a departure from those default rules under 39(a). Proposed 39(b) would allow a party to seek an assessment that differs from what was already done under 39(a).

Judge Bybee observed that if a split decision doesn't make clear which party is to bear the costs, the clerk will ask the judges. The response might be that each bears its own costs, without having any idea about the cost of a bond. Judge Nichols stated that proposed 39(b) would allow a party to ask the court of appeals to change that determination. The subcommittee considered dealing with all of these cost issues in the court of appeals after everything was done in the district court, but thought that this created additional litigation in the court of appeals.

In response to questions from a judge member, Judge Nichols stated that there weren't many examples. A court of appeals can delegate the allocation issue to the district court.

Mr. Byron noted that if a good faith estimate is provided, then the deadline can be 21 days, the same as the date for issuance of the mandate.

The Reporter added that a virtue of asking the court of appeals to reallocate soon after its decision on the merits is that the matter will be fresh in the judges' minds. In addition, the problem of making sure that the parties know the cost of the supersedeas bond could be addressed by an amendment to Civil Rule 62.

Judge Bybee wondered whether all deadlines should be off for bonds. Ms. Dwyer stated that she didn't have a problem with proposed Rule 39(b). It isn't earthshattering; she has never seen a problem in this area in her 35 years.

Mr. Freeman reminded the Committee of the Solicitor General's question whether the costs of a supersedeas bond may be recoverable at all. He also asked how proposed Rule 39(b) interacts with the issuance of the mandate.

Professor Struve noted that the mandate issue is front and center in the *Hotels.com* case, with the curious situation of the division of labor required by that case and the resulting risk of falling between the two stools. One could move up the date of seeking reconsideration in the court of appeals. One could move back the date of the mandate. Or one could have a special rule and exception regarding the mandate.

A judge member asked why not leave it to the district court to reallocate costs, as a number of courts do. Judge Nichols responded that the Supreme Court said that the existing rule makes sense because the court of appeals best understands the nature of the victory.

Ms. Dwyer noted that there is a mandate problem; the court can't just recall the mandate.

Judge Nichols asked if there is agreement that the best solution would:

1) Provide parties with perfect information early;
2) Provide the court of appeals with authority—which it could delegate to the district court—to determine who bears the costs and in what percentage; and
3) Minimize any impact on the issuance of the mandate to the extent possible so that things get wrapped up in the court of appeals early.

Mr. Byron expressed uncertainty about number 2 and suggested that it is not always a good idea to jam up the court of appeals with what could be a hard but rare issue. Perhaps the mandate could be held.

Judge Nichols stated that we don't want to create a jurisdiction stripping problem. Mr. Freeman noted that in some cases a delay of the mandate may be a real problem. A liaison member added that a party resisting payment may seek to delay the mandate.

Professor Struve added that it need not be all or nothing. While mandates are undertheorized, there could be a limited remand, so that the case goes down except for this limited purpose.

Judge Bybee asked whether there is a big enough issue to deal with. Judge Nichols responded that a survey of the clerks and other research had shown this to be a very small problem with few reported cases. Proposed 39(b) is not designed to change much, but rather to make express what is now already an option, and to provide the clarity suggested by *Hotels.com*. If the Supreme Court had not suggested that matters be clarified, it wouldn't be clear that an amendment is warranted. Judge Bybee added that a rule amendment allows useful information to be added in a committee note.

A liaison member observed that there may be more of a problem now. Professor Struve added that a court of appeals can let a district court resolve the allocation question. The Reporter emphasized that the subcommittee was looking to make a minimalist change, rather than a complete revamping of how costs on appeal are handled.

Judge Nichols asked whether the Committee wanted to do anything? A minor change along the lines under consideration? Be more aggressive in moving closer to an optimum solution? He noted that the current draft of 39(b) is not perfect, that we are not fixing a huge problem, and that the subcommittee would give it another try. Judge Bybee agreed that it made sense for the subcommittee to do so.

The Committee then took a break for lunch.

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

Lisa Wright presented the report of the IFP subcommittee. (Agenda book page 209). She explained that the subcommittee has been looking into ways to make Form 4 simpler, useful, and less intrusive.

A survey revealed that indigency is clear in the vast majority of cases; the existing forms come back with lots of zeros. When IFP status is denied, it is typically because of the lack of a nonfrivolous legal issue.

After the last meeting, a draft revised form was circulated to senior staff attorneys for comment. The response was generally supportive. Some had concerns about the order of the questions, whether liquid assets should be separated from illiquid assets, whether more detail about expenses should be required, and whether information about spouses should be required.

In response, the subcommittee reduced the three introductory questions to one yes-or-no question. It concluded that a distinction between liquid and illiquid assets would be relevant to very few cases, and that if an applicant had significant assets but could not access them, the applicant could explain that situation. It also concluded that more detail regarding expenses was not necessary, because the funds for those expenses would have to come from either assets or income, both of which

must be reported. The subcommittee considered asking whether spousal income and assets were available to the applicant, but concluded that the intrusiveness of questions about a spouse outweighed their benefit. Given the survey responses—which were based on a form that requires disclosure of spousal resources—it seemed unlikely that they make a difference to the indigency determination.

Ms. Wright added that the IFP statute has a drafting error. It is not entirely clear whether the statutory provision calling for a "statement of all assets such prisoner possesses" applies to non-prisoners. Courts generally say it does. The draft form calls for the applicant to state the applicant's "total assets"; does that comply with the statutory provision calling for "all assets"?

Judge Bybee thanked the subcommittee and those who contributed to its work, noting that the draft form is an improvement on the current form. He asked whether the point of the first question was that if an applicant answered "yes," that there may be no need to answer the remaining questions. Ms. Wright explained that the subcommittee was initially thinking along those line, but concluded that the rest of the draft form was so simple that it made sense to simply answer all of the questions.

Judge Bybee wondered whether it would make sense to move the first question to the end; the Clerk's office could jump to the last question when processing applications. Ms. Wright responded that the first question also signaled the general nature of IFP eligibility.

The rules law clerk noted that there was some district court and unpublished court of appeals caselaw that interpreted "all assets" to include spousal assets, as well as a published court of appeals decision holding that it was an abuse of discretion to deny IFP status for failure to include spousal information without inquiring about its availability to the petitioner. Ms. Wright noted that the form could ask if spousal assets are available.

Judge Bybee asked if the subcommittee was asking the Advisory Committee to approve the draft form. Ms. Wright said not at this point. The next step would be to consult with the Supreme Court Clerk; the rules of the Supreme Court incorporate this form.

Professor Struve noted that question 2 asks for "monthly take-home pay from work," but that this amount varies for some workers. Perhaps "average" should be added. Ms. Wright suggested "typical" rather than "average." Professor Struve was content with leaving question 2 as is.

The Reporter asked if the Committee is comfortable with the form calling for "total assets" rather than "all assets." In response to a question from Judge Bybee, Ms. Wright stated that the difference could be that "all assets" might require listing assets. Ms. Dwyer stated that this draft form is great. It includes what the court takes

into account. Itemizing assets would be going backwards. She suggested that perhaps the questions should be reordered: 1, 3, 2.

In response to a question from Mr. Byron about caselaw regarding question 6, the Reporter noted the *Floyd* case. [*Floyd v. U.S. Postal Service*, 105 F.3d 274 (6th Cir. 1997).] There, the Department of Justice had argued that the requirement of stating "all assets such prisoner possesses" meant that only prisoners had to file an affidavit of assets. The Court of Appeals rejected that view, relying in part on existing Form 4. As to another issue regarding IFP practice, *Floyd* read the Prison Litigation Act to repeal part of then-existing FRAP 24. A later decision interprets a subsequent amendment to FRAP 24 to supersede *Floyd* regarding that issue. [*Callihan v. Schneider*, 178 F.3d 800, 803 (6th Cir. 1999).] In addition, there is a history in this area of the form driving practice, even without amendments to statute or rule.

Judge Bybee returned to the issue of the order of the questions, noting that some staff attorneys from some circuits had concerns about the placement of the first question. If the draft form no longer instructs applicants to skip the rest of the questions if this is answered yes, it can be moved to the end and the Ninth Circuit can simply look to the last question first. Moreover, some circuits have their own forms, so this won't be the last word.

Ms. Dwyer said that she had no objection to moving the first question to the end.

Judge Bybee synthesized various suggestions and proposed that question 6 read, "What is the total value of all your assets?"

With these changes, the draft form can be discussed informally with the Clerk of the Supreme Court.

V. Discussion of Joint Projects

A. Pro Se Electronic Filing

The Reporter introduced the joint project regarding electronic filing by pro se litigants, pointing both to his short memo about two issues that this Committee might want to focus on and Professor Struve's longer memo about the project as a whole. (Agenda book page 217).

First, based on an FJC Report, it appears that the courts of appeals are more receptive to electronic filing by unrepresented litigants than are trial courts. (Agenda book page 237). Maybe this is because of the much smaller number of filings in the courts of appeals. Maybe this is because the filing of case-initiating documents in the courts of appeals, even when filed by attorneys, do not open a case in CM/ECF, but instead a case is opened by the court staff. The Committee might think it appropriate

to flip the default and allow electronic filing in the courts of appeals unless a court order or local rule prevents such filing, perhaps with a good cause requirement. Alternatively, the Committee might think that the courts of appeals are broadly allowing electronic filing by unrepresented litigants under flexibility afforded by the current rule, so that there is no need to change anything.

Second, those who do not file electronically—unlike those who do file electronically—generally have to serve a physical copy of papers on other parties and provide proof of that service, even though the clerk's office will scan submissions and place them on ECF, thereby triggering electronic service on electronic filers. The Committee might consider lifting this burden from paper filers.

Professor Struve reported on how other Advisory Committees have reacted to this project. Bankruptcy is on board with the project, viewing it as an access to courts issue. But their support is tempered by concerns about inappropriate filings, the need to screen filings, and various technical and logistical concerns. Civil has concerns about how much this project is a matter for rule making, as opposed to other Judicial Conference committees. Service is a classic rules issue, but there are concerns about whether documents filed under seal always make it to other parties.

It is also possible to disaggregate submission of documents (whether via CM/ECF or email) from notice of submission of those documents. Technical issues like adequate software to scan for viruses could be handled by CACM.

Judge Bates stated that we are looking for the input of this Committee. There had been suggestions made to various committees; they had been stalled, in part because some committees wanted to wait for others. At his direction, the Reporters worked as a group to move the project along.

A judge member observed that, based on the FJC report, it seemed that the Sixth Circuit was out of step. Mr. Reagan responded that, since the original research was conducted months ago, the Clerk of the Sixth Circuit had stated that they are now looking into joining the majority. The judge noted that there was no real downside to crafting a rule that reflects the majority or consensus approach.

Professor Struve said that the key question here is whether this Committee wants to move first and make the rule in the courts of appeals more permissive or wait until other courts are ready as well. Ms. Dwyer stated that the Ninth Circuit presumes that electronic filing is permitted unless the court says no, and that the court has arrangements with 4 or 5 prisons, too. We don't have the staff or other resources for a separate system for pro se litigants. When items are filed under seal, staff will check to see if appropriate, referring the issue to a panel if necessary.

Professor Struve added that anyone can file under seal, but needs to show that the seal should continue. Ms. Dwyer pointed out that plenty of lawyers have problems with oversize filings.

Mr. Reagan stated that in some districts where there is a relationship with a state prison, state prisoners have the best access to electronic filing among pro se litigants: they can go to the library, email the court, and the court converts the email to place on the docket. Ms. Dwyer asked why move backwards from the progress made during the pandemic; it is easier to put electronic submissions on the docket than to scan paper filings.

A judge member mentioned that an email box was a success. A different judge member stated that, from the district court perspective, moving away from paper is good, including for filing and serving court orders. Dealing with docketing of non-electronic documents takes a lot of time. Ms. Dwyer added that mailing costs a huge amount of money in postage.

Mr. Byron noted the value in taking baby steps here. A judge member suggested at least not requiring non-electronic filing to mail documents to electronic filers. Mr. Freeman urged that we not let the perfect by the enemy of the good. Should the Appellate Rules move forward alone or only if all sets of rules move forward together? Professor Struve added that they have evolved thus far in tandem and that there is value in keeping them together.

B. Direct Appeals in Bankruptcy Cases

The Reporter introduced a possible amendment to FRAP 6 in conjunction with a proposed amendment to Bankruptcy Rule 8006(g). (Agenda book page 255.) This issue was not on the Committee's agenda at the last meeting but arose during the last meeting. No action was taken at the time, but Judge Bybee encouraged the Reporter to work with the reporters for the Bankruptcy Rules Committee and its Privacy, Public Access, and Appeals Subcommittee.

Under 28 U.S.C. § 158, appeals from bankruptcy courts are usually heard by either a district court or a bankruptcy appellate panel, perhaps followed by an appeal from those courts to a court of appeals. But in certain circumstances, § 158(d)(2) permits an appeal to be taken directly to the court of appeals. The Bankruptcy Committee is proposing to amend Bankruptcy Rule 8006(g) to make clear that any party to a bankruptcy appeal can request that the appeal be heard directly by the court of appeals. That Committee views the amendment as a clarification of existing law, not a change in the law.

The problem from the perspective of the Appellate Rules is that FRAP 5, which deals with permission to appeal, doesn't fit this situation very well. That's because FRAP 5 is designed for the situation where the question before the court of appeals

is whether to allow an appeal at all. But in the context of direct bankruptcy appeals under § 158(d)(2), there is an appeal; the question is whether the court of appeals (as opposed to the district court or bankruptcy appellate court) is going to hear that appeal.

Accordingly, the draft amendments to FRAP 6, which deals generally with appeals in bankruptcy cases, would add specific provisions to deal with the procedure for seeking authorization of such a direct appeal. The reporters for the Bankruptcy Rules Committee are satisfied with this draft, as are the members of that Committee's Privacy, Public Access, and Appeals Subcommittee. But due to the way this issue came up, no subcommittee of this Committee has considered this draft.

Professor Struve added that when FRAP 6(c) was created, the possibility that an appellee might seek authorization for a direct appeal was not considered and the rule was not drafted with that possibility in mind.

Mr. Byron noted that where there is a right to appeal under § 158(a)(1) or (2), the only question is where the appeal will be heard. But there are also appeals that can only be heard by leave of court under § 158(a)(3). Is it clear enough how the draft amendment to FRAP 6 works in those situations?

The Reporter responded that this draft does not address leave to appeal under § 158(a)(3), although it does require, in cases where leave to appeal is required under § 158(a)(3), that the petition to authorize a direct appeal include a copy of any decision on a motion under Bankruptcy Rule 8004, which governs motions seeking leave to appeal under § 158(a)(3).

Professor Struve added that it would feel clearer if one were also looking at Bankruptcy Rules 8004 and 8006. Perhaps discussion of those rules should be added to the committee note.

The Reporter reiterated that no subcommittee of this Committee had yet reviewed this draft. While this Committee delayed the Bankruptcy Committee from publishing their proposed rule in August of 2022, the next time proposed rules would be published for public comment would be August of 2023, so putting this off until the spring meeting need not further delay publication.

Judge Bybee appointed Justice Kruger and Danielle Spinelli as a subcommittee to give the draft a close read.

C. Appeals in Consolidated Cases

The Reporter presented a report about appeals in consolidated actions. (Agenda book page 265.) A Joint Civil-Appellate Subcommittee has been considering for some time whether any rule amendments would be appropriate in response to the Supreme Court's decision in *Hall v. Hall*, 138 S. Ct. 1118 (2018). In that case, the Court held that consolidated cases retain their separate identity for purposes of appeal. That means that once any one of the consolidated cases is completely decided, an immediate appeal can be taken.

Extensive research by the FJC led the Joint Subcommittee to conclude that there is not a sufficient problem to warrant a rule amendment. The issue arises rarely. And lawyers tend to err on the side of filing premature notices of appeal.

Mr. Byron asked if there were any representatives from this Committee on the Joint Subcommittee. The Reporter responded that by the time the Joint Subcommittee reached its final decision, it appeared that changes to the membership of this Committee had left the Joint Subcommittee without a representative from this Committee. But he added that one member of the Joint Subcommittee was a Circuit Judge who had been on the panel reversed by the Supreme Court in *Hall*.

The Committee unanimously voted to remove this item from the agenda, with Judge Bybee noting that the issue could be raised again in the future.

VI. Discussion of Recent Suggestions

A. Striking Amicus Brief; Identifying Triggering Person (22-AP-B)

The Reporter presented a suggestion that was not on the agenda for the last meeting but briefly discussed at that meeting because it was filed after the agenda book had been compiled and related to another matter that was on the agenda. The suggestion is that, when a court strikes an amicus brief (or prohibits its filing) under FRAP 29(a)(2) because the brief would otherwise result in a judge's disqualification, that the amicus or counsel triggering the problem be identified.

The Reporter noted that the Committee might choose to refer the matter to a subcommittee, or it might conclude that the matter is too close to the standards for recusal—the suggestion that was removed from the agenda at the last meeting—and likewise remove this suggestion from the agenda.

Mr. Freeman wondered about the mechanics; would the brief be refiled with the triggering amicus or counsel removed? Judge Bybee expressed the concern that at some point it would be possible to figure out which judge was the issue and why. A judge member questioned its utility. The reasons for recusal are multifaceted. A

judge might recuse from cases involving a law firm where his son worked, but only while he worked there, not after he left the firm.

A liaison member wondered, if the brief could not be refiled, what benefit there could be—other than the possibility of reverse engineering what judge would have been recused. A judge member asked if we know about the ability to refile, to which the liaison member replied that it would depend on when the brief was stricken, and at least would require a motion seeking permission to file late. The Reporter added that the suggestion is that the information could be used to avoid future briefs being stricken.

Mr. Freeman expressed concern about reverse engineering and the information being used to keep particular judges off a case. The bite is in en banc proceedings. He fears that it would be used opportunistically. The United States wouldn't do so, but there are cases where people act strategically.

A liaison member said that it would produce no really useful information for the future because the reason for a recusal issue can change, and it only matters for en banc proceedings or a very small circuit like the First.

Mr. Freeman added that the history would be public, enabling reverse engineering.

The Committee agreed, without opposition, to remove the item from its agenda.

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

The Reporter presented a suggestion that Rule 26.1 be amended to require disclosure of a non-party that has a financial stake in the outcome of an appellate case. (Agenda book page 279). There are third-party litigation funders who make non-recourse investments in litigation and the suggested amendment would require their disclosure. The Reporter noted that the Civil Rules Committee has been considering this issue for some time, as shown by the twenty-five-page excerpt from its Fall 2021 report. This Committee might consider creating its own subcommittee or seeking to coordinate with Civil.

Further discussion revealed that while the MDL subcommittee had been considering this topic, there is currently no Civil subcommittee addressing this issue.

Judge Bybee decided to hold this item until the next meeting following consultation with the Civil Rules Committee.

VII. Review of Impact and Effectiveness of Recent Rule Changes

Judge Bybee directed the Committee's attention to a table of recent amendment to the Appellate Rules. (Agenda book page 236). He called for any comments or concerns about these recent amendments. The Committee did not raise any particular concerns.

VIII. New Business

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

IX. Adjournment

Judge Bybee thanked everyone, noting that it had been a very productive meeting. He acknowledged that it consumed a lot of time, and that there are other demands on people's time. That time is well worth it if the Committee's efforts can prevent or help avoid misunderstandings and errors.

The next meeting will be held on March 29, 2023, in West Palm Beach, Florida.

The Committee adjourned at approximately 3:15 p.m.